EVEBRIEF

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LOCALISM

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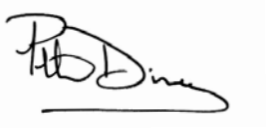
In this issue we report on consultation documents introducing two aspects of the coalition Government's Localism agenda, the right to challenge the running of local services and the right to purchase assets of community value. These confirm the commitment to the localism agenda. We also report on the latest chapter in the Cala Homes challenge to the Sec of State's intention to abolish regional special strategies.

The Cala challenge (item 06) failed and the judgement confirmed that the Sec of State was entitled to advise that there was an intention to revoke spatial strategies. Not a surprising result! It is however interesting to note that following the judgement the Sec of State, in an appeal decision on a case in Crawley, has made clear that whilst it is the Government's intention to revoke regional special strategies, in the provisions of the Localism Bill which is now before Parliament, carry little weight in decision making at this stage of the parliamentary process.

At item 24 we report on the Government's ambition for locally driven growth for business investment and economic growth, with the four key policies of; decentralising decision making; providing incentives for growth (the New Homes Bonus); sweeping away out dated planning rules; and targeted investment in transport, affordable homes and regional growth.

The Localism agenda is gaining momentum and additional clear explanation of its impact can only benefit its practical implementation.



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LOCALISM BILL

01 CLG Consultation Paper

Proposals to introduce a Community Right to Challenge

Deadline for Comments: 03.05.11

This document sets out the provisions being made by the Government in the Localism Bill to introduce a Community Right to Challenge the running of local services. It seeks views on the detail of how the Right will work in practice, which will be set out in regulations and invites views on the type of support and guidance that should be provided.

http://www.communities.gov.uk/publications/localgovernment/righttochallengeconsultation

02 CLG Consultation Paper

Proposals to introduce a Community Right to Buy

Deadline for Comments: 03.05.11

This document sets out the provisions in the Localism Bill which will assist community organisations who wish to purchase assets of community value. It seeks views on the detail of how the scheme should be delivered which will be set out in regulations. It also invites views on the type of support and guidance that should be provided.

http://www.communities.gov.uk/publications/localgovernment/righttobuyconsultation

LANDLORD AND TENANT

03 High Court

Exercise of break clause

* MW TRUSTEES LTD V TELULAR CORPORATION (2011) PLSCS 46 – Decision given 09.02.11

Facts: TC, the defendant, held a ten-year lease from March 2005 of office premises. In 2008, when the reversion was acquired by the claimant, MWT, TC was informed of the change in its landlord. In 2009 TC sought to exercise a tenant's break clause in the lease which would allow it to terminate the lease in March 2010. TC, as a company, knew of the change of landlord, but the individual who prepared the break notice did not and she sent it by special delivery to the original landlord who directed her to contact MWT's managing agents. An email from TC's employee to the second claimant stating that she had sent the notice to the former landlords and asking about the steps necessary to terminate the lease reached the managing agents who replied by email on 17.08.09 stating 'We accept the attached letter and can confirm that we are happy for you to break the Lease' and asking TC to readdress its letter to MWT. A replacement notice was prepared, but either it was not sent or it was lost in the post.

Point of dispute: Whether MWT's claim for a declaration that TC had not served a valid break notice and that the lease was continuing would be allowed. TC argued that the managing agents' email had waived any defects in the notice since they had represented that MWT accepted the notice notwithstanding its defects.

Held: MWT's claim was dismissed. A reasonable recipient of the notice would not have been misled as to TC's intentions to terminate the lease, notwithstanding that the notice had been addressed to the wrong party. The lease only required the notice to be 'sent' to the landlord as opposed to being 'addressed' to the landlord and did not require the landlord's details to be referred to in the notice. TC's intentions regarding its wish to terminate the lease were clear to MWT. The second claimant had referred the documentation to the managing agents for action and he had acknowledged it by email. The managing agents' use of the word 'accept' meant that it accepted the notice on behalf of MWT, that the documentation showed an intent on TC's part to terminate the lease and that it had the effect of terminating the lease in March 2010. MWT were either estopped from subsequently challenging the validity of the notice or they were deemed to have waived the requirement for a notice to be served in the manner specified in the lease. The lease had been effectively terminated.

PLANNING

04 Supreme Court

Protected species – planning permission granted for bus route over land occupied by protected bat species – correct test of disturbance – Regulation 3(4) Conservation (Natural Habitats &c) Regulations 1994

** R (ON THE APPLICATION OF MORGE) V HAMPSHIRE COUNTY COUNCIL
(2011) PLSCS 14; (2011) All ER (D) 114 (Jan) – Decision given 19.01.11

Facts: HCC granted planning permission for the construction of a new bus route along an old railway line which had become overgrown and provided a haven for wildlife, in particular a protected bat species. M, a local resident, sought judicial review of the permission on the ground that it breached the requirements of Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora (the Habitats Directive) owing to its likely effect on the bat population. At first instance, and in the Court of Appeal, M's application was dismissed.

