

EVEBRIEF

Legal & Parliamentary

Volume 33(02) 14 February 2011

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LOCALISM BILL – THE SEQUEL



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We lead again in this edition of Evebrief on the Localisation Bill, as the Department of Communities and Local Government issues a considerable number of impact assessments on various aspects of this flagship policy. Considering a major aim of this proposed legislation is to reduce bureaucracy, there seems to be a danger of its simply moving it from Central to Local Government, whilst at the same time losing some of the benefits centralisation brings. Only time will tell whether the policy which overturns many of the centralised policies of the last Conservative Government will work. If readers are struggling with what the Localisation Bill is all about, at Item 20 we report on the recently published CLG Plain English Guide to the Bill which at 20 pages is quite concise for a Government document.

We also report on a number of cases from a variety of Courts or Tribunals this month, all of general interest rather than changing anything fundamentally. In the case of *R v Elmbridge Borough Council*, which we report at item 08, the Court looked at the statutory duty to have special regard to preserving the setting of Listed buildings. This will always be difficult in a modern city with competing interests, as the development of the 'Shard' skyscraper has shown. In the case in question it was a development on the opposite riverbank to Hampton Court Palace, and addressed the application of the 'exception test' in PPS 25 that allows development if safe and providing wider sustainable benefits to outweigh the flood risk. It will be interesting to see how this benefit is explained to those affected by flooding in the future.

Steve Hile



GERALDEVE

01 LOCALISM BILL

Progress on this continues with the publication by the Department of Communities and Local Government of a number of Impact Assessments which summarise the impact of the policies in the Bill. The following are of most relevance:

Localism Bill: Summary Impact Assessment

<http://www.communities.gov.uk/publications/localgovernment/localismimpactassessmentsum>

Localism Bill: Small Business Rate Relief Automation – Impact Assessment

This document assesses the impact of automating the small business multiplier for all below the thresholds, but keeping the single property criterion in order to be eligible for a discount while removing the legal requirement to submit an application.

<http://www.communities.gov.uk/publications/localgovernment/localismsmallbusiness>

Localism Bill: Neighbourhood plans and community right to build – Impact Assessment

This document assesses the impact of binding neighbourhood plans instigated by neighbourhood groups, in partnership with local planning authorities and set within the context of a strategic plan and national policy framework.

<http://www.communities.gov.uk/publications/localgovernment/localismneighbourhoodplans>

Localism Bill: Major Infrastructure Projects – Impact Assessment

This document assesses the impact of abolishing the Infrastructure Planning Commission, and setting up a Major Infrastructure Planning Unit within the Planning Inspectorate to take over its functions. The current fast track process for major infrastructure planning applications is being preserved.

<http://www.communities.gov.uk/publications/localgovernment/localisminfrastructureprojects>

Localism Bill: Local referendums – Impact Assessment

This document assesses the impact of giving electors the power to instigate non-binding local referendums, and of abolishing the wider petitions duty.

<http://www.communities.gov.uk/publications/localgovernment/localismreferendums>

Localism Bill: Local plan reform – Impact Assessment

This document assesses the impact of amending legislation relating to Local Development Schemes, Annual Monitoring Reports and the examination, adoption and withdrawal of Development Plan Documents, and to issue revised guidance.

<http://www.communities.gov.uk/publications/localgovernment/localismlocalplanreform>

Localism Bill: Enforcement package – Impact Assessment

This document assesses the impact of a package of measures, including:

- i. to create a power for local authorities to take enforcement action against certain breaches from the date on which they are discovered, rather than the date on which they occurred; and to increase the level of fine that can be incurred for failing to comply with Breach of Condition Notices;
- ii. to limit the use of retrospective planning applications;
- iii. to ensure that people who deliberately deceive the local planning authority about the nature of their intended development, or who conceal it until the window for enforcement action is past, are no longer able to profit from this practice; and
- iv. to extend the enhanced controls over advertisements that apply in London to enforcement authorities throughout the rest of England, in order to strengthen the enforcement system and improve consistency across the country.

<http://www.communities.gov.uk/publications/localgovernment/localismenforcement>

Localism Bill: Discretionary Business Rates discounts – Impact Assessment

This document assesses the impact of introducing powers that give local authorities complete discretion over business rate discounts provided that they fund the cost of any discount that they introduce.

<http://www.communities.gov.uk/publications/localgovernment/localismbusinessrates>

Localism Bill: Devolution package – Impact Assessment

This document assesses the impact of streamlining and strengthening the current institutional framework for London: new housing and regeneration powers for the Greater London Authority, abolition of the London Development Agency, limiting the remit of the Homes and Communities Agency to outside London and giving enabling powers to the Mayor to designate development corporations.

<http://www.communities.gov.uk/publications/localgovernment/localismdevolution>

Localism Bill: Compulsory pre-applications for consultations between prospective developers and local communities

This document assesses the impact of a new statutory requirement for pre-application consultation in respect of all very large scale major developments, with matters of detail being left for developers to determine with the local community.

<http://www.communities.gov.uk/publications/localgovernment/localismpreapplications>

Localism Bill: Community Right to Buy – Impact Assessment

This document assesses the impact of providing time for communities to organise themselves to raise the funding to bid to buy on the open market the assets they have identified as important to their community.

<http://www.communities.gov.uk/publications/localgovernment/localismrighttobuy>

Localism Bill: Community Infrastructure Levy – Impact Assessment

This document updates the February 2010 assessment to reflect policy developments on the Community Infrastructure Levy and latest available data on market conditions in the land market. The quantified costs and benefits of a Community Infrastructure Levy as a whole are assessed relative to the previous s106 planning obligations system.

<http://www.communities.gov.uk/publications/localgovernment/localisminfrastructurelevy>

Localism Bill: Cancellation of certain backdated non domestic rates liabilities – Impact Assessment

This document assesses the impact of waiving the backdated element of certain backdated business rates liabilities for those properties that meet the eight-year installment scheme, and which also incurred extra rates bills as a result of being split from another hereditament. This extra burden on some ratepayers was exacerbated by the onset of the economic downturn.

<http://www.communities.gov.uk/publications/localgovernment/localismnondomrates>

Localism Bill: Business Rate Supplement – Requirement for a Ballot for all Business Rate Supplement Proposals – Impact Assessment

This document assesses the impact of amending the Business Rate Supplement Act 2009 to ensure that there must be a ballot of businesses before any Business Rate Supplement is imposed.

<http://www.communities.gov.uk/publications/localgovernment/localismbusinessratesupplement>

Localism Bill: Abolition of the regional planning tier and introduction of the duty to co-operate – Impact Assessment

The Government believes that regional strategies have failed to provide certainty for communities and investors and that local authorities and communities should decide on the level and distribution of growth in their areas. This document assesses the impact of abolishing the regional planning tier and introducing the Duty to Co-operate.

<http://www.communities.gov.uk/publications/localgovernment/localismregionalplanning>

LANDLORD & TENANT

02 Court of Appeal

Statutory continuation of business lease – whether electricity company had a right of way over appellant's land to lay and maintain electricity cables pursuant to 1953 lease – whether respondent estopped from asserting invalidity of s25 notice

* EASTERN POWER NETWORKS PLC
(FORMERLY EDF ENERGY NETWORKS (EPN) PLC) V BOH LTD
(2011) PLSCS 28 – Decision given 26.01.11

Facts: The respondent, EPN, an electricity supplier, operated a substation on the Wembley Trading Estate. Access to the station was across BOH's land and underground cables also crossed their sites. BOH claimed that EPN did not have the necessary rights to cross its land or to maintain their cables, but EPN argued that these had been granted in a 1953 lease by a common predecessor of all the parties. This lease, which included a right of way over the lessor's land for all purposes necessary for the enjoyment of the demised premises, together with a right to lay and maintain electricity cables under the land, had expired in 1994. Since then EPN had acquired the freehold of the substation site, but it contended that the lease had continued pursuant to Part II of the Landlord & Tenant Act 1954.

Point of dispute: Whether BOH's appeal would be allowed against the finding of the judge in the court below that EPN had the necessary rights of access over BOH's land and a right to maintain the underground cables. The case turned on: (i) the validity of a notice under s25 of the 1954 Act served in 1993 by the then freeholder of the substation site; and (ii) whether the lease, or part of it, had otherwise been determined by merger with the freehold acquired by EPN, or by forfeiture or surrender. BOH contended that the judge had erred in law in finding that no merger had taken place.

Held: The appeal was dismissed. The ordinary rule was that the coalescence of a lease and its reversion in the same party (A) would result in a merger and extinguish the lease. However, in equity, it was open to A to form an intention, and to declare accordingly, that that should not happen. This principle had been extended such that if A did not expressly declare this intention, or if there was no other evidence of such an intention on its part, there was a presumption against any intention for a merger if such a merger would be against A's interest. These equitable principles prevailed over the ones applicable at law. The judge found no evidence to suggest that EPN had intended any merger and nor would one have been in its interest. This was the approach that he was required to adopt, and it was irrelevant that the lack of a merger might be contrary to the interests of the co-reversioners.



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03 High Court

Roof space

* ROSEBERY LTD V ROCKLEE LTD
(2011) PLSCS 16 – Decision given 20.01.11

Facts: The first defendant was the landlord of a block of flats in which the claimant held a lease of a sixth floor flat and the second defendant was the lessee of two seventh floor flats. In 1984 the claimant was granted a supplemental underlease of roof space outside its flat, comprising the roof of the flat on the fifth floor below. The demise was described as 'the terrace adjoining the premises as the same is more particularly delineated on the plan'. The original intention was to use the space as a roof terrace or for a conservatory, but later the claimant built an extension to its flat with the first defendant's permission. In 2008 the first defendant granted an underlease of the roof of this extension to the second defendant.

Point of dispute: Who owned the rights over the flat roof above the extension? The claimant contended that the second defendant's underlease could take effect only in reversion. It argued that there was a presumption that a demise of a roof included the full height of the airspace available to the lessor. Alternatively, even if the demise under the 1984 lease was restricted vertically to the height of its sixth floor flat, it owned the extension built on that space, including its roof, so that neither it nor the second defendant could use the roof of the extension, except for maintenance. The defendants contended that the 1984 underlease demised only the airspace above the fifth floor roof, up to the same height as the rest of the claimant's flat.

Held: The claim was allowed in part.

- i. There was no presumption that where a lease included a roof, the demise extended up to the full height of the airspace available to the lessor. The 1984 underlease did not extend to the airspace above the extension roof. The landlord at that time would not have contemplated the possibility of building a roof terrace on top of that extension. The natural meaning of the words used to describe the demise in the 1984 underlease, namely 'the terrace adjoining the premises' was that the height of the demise was the same as the claimant's flat. The plans for the claimant's extension did not refer to any proposed use for the roof.
- ii. However, the 1984 underlease did include the roof of the extension.