Point of dispute: Whether M's appeal against the Court of Appeal's ruling would be allowed. The issues were:

i. The meaning of deliberate disturbance in article 12(1)(b) of the Directive which requires Member States to take measures to prohibit the deliberate disturbance of protected species. The Court of Appeal considered the 2007 guidance on article 12(1)(b) and ruled that the threshold for disturbance was that the proposed scheme would have a detrimental effect on the conservation status of the species at population level, but concluded that the loss of foraging habitat for bats occasioned by the scheme would not have that effect.

ii. Whether the planning committee had had due regard to the Habitats Directive in reaching its decision as required by Regulation 3(4) of the Conservation (Natural Habitats &c) Regulations 1994. The Court of Appeal held that an lpa should not grant planning permission unless it was satisfied that development would not offend article 12(1) or that Natural England would permit a derogation from that article and grant a licence under Regulation 44.

Held: The appeal was dismissed (Lord Kerr dissenting).

i. A deliberate disturbance was an intentional act carried out in the knowledge that it will or may have a particular consequence of disturbing the relevant protected species. In determining what amounted to a disturbance in that context various broad considerations relating to article 12(1)(b) had to be taken into account. Beyond noting these, it was difficult to take the proper interpretation and application of the article much further than the 2007 guidance document. The illustrations given in that were just the ends of the spectrum within which the question of disturbance arose. To say that regard must be had to the effect of the activity on the conservation status of the species was not to say that the activity was prohibited only if it affected that status. Disturbance of that kind illustrated one end of the spectrum and the Court of Appeal had erred in applying it as the test. Within the spectrum each case had to be judged on its own merits. The advice of Defra's head of protected and non-native species policy was that consideration should be given to the rarity and conservation status of the species and the impact of the disturbance on the local population of a particular protected species.

ii. In considering the obligations of an lpa under Regulation 3(4) of the 1994 Regulations, it was relevant that a grant of planning permission could no longer be raised as a defence on a prosecution for the offence of disturbing wild animals contrary to article 12 in the Habitats Directive. Natural England was responsible for enforcing the directive and it was not the duty of an lpa to police article 12 offences. Accordingly when determining a planning application lpas were not required to satisfy themselves that the development would not offend article 12 or that Natural England would be willing to allow a derogation from the article and grant a license under Regulation 44. The lpa's only obligation was to 'have regard' to the requirements of the directive so far as they might be affected by a decision to grant planning permission. It would be placing too much of a burden on lpas if they had to police the fulfilment of Natural England's duties. Where, as in this case, Natural England was satisfied that the proposed development would comply with article 12, lpas were entitled to presume that that was so. The planning committee of HC had plainly had regard to the requirements of the Habitats Directive.

05 Court of Appeal

Environmental Impact Assessment (EIA)

*R (ON THE APPLICATION OF BATEMAN) V SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
(2011) PLSCS 58 – Decision given 22.02.11

Facts: B sought planning permission for the extension of a grain storage and handling facility near to a village. The proposed development fell within Schedule 2 to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. B asked for a screening opinion from the lpa, SCDC, who replied in writing stating that in their opinion, the development would not be 'likely to have significant effects on the environment' and that in their opinion an EIA was not required. This letter was accompanied by a statement from a planning officer giving reasons for that decision. Planning permission was subsequently granted.

Point of dispute: Whether B's application for judicial review of the decision to grant permission for the development would be allowed. B argued that the screening opinion should be quashed as it did not contain sufficient reasoning to satisfy the requirements of the 1999 Regulations, that the likely effect of the development on traffic movements, noise and landscape had not been properly considered and that the planning officer had failed properly to explain why an EIA was not required. The matter was heard by the Court of Appeal as the High Court refused permission to challenge the grant of planning permission.

Held: The application was allowed. Planning authorities had to decide on a case-by-case basis whether a development was likely to have a significant effect on the environment. In a screening opinion the lpa had to provide sufficient information to enable an interested party to see that the possible environmental effects of a development had been properly considered and to understand the reasons for a decision. In this case the planning officer had given no clear statement of her reasons for concluding that there would be no discernible effects on traffic, landscape or noise. The adoption of a screening opinion was part of process leading to the grant or refusal of planning permission and if one step in that process was legally flawed, the whole process was flawed and the permission must be quashed.

06 Administrative Court

Proposed legislation to abolish regional spatial strategies

** R (ON THE APPLICATION OF CALA HOMES (SOUTH) LTD) V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Facts: CH, the claimant, wanted to build 2,000 houses on a site near Winchester. Planning permission for the development had been refused by the lpa and an appeal against that decision was pending. In May 2009 a regional spatial strategy (RSS) which would provide for the development of 5,500 new homes in the Winchester area was introduced. Since this covered CH's site it greatly increased CH's chances of securing planning permission. After the Coalition Government was elected in May 2010 the Sec of State issued a letter to all lpas informing them that the Government intended to abolish RSSs and directing them to have regard to that letter as a material consideration when making planning decisions. In July 2010 the Sec of State made a statement of intention to revoke RSSs. CH challenged the lawfulness of that statement by judicial review, a claim which was allowed. On the same day as this judgment was published, 10.11.10, the Sec of State issued a further statement addressed to lpas to the effect that the Government still intended to abolish RSSs and indicating that the advice contained in the May 2010 letter stood. CH obtained an order that this statement should be stayed, but that stay was lifted on an application by the Sec of State (See Evebrief Volume 33(01) item 03).

Point of dispute: Whether to allow CH's claim that:

i. The Sec of State's November statement and letter represented an unlawful attempt to subvert the application of the existing statutory framework for planning decisions and the effect of the earlier judgment; and

ii. The need for a strategic environmental assessment should have been considered under the Environmental Assessment of Plans and Programmes Regulations 2004.

Held: CH's claim was dismissed.

i. The Sec of State had been entitled to advise lpas that the proposed revocation of RSSs was to be regarded as a material consideration in their planning decisions. A change of national policy that would remove RSSs as an element of the development plan would affect planning throughout the country – changes to the planning policy framework could be seen as being relevant to a planning decision. The Sec of State had not advised lpas to assume that RSSs had already been revoked, or to ignore them, and had not specified how much weight planning authorities were to give to relevant provisions of RSSs pending their abolition – he had advised them, correctly, to take the proposed abolition into account in their planning decisions.

ii. The requirements of the SEA directive were concerned only with the effects on the environment of those 'plans and programmes' that fell within its scope. National planning policy did not constitute a plan or programme for those purposes. The government's stated commitment to the abolition of RSSs did not amount to a "plan or programme" or a modification of such a plan or programme.

07 Administrative Court

Proposed demolition of building in designated conservation area

* TRILLIUM (PRIME) PROPERTY GP LTD V TOWER HAMLETS LONDON BOROUGH COUNCIL
(2011) PLSCS 41 – Decision given 04.02.11

Facts: The claimant owned a 1930s neo-Georgian former labour exchange building next to Limehouse Cut, London's oldest canal. In 2009 THLBC refused its application to demolish the building and to replace it with a mixed use development. Previously, English Heritage had refused to list the building, THLBC had declined to include it in the list of buildings of local interest and they had also concluded that it should not form part of the conservation area. Faced with local pressure to prevent the demolition THLBC proposed to establish a Limehouse Cut conservation area including the claimant's building and some adjoining Victorian warehouses under the Planning (Listed Buildings and Conservation Areas) Act 1990. In late September 2009, upon the claimant giving notice of its intention to demolish the building within two months, THLBC proceeded to designate the conservation area without consulting either the claimant or any of the other owners whose properties would be included in it.

Point of dispute: Whether the claimant's application to challenge THLBC's decision would be allowed. The claimant argued that the conservation designation had been made for the improper purpose of preventing the demolition of its building rather than for the required statutory purpose of protecting the special character and appearance of the area. It also argued that it had a legitimate expectation to be consulted on the designation of a conservation area that affected its property and proposed development.

Held: The claim was allowed.

i. The lpa was under a duty to keep under review the question of whether any part of their area should be designated as a conservation area. Designation could be a response to an actual or perceived threat to the character of an area, but the primary consideration was whether the area was of sufficient special interest to justify the designation. It should not be imposed in response to local pressure or to bring the future of particular unlisted buildings under control. Although the driving force behind the designation of the Limehouse Cut conservation area had been to prevent the demolition of the claimant's building, that was not unlawful and THLBC had subsequently come to the decision that the area merited conservation status due to its special interest.

ii. Although the claimant had a legitimate expectation that it would be consulted over a designation decision affecting its building, THLBC had been entitled to conclude that consultation with either the claimant or others would put the proposed designation at risk of harm and that the risk of the building being demolished at an early date was so great that their route to the designation was warranted.

iii. However, the designation was quashed because the report of THLBC's officers on which the decision to designate was based was misleading, which meant that the council had taken into account irrelevant considerations in reaching their decision. The report had not been full, fair or balanced and failed to mention that designation had been considered and rejected in the recent past, the refusal of local listing and it gave the erroneous impression that the designation was supported by English Heritage.