A declaration would be made that the 1984 underlease demised to the claimant the extension including its roof but excluding any airspace above it.

PLANNING

04 Court of Appeal

Enforcement of planning control – commercial use of residential car parking spaces

* SUBURBAN PROPERTY INVESTMENT LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2011) All ER (D) 122 (Jan)

Facts: The claimant, SPI, owned a lease of a garage and a car parking space at premises comprising a block of 24 flats with garages and parking in south London which had been built in 1965. Condition 3 of the planning permission stated: 'the garages and car parking accommodation shall not be used for any purposes other than those incidental to the enjoyment of a dwelling house or flat and no trade or business shall be carried on therefrom'. In 2006 the local planning authority issued an enforcement notice alleging a breach of planning control on the grounds that the car parking area was being used by paying members of the public from nearby residences. On appeal the notice was upheld by an inspector appointed by the Sec of State.

Point of dispute: Whether SPI's appeal would be allowed against the decision of the judge in the court below upholding the inspector's decision. The question was whether the literal meaning of condition 3 was that any use which was, or would be, incidental to the enjoyment of the dwelling house or flat would be permissible and not in breach of condition 3.

Held: SPI's appeal was dismissed. Words could not be imported into condition 3. The judge had been correct in finding that the car park could not be used for car parking incidental to the enjoyment of a dwelling house or flat somewhere else in London, but had to be incidental to the 24 flats in the premises. Use of the car park by anyone else was use for a separate car parking purpose; it was not incidental to those dwellings and would require additional permission.

05 Court of Appeal

Use of polytunnels for intensive agricultural purposes in semi-natural area requiring environmental impact assessment (EIA)

** R (ON THE APPLICATION OF WYE VALLEY ACTION ASSOCIATION LTD) V HEREFORDSHIRE COUNCIL(2011) PSCS 27 – Decision given 02.01.11

Facts: The respondent association (WVAA) objected to an application by the interested party to use polytunnels for the cultivation of soft fruit on a farm situated within the AONB. HC granted permission for the development, taking the view that an environmental statement was not required – the only potentially relevant category was para 1(a) of Schedule 2 of the 1999 EIA Regulations being projects for the use of cultivated or semi-natural land for intensive agricultural purposes but HC took the view that the cultivated nature of the land precluded it from being 'semi-natural'.

Point of dispute: Whether to allow HC's appeal against the High Court's decision to allow WVAA's claim for judicial review of the grant of planning permission. The judge concluded that HC had erred in law by concluding that the development was not covered by Schedule 2.

Held: The appeal was allowed.

1. Under the 1999 Regulations it was for the lpa to determine whether a development for which planning permission was being sought was an EIA development. The court's role was to check that the decision was lawful, not to act as the primary decision maker. In this case its role was to consider whether HC had correctly understood the meaning of para 1(a) and secondly, whether, in applying the expression to the fact, they had reached a conclusion that was open to a rational decision maker. The deputy judge's reasoning had not sufficiently distinguished between these two stages. He had attached too much weight to the AONB designation – the cultivated land did not become semi-natural simply because it was included in an AONB.
2. The essence of HC's reasoning had been set out in the screening opinion and was sufficient.

06 Court of Appeal

Unauthorised works to eighteenth century cottage – whether cottage listed building within Planning (Listed Buildings and Conservation Areas) Act 1990 ('1990 Act') – discrepancy over address of property

* BARRATT V ASHFORD BOROUGH COUNCIL
(2011) PLSCS 24 – Decision given 25.01.11

Facts: In 2006 B purchased an eighteenth century farm worker's cottage and applied for permission to make alterations to it. The respondent lpa, ABC, refused permission and in 2008 applied for an interim injunction to stop unauthorised works. ABC considered that the property was listed under the address of 'High House Cottage', Corkscrew Lane, Stone-cum-Ebony, which was also how the property was noted in the Local Land Charges Register. However, the house which B had purchased had a different address. In April 2009 the list was amended to show the correct address. At first instance the judge held that the cottage was a listed building for the purposes of the 1990 Act. The incorrect address was not fatal to its identification since the building described in the entry, which included Ordnance Survey map references, was, in fact, the same as B's house.

Point of dispute: Whether B's appeal would be allowed. B argued that the cottage had not been listed at the material time within the meaning of the 1990 Act, although he accepted that it was listed as from 2009. He also contended that the discrepancies in the name, address and descriptive details in the listing rendered ineffective the official entry relied on by ABC for their enforcement measures.

Held: The appeal was dismissed. It was not a statutory requirement that listing was only effective if entered under a unique correct name that must take precedence over a description, map reference, verbal description or some other means of identification. The register had to be clear enough so that it was reasonably possible for the public to ascertain whether a particular building was listed. The 1990 Act required the compilation of a list of buildings, not names. ABC were entitled to rely on the map references for the purposes of identifying which building was listed. The map pinpointed the exact location of B's building and on a true construction of the entry in the 1990 register it was a listed building at the material date.

07 Divisional Court

Airport expansion – whether local planning authority failing to take into account government policy on reduction of aviation emissions

* R (ON THE APPLICATION OF GRIFFIN) V NEWHAM BOROUGH COUNCIL
(2011) PLSCS 18 – Decision given 20.01.11

Facts: The operator of London City Airport, applied to the local planning authority, NBC, for permission to operate more flights from the airport, a proposal which was opposed by Friends of the Earth (FE). In 2008 NBC resolved that it would allow the application subject to a s106 agreement. The matter was reconsidered in 2009. Submissions that the planning assessment relating to the proposal should be reconsidered in the light of uncertainties raised by the Government's committee on climate change, which had been asked to advise on a proposed government target to reduce aviation emissions by 2050, were considered but it was concluded that government policy on climate change and aviation had not changed in any material way. The planning application was allowed, government policy in the 2003 Air Transport White Paper, which advocated the growth of existing airports, having been balanced against the adverse environmental consequences of the proposal.