08 Administrative Court

Section 106 agreement – contributions calculated in accordance with supplementary planning guidance (SPG) which subsequently changed – whether lpa entitled to enforce payment of contributions under agreement

* R (ON THE APPLICATION OF RENAISSANCE HABITAT LTD) V WEST BERKSHIRE DISTRICT COUNCIL
(2011) PLSCs 56 – Decision given 16.02.11

Facts: RHL, the claimant developer, was granted planning permission by WBDC, the defendant, for a residential development on land in Thatcham. The parties entered into an agreement under s106 of the Town and Country Planning Act 1990 under which RHL undertook to contribute specified sums towards infrastructure costs flowing from the development. These sums had been calculated according to WBDC's SPG issued in April 2004 and RHL started to pay them. At the same time various developers in the area had appealed successfully against WBDC's refusals of planning permission for some developments, these refusals being connected to the developers' unwillingness to pay infrastructure contributions. In determining these appeals planning inspectors had criticised WBDC's calculations and in response WBDC amended the SPG. RHL contended that it should not pay any further contributions under the s106 agreement since if the new SPG applied no more instalments would be due.

Point of dispute: Whether RHL's application for judicial review of WBDC's claim for outstanding contributions under the s106 agreement would be allowed. RHL contended that WBDC were seeking to impose an unlawful obligation in enforcing the agreement for more than could be justified under the SPG. RHL also argued that WBDC had failed to consider whether any planning purpose connected by its development would be served by enforcement.

Held: RHL's claim was dismissed. At the time when they entered into it the s106 agreement had been lawful and it contained specific sums which RHL had agreed to pay rather than the method by which these were calculated. RHL was aware of the SPG and could have established how the sums had been arrived at under that guidance, RHL had not challenged the lawfulness of the SPG on which the contributions were based, and although the SPG had been changed in response to criticism did not mean that the earlier one was unlawful. The planning purpose for the surplus contributions did not have to relate to the specific development in connection with which the s106 agreement was entered into – they could be used to benefit the area where the new residents would live.

09 Department of Communities and Local Government – Consultation

Planning Policy Statement 3: Planning for Housing – Technical change to Annex B, Affordable Housing definition

Deadline for Responses: 11.04.11

This consultation concerns a technical change to Annex B of PPS 3 in order to include the new Affordable Rent product (see item below) within the definition of affordable housing. It seeks views on the definition of Affordable Rent. The change will mean that affordable rent can be regarded as affordable housing for planning purposes.

http://www.communities.gov.uk/publications/planningandbuilding/pps3annexconsultation

10 Infrastructure Planning Commission

Infrastructure Planning Commission (IPC) – Guidance and Advice Notes

The IPC has published the following guidance and advice notes:

- IPC Guidance Note 1 on pre-application stages
- IPC Guidance Note 2 on preparation of application documents
- Advice Note 1: Local impact reports
- Advice Note 2: Working together on nationally significant infrastructure projects. This relates to the outreach project which IPC is implementing
- Advice Note 3: Scoping opinion consultation. This explains IPC's role in the process of scoping environmental statements and is intended to assist applicants and statutory consultees
- Advice Note 4: Section 52. This contains advice about how to apply to the IPC to authorise a developer to serve a written notice ('and interests notice') which requires the recipient to provide information to the developer about interests in land
- Advice Note 5: Section 53. This sets out how to apply to the IPC for a rights of entry notice to gain access to land in order to carry out surveys and take levels
- Advice Note 6: Preparation and submission of application documents. This is to assist applicants in the preparation, organisation and submission of applications to the IPC
- Advice Note 7: Environmental Impact Assessment, screening and scoping
- Advice Note 8: Sections 8.1 – 8.5 (published February 2011). This is in five sections and takes the applicant step by step through the planning process for major infrastructure projects

- Advice Note 9: Rochdale Envelope. This addresses the use of the 'Rochdale Envelope' approach under the Planning Act 2008. A number of developers, particularly those for offshore wind farms, have sought guidance from the IPC on the degree of flexibility that would be considered appropriate with regard to an application for a nationally significant infrastructure project under the Planning Act 2008 regime

http://infrastructure.independent.gov.uk/legislation-and-advice/our-guidance-and-advice/

RATING

11 Statutory Instrument

SI 2011/255 The Non-Domestic Rating and Business Rate Supplements (England) (Amendment) Regulations 2011

These Regulations, which come into force on 10.03.11, amend the 1990 Regulations so that ratepayers will be entitled to the payment of interest by a billing authority on any repayment of business rate supplements ('BRS') where a ratepayer has overpaid, but only where the overpayment of the BRS is in consequence of the alteration of a rating list.

http://www.legislation.gov.uk/uksi/2011/255/contents/made

12 Statutory Instrument

SI 2011/434 The Valuation Tribunal for England, Non-Domestic Rating and Council Tax (England) (Amendment) Regulations 2011