Point of dispute: Whether FE's application for judicial review of the decision to grant planning permission should be allowed. FE argued that the 2009 report had not taken into account the fundamental change in government policy towards aviation and climate change that had taken place since the 2008 report was issued, as reflected in the parliamentary statements concerning aviation emissions targets. It was also argued that NBC's considerations of noise levels around the airport was defective as the consultation on this had been too restrictive.



Held: FE's claim was dismissed.

- i. Government policy had not changed between 2008 and 2009. The 2003 White Paper was still the appropriate policy statement. The subsequent parliamentary statements and publications set out a range of measures that could reduce the effect of aviation on climate change but they did not amount to a change from the policy of increasing airport capacity in the south east.
- ii. NBC had not acted irrationally in basing their decision on noise on scientifically prepared noise contours or in choosing 57dB as an appropriate level for that decision. The omission of surrounding London boroughs that fell outside that contour from the consultation process did not amount to a breach of their duty to consult other planning authorities whose areas might be affected by the development.

08 Administrative Court

Comprehensive redevelopment of site – effect on setting of Hampton Court Palace – statutory duty to have special regard to preserving setting of listed buildings

**R (ON THE APPLICATION OF GARNER) V ELMBRIDGE BOROUGH COUNCIL
(2011) PLSCS 32 – Decision given 31.01.11

Facts: In 2009 the defendant local authority, EBC, granted planning permission for a comprehensive mixed-use redevelopment of Hampton Court station and adjoining land. The site lay on the opposite bank of the River Thames from Hampton Court Palace, a scheduled ancient monument and Grade I listed building, and a Grade II listed bridge lay to the west of the site. The claimant, G, was an architect who had previously been responsible for looking after the palace and had advised Historic Royal Palaces on objections to earlier planning applications on the station site. In granting permission for the development EBC noted that the proposal was based on a planning brief that English Heritage had deemed to be satisfactory, that it met the technical requirements of various specialist consultees, including the Environment Agency and the local highways authority, and that it would deliver regeneration and redevelopment of wasted space.

Point of dispute: Whether G's application for judicial review of the grant of planning permission would be allowed. G argued that EBC: (i) had failed to have special regard to the desirability of preserving the setting of the palace and bridge (s66(1) Planning (Listed Buildings and Conservations Area) Act 1990); and (ii) had not properly applied the sequential tests for development of the flood plain as set out in PPS 25.

Held: The claim was dismissed.

1. A local planning authority (lpa) had to have special regard to the desirability of preserving the setting of a listed building. Under s66 of the 1990 Act this goal was more than a mere material consideration and there was a presumption against granting permission. The merits of a proposed development would have to outweigh its potential harm to the setting of a listed building. Although EBC had not specifically referred to the s66 duty they had approached the issue in the correct manner, and had had special regard to the desirability of preserving the setting of the palace and the bridge. The history of the planning application and the sequence of events that had occurred during the period of its consideration showed that the desirability of preserving the setting of the palace and the bridge had been one of the key issues in the decision and that special regard had been paid to it.
2. The sequential test in PPS 25 did not apply to a mixed use development, which had to be located on a particular site in order to regenerate it. Finding other sites for some component parts of the development would have been pointless. In this case the 'exception test' in PPS 25 applied, which permitted development where it could be shown that the development would be safe and would provide wider sustainability benefits to the community that outweighed the flood risk.

09 The Planning Inspectorate

Barge capable of navigation on which a two storey timber structure had been erected – whether requiring planning permission. "Not everything that floats is a boat."

**COLLINS V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
APP/E9505/C/10/2134003 & 2134010 – Decision date 11.01.11

Facts: C constructed a two storey timber structure on a steel hulled flat bottomed barge, about 7m long by 3.5m wide which was moored at Thorpe St Andrew. The Broads Authority alleged that this was unauthorised operational development and issued an enforcement notice. The barge had a rudder, propeller and engine room, but no engine. C owned a tug which could be used to move the barge and it could also be moved manually, but C intended to keep it on its mooring and use it as a holiday home.

Point of dispute: Whether C's appeal against the enforcement notice would be allowed. C's argument was that since the barge floated and was capable of navigation it was a boat and no planning permission was therefore required for the works.

Held: C's appeal was dismissed. The works that had been carried out did not involve the fitting out of a boat or vessel for the purpose of navigation or travelling across water. The size of the structure which had been erected on the barge compromised its manoeuvrability. The fact that the structure was capable of floating and of being moved did not mean that it was immune from normal planning controls. The structure could not be described as a houseboat either as it was, in effect, a flat pontoon on which a two storey wooden house had been erected. The size of the structure meant that it had to be built in situ, it was intended to be permanent and its overall design was indicative of an intention to use it as a dwelling. For the purposes of s336(1) of the Town and Country Planning Act 1990 it was a building and the operations had taken place without the necessary planning permission.

10 CLG Guide

A plain English guide to the Localism Bill

This document provides a simplified overview of the Localism Bill under four headings:

- i. New freedoms and flexibilities for local government;
- ii. New rights and powers for communities and individuals;
- iii. Reform to make the planning system more democratic and effective; and
- iv. Reform to ensure that decisions about housing are taken locally.

<http://www.communities.gov.uk/publications/localgovernment/localismplainenglishguide>

11 CLG Prospectus

Supporting Communities and Neighbourhoods in Planning: Prospectus

This prospectus invites applications, by 21.02.11, from eligible organisations for grant funding under the Communities and Local Government Department's Supporting Communities and Neighbourhoods in Planning scheme. The document describes this grant programme, including the purpose, selection and eligibility criteria. It also provides details on how applications will be dealt with.

<http://www.communities.gov.uk/publications/planningandbuilding/neighbourhoodsprospectus>

12 CLG Statistics

National non-domestic rates collected by local authorities in England 2009-10 (Revised)

This latest statistics release (25.01.11) includes data from 2005-06 to 2009-10 and updates the last release which was issued on 09.09.10. The following are the key points from the latest release:

- the net rate yield (after allowances for changes in respect of previous years and reliefs) increased by 1.8% to £19.4bn in 2009-10;
- the contribution to the pool (net rate yield after allowances for collection costs including losses) increased by 1.7% to £19.0bn in 2009-10; and
- between 2005-06 and 2009-10 the contribution to the pool from the local lists increased by £3.4bn or 21%.

<http://www.communities.gov.uk/publications/corporate/statistics/nondomesticrates200910rev>

RATING

13 Upper Tribunal (Lands Chamber)

Rating of car parking spaces

* JOHN REEVES (VO) V LAURENCE TOBIAS AND OTHERS [2010] UKUT 411 (LC) LT Case Number: RA/2/2010 – Before The President – Decision given 12.11.10

Property: 46 car parking spaces within a larger surfaced car park which the council had let on individual licenses to residential licensees.

Issue: Whether, as found by the Valuation Tribunal, the individually assessed spaces should be deleted from the non-domestic rating lists as they were 'domestic property'.

Held: The VO's appeal was allowed. Section 66(1) of the Local Government Finance Act 1988 included as domestic property 'a private garage... used... for the accommodation of a private motor vehicle' but these spaces were not 'a garage' (s66(1)(c)) and there was no justification for including residential parking in s66(1)(d) as 'storage of articles of domestic use'.



14 Statutory Instrument

SI 2011/113 The Non-Domestic Rating (Collection and Enforcement) (Local Lists) (Amendment) (England) Regulations 2011

These Regulations, which come into force on 31.03.11, amend Schedule 1A to the 1989 Regulations so that a ratepayer and a billing authority may agree that payment of the installments of backdated liability for non-domestic rates are deferred until on or after 01.04.12, although liability must still be discharged within the overall eight-year period from the date of the earliest agreement between the ratepayer and the billing authority.

<http://www.legislation.gov.uk/ukxi/2011/113/contents/made>

REAL PROPERTY

15 Court of Appeal

Town and village greens – s22(1A) Commons Registration Act 1965 – land registered on basis of use by significant number of inhabitants of neighbourhood – whether registration requirements met where used by two neighbourhoods

* LEEDS GROUP PLC V LEEDS CITY COUNCIL
(2010) PLSCS 325 – Decision given 20.12.10

Facts: The respondent council, LCC, registered as a town or village green a piece of land on the outskirts of Leeds. The application claimed that the land had been used as of right by a significant number of inhabitants of a 'neighbourhood within a locality' for lawful sports and pastimes for 20 years, and thus met the requirement for registration as a Class C green within the second limb of s22(1A) of the Commons Registration Act 1965. In the application the relevant locality was given as 'Yeadon' and the applicant described himself as acting on behalf of residents of areas known as 'The Haws' and 'Banksfield', which lay on either side of the land.

Point of dispute: Whether LG's appeal would be allowed against the decision of the court below not to allow its challenge to the registration. LG's argument was that only use of the land by inhabitants of a single neighbourhood would satisfy the statutory requirements and that since 'The Haws' and 'Banksfield' were two separate neighbourhoods these requirements were not met.

Held: The appeal was dismissed. In order to construe s22(1A) of the 1965 Act the judges considered that the starting point lay in s6(c) of the Interpretation Act 1978, which states that the singular is to include the plural, unless the contrary intention appeared. There was no such contrary intention with the concept of 'any neighbourhood' in s22(1A). Under the pre-existing common law the position was that use as of right by the inhabitants of a locality would give rise to a right of recreation, but the claim would fail if those who used the land came from more than one locality. However, there was no reason to infer that all aspects of the common law locality rule were intended to be grafted onto the new concept of 'neighbourhood within a locality'. It would be contrary to legislative intention to confine any 'neighbourhood within a locality' to only one neighbourhood and absurd if a bar to registration arose when the evidence demonstrated that the land was valuable for recreational uses for two or more neighbourhoods rather than just one.

16 Court of Appeal

Easement for right of way over bridle path

* CAMPBELL V WILLIAM T BANKS
(2011) PLSCS 35 – Decision given 01.02.11

Facts: Since 1986 the appellants had owned a property from which it ran a riding stables. They rode their horses along two lanes that crossed neighbouring farmland belonging to the respondents. Until 1953 the two properties had been in common ownership. In 1998 the two lanes were registered as permissive footpaths and the following year the respondents erected a gate which prevented the riders obtaining access to the lanes. In 2003 the appellants removed the gate posts and the respondents re-erected the gate in the same position in 2008.