These regulations, which come into force on 01.04.11, make amendments to four sets of regulations which were made in connection with the establishment of the Valuation Tribunal for England on 01.10.09.

http://www.legislation.gov.uk/uksi/2011/434/contents/made

13 CLG Business Rates Information Letter

Business Rates Information Letter (1/2011): Confirmation of the 2011/12 Multipliers and additional Rating Information

This letter provides confirmation on the 2011/12 business rate multipliers, and informs local authorities of the extension of the moratorium on payments of certain backdated business rates liabilities. It also reminds local authorities of their discretionary powers under the rural rate relief legislation which allows them to provide rate relief to rural public houses.

http://www.communities.gov.uk/publications/localgovernment/bril12011

LEASEHOLD REFORM

14 Court of Appeal

Collective enfranchisement – respondent applying to acquire part of building containing 20 flats divisible into two sets of ten flats – whether property constituted 'self-contained part of building'

** 41-60 ALBERT PALACE MANSIONS (FREEHOLD) LTD V CRAFTRULE LTD
(2011) PLSCS 61 – Decision given 24.02.11

Facts: C, the respondent, was the nominee purchaser on behalf of ten tenants who wished to acquire the freehold of the building in which their flats were located, a mansion block in London SW11 which was divided vertically into two halves. The notice stated that the property to be enfranchised was the part of the building containing flats 41-60. Each half of the building contained ten flats and they had separate entrances and common parts. The appellant freeholder disputed C's right to enfranchise on the ground that the property did not qualify as a 'self-contained part of a building' for the purposes of ss3 and 4 of the Leasehold Reform, Housing and Urban Development Act 1993. Each of the two halves of the building, one containing flats 41-60 and the other 51-60 could have qualified as a self-contained part. The question was whether the statutory right to enfranchisement was exercisable only in respect of a self-contained part of a building which could not be further sub-divided into smaller self-contained parts.

Point of dispute: Whether the freeholder's appeal would be allowed against the ruling of the county court judge, upheld in the High Court, that the participating tenants could enfranchise all the property specified in their initial notice. The freeholder was given leave to take the case to the Court of Appeal as it raised an important point of principle as to the meaning of a 'self-contained part of a building' in ss3 and 4.

Held: The appeal was dismissed. The expression 'self-contained part of a building' would include a self-contained part of a building that was capable itself of being divided into smaller self-contained units. Section 13 of the 1993 Act envisaged that a notice which specified one self-contained part of a building (X) might later be replaced by a notice that specified a different self-contained part (Y) where Y was only a part of X. If notices in respect of both X and Y were valid, it followed that a self-contained part of a building could not be limited to the smallest possible self-contained part.

REAL PROPERTY

15 Court of Appeal

Appellant obtaining transfer of title to land on ground of adverse possession – respondent successfully applying for rectification of register on basis of mistake – whether judge erring in holding that land registrar had jurisdiction to correct mistakes other than procedural errors

* BAXTER V MANNION
(2010) PLSCS 57 – Decision given 22.02.11

Facts: The respondent purchased some land in 1996 and was registered as proprietor. In 2005 the appellant, who claimed adverse possession of the land, applied to the local land registry to register it in his name pursuant to Schedule 6 of the Land Registration Act 2002. Notice of this application was served on the respondent, and when he failed to reply the land was registered in the appellant's name. The respondent applied to the deputy adjudicator to rectify the title and re-register him as the owner on the basis that the appellant's registration had been a mistake since he had not been in possession of the land for the requisite ten-year period. Under para 6 of Schedule 4 to the Land Registration Act 2002 no alteration could be made to a proprietor's title without his consent, unless he had contributed to the mistake by fraud or lack of proper care.
The adjudicator concluded that the appellant had not fulfilled the criteria for adverse possession which meant that para 6 did not apply and the register could be altered without the appellant's consent.

Point of dispute: Whether the appellant's appeal would be allowed against the High Court judge's finding that it would be unjust for the alteration to the register not to be made.

Held: The appeal was dismissed.

i. A party who had not been in adverse possession of land should not be able to obtain registered title and a registration obtained by a party who was not entitled to apply for it would be a mistake. Returning the register to how it was before the application was made would be correction of a mistake within the meaning of paras (1) and (5) of Schedule 4. There was no reason for limiting such a correction to a mistake arising from an official error, as contended by the appellant and such an interpretation could invite fraud.

ii. It was common ground that the adjudicator had misdirected herself on the burden of proof. The onus of proof lay with the respondent.

iii. The judge had considered whether it would be unjust not to re-register the respondent as the holder of the title to the land and concluded that it would be. The appellant had made an unjustified attempt to obtain title and unless the register was altered the respondent would lose his property.