Point of dispute: Whether the appellants' appeal would be allowed against the High Court ruling that they had not acquired either a public or private right of way along the lanes on foot, with vehicles or with horses. The appeal was limited to the possible application of s62 of the Law of Property Act 1925 which was not referred to in the judgement of the court below. The appellants argued that they did not need to establish an express right of way or one acquired by use, since on the true construction of s62 all the rights enjoyed over the lanes by the common owner of the estate before it was divided up had become annexed to the appellants' land as easements.

Held: The appeal was dismissed. This was the type of situation where s62 might be able to create legal easements over the two lanes on the respondents' land, but the appellants had been unable to provide proof that either lane had been used as a bridleway for the benefit of their land, nor could they demonstrate that the lanes had been used as a bridleway before 1986. The appellants' claim to a public right of way for horses over the lanes failed for lack of proof of intention to dedicate the lanes as bridleways since 1953.

17 High Court

Width of right of way

*CARPENTER V CALICO QUAYS LTD
(2011) PLSCS 29 – Decision given 27.01.11

Facts: The respondents owned a plant nursery on a site which had originally been accessed from the A6. In 1989 the route of the A6 was altered and the respondents' existing access was closed up and a new route provided over land belonging to the appellants' predecessors in title. Rather than compulsorily acquiring the access road land the Sec of State advised the respondents to negotiate a right of way with the landowners resulting in the appellants' predecessors in title entering into a 1999 deed granting a right of way to the respondents over the 'roadway' which was shown coloured brown on the attached plan.

Point of dispute: The extent of the respondents' right of way. The appellants contended that it was limited to the tarmacked road surface while the respondents argued that it included the grass verges on either side. The judge at first instance, finding that the plan attached to the deed was schematic only, concluded that the right of way extended beyond the tarmacked surface to a boundary fence on one side and to a 'rollover point' on the other, where an embankment that supported the road dropped away steeply.

Held: The appellants' appeal against the judge's findings was dismissed. The 1999 deed had to be construed against the background material that would have been reasonably available to the parties at the time of the grant, including other relevant instruments and the physical characteristics of the land. Regard had to be had as to what was being replaced – if the former route included safe pedestrian access on grass verges it was reasonable to expect the replacement to have something similar. By the time the deed was completed the road had been completed with two clear grass verges, and the parties had defined the width of the roadway as being the width of the available plot of land. The judge had construed the deed correctly.

TORT

18 Court of Appeal

Economic loss

* ROBINSON V PE JONES (CONTRACTORS) LTD
(2011) PLSCS 15 – Decision given 01.01.11

Facts: In 1992 R purchased a new house which had been constructed by PEJ, a firm of builders. In September 2004 it was discovered that the chimney flues had not been built in accordance with good building practice or with the building regulations in force at the time when the house was built. R claimed damages for breach of contract and negligence. The former was statute-barred under the Limitation Act 1980 and R sought to recover damages in tort for economic loss.

Point of dispute: Whether R's appeal would be allowed against the ruling of the judge in the court below that PEJ did not owe a duty to R in respect of economic loss. The contract between the parties, which was a standard NHBC form of agreement, satisfied the requirement of reasonableness under the Unfair Contract Terms Act 1977 and excluded concurrent liability in tort.

Held: R's appeal was dismissed.

- i. On the issue of reasonableness under the 1977 Act the judge's decision must carry great weight. The NHBC agreement provided substantial protection to a purchaser and it could not be said that those contractual terms were unreasonable.
- ii. The relationship between a builder and his client was primarily governed by the contract between them. The law of tort imposed a more limited duty on the builder to take reasonable care to protect its client against suffering personal injury or causing damage to other property. The relationship and dealings between the parties would have to be examined to ascertain whether the builder assumed the wider responsibilities identified in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. In this case there was nothing to suggest that PEJ had assumed any such responsibility.
- iii. PEJ's warranties of quality and R's remedies in the event of a breach of warranty were clearly set out in the contract. It would be inconsistent with the scheme of the contract if the law were to impose on PEJ duties of care in tort that exceeded its contractual liabilities. If a defect in the construction of the house generated only economic loss, namely the cost of repair, there was no reason why any liability in tort for that loss should not be excluded by a clause in the building conditions.

HOUSING

19 CLG Statistical Publication

House Price Index – November 2010

These statistics, released on 18.01.11, are based on mortgage completions during November 2010. The key points from the release are as follows:

- in November house prices were 4% higher than at the same time in 2010, but they were slightly lower than a month earlier (0.1% – seasonally adjusted);
- the average mix-adjusted UK house price was £208,585 (not seasonally adjusted);
- average house prices were 0.6% lower over the quarter to November, compared to a quarterly increase of 0.9% during the quarter to August (seasonally adjusted);



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- average prices increased during the year in England by 4.7%, in Wales by 3% but went down in Northern Ireland by 11.3% and in Scotland by 2.4%;
- prices paid by first time buyers were 2.4% higher on average than a year earlier whilst prices paid by former owner occupiers increased by 4.6%; and
- prices for new properties were 8.9% higher on average than a year earlier whilst prices for pre-owned dwellings increased by 3.7%.

<http://www.communities.gov.uk/publications/corporate/statistics/hpi112010>

20 Homes & Communities Agency Statistical Publication

Monthly Housing Market Bulletin 26 January 2011

This bulletin provides HCA staff with the latest information on housing market trends, the economy and the housebuilding industry. The following are of interest:

- House prices are falling slightly – Nationwide recorded a 1% fall in the three months to December 2010. This fall appears to be being driven by a decrease in demand for properties, in part caused by economic uncertainty. This downward trend is forecast to continue into 2011.
- According to the Council of Mortgage Lenders mortgage lending fell by 15% over the last year and there has been a shift away from interest only mortgages as lenders anticipate future regulatory changes.
- Economic growth fell by 0.5% in Q4 2010 and it remains to be seen in the next quarter whether the economy has entered into a double dip recession.
- Unemployment rose by 49,000 in the three months to November, largely due to public sector job losses.
- Housebuilders continue to concentrate on profit rather than volume.

<http://www.homesandcommunities.co.uk/public/documents/housing-bulletin-jan2011.pdf>

21 RICS Research Report

The Future of UK Housebuilding

Drawing on reviews of the housebuilding industry's history and examination of its current status, the challenges that it faces and drivers for change, this review presents a number of possible housebuilding scenarios for the next 10 to 20 years with the aim of encouraging more strategic thinking within the industry as it moves towards a more sustainable future.

- UK housebuilding has long been associated with lack of supply, fragmented industry structure, risk-averse attitudes and an unresponsive planning system. Together with the recent economic downturn these factors present significant challenges to the industry.

- The future scenarios for UK housebuilding incorporated in this report show a variety of possible inter-connected pathways along which the industry could progress over the next 10 to 20 years.

- The future of housebuilding is likely to be driven by a combination of Government policy on sustainability, legacy of the economic downturn, and the rapid evolution of innovative technology in the short and medium term. Currently, the most important factors are the introduction and implementation of the Code for Sustainable Homes and achieving Zero Carbon Homes by 2016. Issues such as increased global competition and aspects of sustainability other than energy (such as water, waste and ecology) are likely to become increasingly dominant.

- The RICS considers that the industry will continue to be dominated by private housebuilders, but that its structure will become more diverse.

- Land use planning, the economy and the variability of the housing market will continue to play a dominant role in the nature and form of UK housebuilding.

- It is important for practitioners to become more adaptable and forward thinking in their planning and approach and to take a longer term perspective.

http://www.rics.org/site/download_feed.aspx?fileID=8638&fileExtension=PDF

GENERAL

22 English Heritage Publication

New Uses for Former Places of Worship

This document provides advice on the conversion of historic former places of worship to new uses. It is primarily aimed to be of benefit to new or potential new owners or occupiers of such buildings, but will also provide clarity for local authorities on the approach taken by English Heritage when advising on proposals for re-use. It should be read in conjunction with PPS5, the Historic Environment Planning Practice Guide and any relevant local planning guidance.

http://www.helm.org.uk/upload/pdf/EH_Places-of-Worship-2010.pdf?1295507548

23 English Heritage Publication

Pillars of the Community: The transfer of local authority heritage assets

This guidance, which is intended for use by local authorities and community organisations, gives advice on the legal, financial and regulatory issues involved with the transfer of property assets from local authorities to community-based organisations.

- Part A explains the context of asset transfer, both in terms of the efficient asset management of public assets and the conservation of the historic environment
- Part B explains how local authorities can take stock of their heritage assets and formulate transfer strategies
- Part C explains how the community can develop successful projects, from assessing potential uses to ensuring the long term viability of the project

<http://www.english-heritage.org.uk/publications/pillars-of-the-community-the-transfer-of-local-authority-heritage-assets/pillars-of-the-community-the-transfer-of-local-authority-heritage-assets/>

24 English Heritage Publication

Practical considerations for the design and implementation of refurbishment projects of historic school buildings

Most local authorities in England have school buildings which could be described as 'historic' being either listed, located within a conservation area or because they are well regarded by the local community. Generally, it is not feasible to move a school to new facilities built on an alternative site and sell the existing buildings due to constraints on Authority land ownership and existing planning policy in PPG5, which states that the best use for a historic building is that for which it was originally designed. Under the current climate of funding restraint the successful refurbishment and remodeling of historic school buildings will continue to play a central role in the delivery of future school improvement and maintenance programmes. This document contains useful advice on how to take advantage of the opportunities afforded by investment in historic school buildings to create modern, well-equipped and inspirational learning environments. The following are the main elements covered in this paper:

- stakeholder engagement;
- affordability;
- design and implementation;
- compliance with statutory requirements; and
- sustainability.

<http://www.helm.org.uk/upload/pdf/practical-considerations-school-buildings.pdf?1296469468>

25 Centre for Cities Report

Cities Outlook 2011

This report highlights some of the challenges faced by the UK's cities today: economic growth, unemployment, changing demographics and increasing resident expectations, but with significantly reduced budgets. Cities are essential to the UK's economic recovery and its continuing global competitiveness and this paper aims to lead us to a better understanding of the economic importance of cities, the relationships between them and how they can work together to succeed in the global economy.

http://www.centreforcities.org/assets/files/Cities%20Outlook%202011/CITIES%20OUTLOOK_2011.pdf

26 CLG Report

Updating the evidence base on English cities – final report

This report provides an update to the 2006 'State of the English Cities' report, which provided a comprehensive analysis of city performance. This report considers new evidence and developments on the most critical urban issues and reviews how the quantitative and qualitative evidence has developed since the publication of the State of the English Cities report. Key indicators relating to city performance are updated, and gaps in the evidence base needed to support future policy making, identified.

<http://www.communities.gov.uk/publications/regeneration/updatesevidencecities>

27 CLG Paper

Regeneration to enable growth: What Government is doing in support of community-led regeneration

This document confirms the Government's commitment to regeneration and explains its new approach of supporting and encouraging local authorities and residents to drive local regeneration through the introduction of a wide range of powers, incentives, freedoms and flexibilities through the decentralisation, localism and Big Society agendas. Examples of government investment in areas like housing, transport and education are highlighted.