16 Court of Appeal

Easement of right of way by prescription – whether judge had erred in law in finding that respondents had established a right of way for commercial purposes

* ESTATE OF LLEWELLYN (DECEASED) V LOREY
(2011) PLSCS 39 – Decision given 03.02.11

Facts: In 1983 the respondents purchased a farm, part of which had been used as a colliery between 1931 and 1960. The southern access route to the farm crossed land which the appellants had owned since 2002. The respondents, who had the benefit of a right of way over the southern route for agricultural and for associated or ancillary residential purposes, wanted to set up a tipping business on the farm, but needed a right of way for commercial purposes over the southern route. The respondents' son had operated a business on the farm since 1984. Between 1965 and 1992 the appellants' land had been let to G by their predecessor.

Point of dispute: Whether the appellants' appeal would be allowed against the finding of the judge in the court below that the respondents had established a right of way over the appellants' land for commercial purposes. The earliest relevant date for prescriptive use in respect of the colliery use was 1954. The judge found that the colliery had been open between 1954 and 1960 and since then it was likely that the southern route had been used for the commercial exploitation of red ash from the colliery. The respondents' son had also used the route for at least 20 years in connection with his business. The appellants questioned whether the colliery had been in continuous use for 20 years from 1954 and, secondly, whether the appellants' predecessor could have prevented use of the southern route.

Held: The appeal was allowed.

(i) The judge had been wrong to hold that the southern route had been used in connection with the removal of colliery waste from 1960 to the late 1970s. After the colliery closed in 1960 there had not been any continuing operations there and there was no evidence that anything had been done with the waste until 1967. The evidence did not justify a finding that the southern route had been used for commercial operations before 1970.

(ii) A prescriptive right of way could only be established if the freehold owner knew of the use relied upon and could have prevented it. If the respondents could have shown 20 years' use that satisfied the relevant tests up to 1960 it would have made no difference if the southern route had not been used after that. There was no evidence that the appellant's predecessor had any knowledge of S's use of the southern route for his business as the land had been let since 1965 until 1992 and the period after that was too short for acquisition of a prescriptive right of way.

17 High Court

Easement – mutual right of fire escape over neighbouring properties – whether grant of ancillary rights void under rule against perpetuities

* MAGRATH V PARKSIDE HOTELS
(2011) PLSCS 40 – Decision given 03.02.11

Facts: M owned a mews property in London W1 next door to PH's hotel, which itself comprised two properties that were linked internally. The hotel and M's property benefited from mutual rights of fire escape that were granted by deed in 1947. The rights permitted passage through each other's property as well as the right to maintain in position, inspect, repair and renew the staircases 'over which any fire escape right may exist or hereafter exist hereunder' together with the right to alter existing staircases and to erect replacements. Since 1947 both properties had been considerably altered and extended and the 'staircases' giving access between the properties no longer existed. In 2001 PH obtained planning permission to redevelop its property into a 21-bedroom hotel. Its architect wrote to M demanding external lighting, additional flights of stairs, a facility for keyless entry onto an internal landing and an electronic sounder in the hall connected to the hotel's alarm system.

Point of dispute: M applied for judgment on a number of preliminary issues. He contended:

i. the purported grant of an ancillary right to erect and use new staircases, creating access points that did not exist at the date of the grant was void and unenforceable under the rule against perpetuities;

ii. the primary right of fire escape was defined in such wide and undefined terms as not to be capable of definition as an easement; and

iii. a right to go over or through his property by any reasonable means was an unenforceable 'right to roam' as it would require his property to be permanently available as a fire escape.

Held: The following preliminary issues were determined:

i. Where the grant of an easement was not immediate but related to the future, it would be void unless it was limited to take effect only within the perpetuity period. A right to maintain staircases over which any right of fire escape 'may exist or hereafter exist hereunder' and to alter 'existing staircases and erect new staircases' offended the rule against perpetuities. The grant of an ancillary right, exercisable at a future uncertain date, to erect and use new staircases creating new access points that did not exist at the date of the grant, was void. Section 162 of the Law of Property Act 1925, which disapplied the rule against perpetuities in certain circumstances, did not help since the erection of new staircases was not an activity that fell within its provisions.

ii. The extent of the right of fire escape depended primarily on construction of the 1947 deed of grant. It did not grant a 'right to roam'. The right was to be provided in the comparatively basic form that would have been contemplated by the parties in 1947. There was no justification for PH to demand whatever means of escape it might require from time to time due to expansion of its building, new health and safety regulations, the development of its business and increasing numbers of guests. There was nothing in the grant to justify almost all of the measures demanded by PH's architect.

HOUSING

18 Home Builders Federation Report

New Housing Pipeline Quarterly Report, December 2010

This report, prepared by a company called Glenigan, is an analysis of market conditions and prospects. It records that the modest pick-up in the number of residential units being granted planning approval lost momentum during the second and third quarters of 2010. Whilst the number of new homes approved by local authorities remained above the low point reached during the first half of 2009, approvals were still sharply down on the pre-recession levels seen during 2006 and 2007.

- during the third quarter of 2010, 36,400 new residential units were approved, a fall of 7% compared to the previous quarter and 18% less than a year earlier
- this compares to a low of 25,200 residential units approved during the second quarter of 2009 and a quarterly average of 64,500 during 2006 and 2007
- the strongest revival in residential approvals has been seen in the Midlands and the North of England while little sign of improvement has been seen in Southern England

http://www.hbf.co.uk/fileadmin/documents/research/HBF_Report_-_Housing_pipeline_-_december_2010.pdf

19 Home Builders Federation Report

New Housing Pipeline Quarterly Report, February 2011

- Glenigan recorded that 33,000 residential units were approved during the fourth quarter of 2010, 9% lower than the previous quarter and 22% lower than a year earlier
- overall, planning approvals during 2010 were 4% higher than the previous year, but around 40% below pre-recession levels

http://www.hbf.co.uk/fileadmin/documents/research/HBF_Report_-_Housing_pipeline_-_Feb_2011.pdf

20 CLG Statistical Publication

House Price Index – December 2010

The latest UK house price index statistics produced by the Department of Communities and Local Government were released on 15.02.11 and relate to data based on mortgage completions during December 2010. The key points are as follows:

- in December UK house prices increased by 3.8% over the year and increased by 0.5% over the month (seasonally adjusted);
- the average mix-adjusted UK house price was £208,148 (not seasonally adjusted);
- average house prices were 0.4% lower over the quarter to December, compared to a quarterly increase of 0.2% over the quarter to September (seasonally adjusted);
- annual average house prices increased by 4.1% in England, by 4.3% in Wales and by 1.8% in Scotland. In Northern Ireland they fell by 16.1%;
- prices paid by first time buyers were 1.4% higher on average than a year earlier, whilst prices paid by former owner occupiers increased by 4.7%; and
- prices for new properties were 7.6% higher on average than a year earlier, whilst prices for pre-owned dwellings increased by 3.5%.

http://www.communities.gov.uk/publications/corporate/statistics/hpi122010

21 CLG Statistical Publication

House Building: December Quarter 2010, England

These figures were released on 17.02.11 and cover the period from October to December 2010. Key points are as follows:

- there were 23,000 building starts in the December quarter 2010, 11% lower than in the September quarter, 54% lower than the March 2007 peak, but 48% above the lowest point which was the March quarter of 2009;
- private enterprise starts (seasonally adjusted) were 9% lower than in the September quarter 2010, while housing association starts were 20% lower than in the September quarter; and
- housing completions (seasonally adjusted) fell from 26,760 in the September quarter to 23,190 in the December quarter of 2010;
- private enterprise housing completions (seasonally adjusted) fell by 18% compared with the September quarter, while housing association completions went up by 3% between the September and December quarters 2010;
- the exceptionally poor weather conditions in December 2010 had a negative effect upon the construction industry affecting both housing starts and completions (unusual weather is not accounted for by the seasonal adjustment of figures); and
- there were 103,140 housing starts in England in the 12 months to December 2010, a rise of 32% compared with the 12 months to December 2009. Annual completions in England totalled 102,570 in the 12 months to December 2010, down by 13% compared with the 12 months to December 2009.

http://www.communities.gov.uk/publications/corporate/statistics/housebuildingq42010

22 Homes and Communities Agency (HCA) Publication

2011-15 Affordable Homes Programme – Framework

The Government intends to increase the number of homes available to buy and rent by investing £6.5bn in affordable housing over the next four years, £4.5bn of which will be for new affordable homes. It is proposing a range of reforms to the way in which social housing is delivered including the following:

- social landlords are to be given greater flexibility to determine the types of tenancies that they grant to new tenants, with the rights of existing assured and secure tenants being protected;
- the introduction of a new Affordable Rent product. Affordable Rent homes will be made available to tenants up to a maximum of 80% of market rent, allocated in the same way as social housing is at present and on flexible tenancies diversifying the range of homes available to people living in social housing; and
- the introduction of a new more flexible delivery model which will mean that providers will use existing assets to help reduce the amount of public funding needed to deliver the new supply. The current system of detailed scheme-by-scheme appraisal will be replaced by more flexible arrangements enabling providers to respond to local needs.