<http://www.communities.gov.uk/publications/regeneration/communityledregeneration>



GERALD EVE'S UK OFFICE NETWORK

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Evebrief has been established for more than 30 years. It is a summary of the latest statutory and legal cases affecting the property industry and is widely regarded in the industry as the most comprehensive document of its type.

Useful web links

www.ukonline.gov.uk
www.odpm.gov.uk
www.dft.gov.uk
www.inlandrevenue.gov.uk
www.hms.gov.uk
www.egi.co.uk
focus.focusnet.co.uk
[www.newLawonline.com](http://www.newlawonline.com)

Abbreviations

The following abbreviations are used in evebrief:

BLD	Lexis Nexis Butterworths (internal abbreviation)
EG	Estates Gazette
EGLR	Estates Gazette Law Reports
EWCA	England & Wales Court of Appeal
EWHC	England & Wales High Court
P&CR	Property, Planning and Compensation Reports
PLSCS	Property Law Service Case Summaries

The star system

Cases are marked with one, two or three stars as follows:

- *** Essential reading on the point of law or valuation with which the case is concerned, because it adds to, or clarifies or changes, the law.
- ** Noteworthy case which does not significantly alter the law or which relates to a relatively obscure point.
- * Interesting but non-essential reading.

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One of our key roles at Gerald Eve Research is to communicate with our clients and others; to inform them, for example, on our latest thinking on topical issues such as legal matters and the implications for broader property market trends.

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EVEBRIEF

Legal & Parliamentary

Volume 33(02) 14 February 2011

- 01 Scotland – Planning
- 04 Northern Ireland – Planning
- 05 Northern Ireland – Rating

SCOTLAND

PLANNING

01 Scottish Government Consultation Paper

Delivering Sustainable Flood Risk Management – a consultation

Deadline for Comments: 18.03.11

Climate change predictions indicate that the number and severity of storm events across Scotland is likely to increase, placing pressure on its existing defences and revealing new areas at risk from flooding. The causes and consequences of flooding need continued investigation and more sustainable approaches to tackling flood risk deployed. This guidance, on which the Scottish Government is inviting comments, complements the flooding legislation that was introduced in 2009 by the Flood Risk Management Scotland Act. It sets out the statutory guidance to SEPA (Scottish Environment Protection Agency – the agency in Scotland in charge of managing flood alerts), local authorities and Scottish Water on fulfilling their responsibilities under the Act and on the steps that should be taken to manage flooding in a sustainable manner. The guidance is intended to ensure adoption of consistent principles and approaches based on good practice lessons in flood management.

<http://www.scotland.gov.uk/Publications/2011/01/14152758/0>



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02 Statistical Bulletin Planning Series

PLG/2011/1: Scottish Vacant and Derelict Land Survey 2010

This bulletin presents a summary of results from the 2010 Scottish Vacant and Derelict Land Survey. This survey, which is a co-operative effort between local authorities and the Scottish Government, is the only national data source for vacant and derelict land. The main points to emerge from the 2010 survey are as follows:

- there were 10,771ha of derelict and urban vacant land recorded in 2010 survey, of which 2,592ha (24%) were urban vacant and 8,179ha (76%) were derelict;
- since 2002 there has been an increase of 125ha in the total amount of derelict and urban vacant land recorded in the survey, from 10,646ha in 2002 to 10,771ha in 2010;
- the amount of land that has been brought back into productive use or removed due to naturalisation has been balanced by a small number of large sites falling out of use;
- since 2002, an average of 537ha of derelict and urban vacant land was brought back into use each year; and
- the highest amount of derelict and urban vacant land was recorded in North Lanarkshire (13% of Scotland's total), followed by Glasgow City and North Ayrshire.

<http://www.scotland.gov.uk/Resource/Doc/339728/0112305.pdf>

03 Scottish Government Circular

Scottish Planning Series: Planning Circular 1 2011: Tree Preservation Orders

This Circular sets out Scottish Government Policy on TPOs and trees in conservation areas contained in the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc (Scotland) Act 2006 and the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 2010 (SSI 2010/434). This circular is intended to provide an overview of the new TPO procedures, explaining how the requirements from the Act and Regulations fit together.

<http://www.scotland.gov.uk/Publications/2011/01/28152314/0>

NORTHERN IRELAND

PLANNING

04 Consultation

Consultation on Draft PPS 23 and PPS 24

Deadline for Comments: 06.05.11

Draft PPS 23 provides a policy for enabling development, ie development that would not normally be acceptable, but can be justified where there are overriding public benefits to be gained from the development scheme overall. The purpose of introducing this policy is to maintain and enhance the standard of a wide range of community facilities in Northern Ireland including cultural, educational, social, health, built heritage and leisure facilities and the restoration and creation of wildlife habitats.

Draft PPS 24 provides guidance on the weight to be accorded to economic considerations in the making of planning decisions.

http://www.planningni.gov.uk/index/news/news_consultation/consultation-pps-01-2011.htm

RATING

05 Statutory Instrument

NISR 2011/16 The Rates (Amendment) (2009 Act) (Commencement No 2) Order (Northern Ireland) 2011

This Order provides for the coming into operation of the provisions of the Rates (Amendment) Act (Northern Ireland) 2009:

- listed in Schedule 1 to this Order, on 10.2.11; and
- listed in Schedule 2 to this Order, on 1.10.11.

<http://www.legislation.gov.uk/nisr/2011/16/contents/made>