The Framework will be of interest to local authorities, housebuilders, developers, affordable housing providers and local community groups. It also includes information on how the new arrangements will work in London, reflecting the Government's intention to devolve the responsibility for delivering new affordable homes to the Mayor.

http://www.homesandcommunities.co.uk/public/documents/Affordable-Homes-Framework.pdf

GENERAL

23 European Court of Human Rights

Human Rights – trespassers – injunction restraining applicant from entering one wood and other woodlands vested in the Sec of State – whether injunction breached applicant's human rights

** HORLE V UNITED KINGDOM
(2011) PLSCS 52 – Decision given 01.02.11

Facts: H and others were travellers who in 2007 established an unauthorised camp in one of the woodlands managed by the Forestry Commission on behalf of the Sec of State for Environment, Food and Rural Affairs (the Sec of State), who sought possession against them and 'persons unknown' in respect of all its woodlands within an area stretching 25 miles to the east and west and ten miles to the north and south of the original camp. This was to prevent the travellers moving onto another area of woodland if a possession order in respect of the original site were ordered. It also sought injunctions against the travellers restraining them from re-entering the woods. The recorder made an order for possession of the original site, but refused to make a wider order in respect of the other woodlands or to grant the injunctions. The Court of Appeal allowed the Sec of State's appeal and granted the relief sought, but on H's appeal to the Supreme Court it was ruled that the wider possession order could not be granted since the travellers did not occupy any part of the other woodlands. However, on the facts of the case, the Court of Appeal was entitled to grant the injunction.

Point of dispute: Whether H's complaint to the European Court of Human Rights against the Supreme Court's ruling regarding the injunction would be allowed. H argued that the injunction violated her rights under Article 8 of the European Convention on Human Rights since it affected her ability to pursue her lifestyle as a traveller and that the authorities had violated the positive obligation on the state to facilitate the gypsy way of life.

Held: H's application was declared inadmissible. Contracting states had a positive obligation to facilitate the gypsy way of life and any measure restricting where they could station their caravans could affect their ability to lead a private and family life. However, H was a 'new' traveller, not a gypsy: she had not been born into an ethnic or cultural group of gypsies such as the Romany gypsies or Irish travellers. The parties had not been asked to make submissions on whether new travellers should be afforded the same protection as established ones and thus it was not appropriate for the Court to rule on this question. Under domestic law H had no right to camp on the land in question; the granting of the injunction did not change her position, except that she could face imprisonment if she continued to camp there. Article 8 could not be interpreted as requiring contracting states to tolerate unauthorised camping on land vested in the state. The court was not persuaded that the injunction was sufficiently wide to interfere with H's way of life.

24 CLG Paper

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

The Local Growth White Paper set out the Coalition Government's plans for locally driven growth, encouraging investment and promoting economic development. This paper outlines the role of Central Government in this approach:

- reforming and decentralising public services;
- providing incentives that will help drive growth;
- removing barriers to local growth; and
- providing targeted investment and reform so as to strengthen the infrastructure for growth and regeneration.

http://www.communities.gov.uk/documents/regeneration/pdf/1830137.pdf

25 RICS Research Report

Sustainability and the Dynamics of Green Building

This report examines the financial performance of green office buildings in the USA. It focuses in particular on the impact of the economic downturn and the recent increase in investment in energy-efficient and sustainable office buildings and attempts to disentangle the "green" premium. Key findings include:

- although there has been a significant increase in the amount of 'green' commercial space office space available, the 'green' premium continues to be maintained;
- the maximum 'green' premium is not necessarily achieved by the greenest buildings;
- energy efficiency is almost fully capitalised in rents and prices of commercial buildings in the USA; and
- the 'green' premium decays over time.

http://www.rics.org/site/download_feed.aspx?fileID=8862&fileExtension=PDF

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THE SUNDAY TIMES 100 BEST COMPANIES TO WORK FOR 2010

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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.

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focus.focusnet.co.uk
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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EVEBRIEF

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SCOTLAND

PLANNING

01 Statutory Instrument

SSI 2011/136 The Town and Country Planning (General Permitted Development) (Non-Domestic Microgeneration) (Scotland) Amendment Order 2011

This Order, which comes into force on 18.03.11, amends the 1992 Order and extends permitted development rights to the installation, alteration or replacement of the following microgeneration equipment in non-domestic buildings:

i. underground pipes required in connection with ground source and water source heat pumps;

ii. solar PV or solar thermal equipment;

iii. biomass equipment; and

iv. anaerobic digestion.

02 Statutory Instrument

SSI 2011/139 The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011

These Regulations, which come into force on 01.06.11 and apply to Scotland only, revoke, re-enact and update, with amendments and savings, Part II of the 1999 Regulations.

http://www.legislation.gov.uk/ssi/2011/139/contents/made

GERALDEVE

03 Scottish Government Consultation

Guidance on the use of compulsory purchase

Deadline for Responses: 06.05.11

The Scottish Ministers have approved the Scottish Law Commission's current work programme which includes a review of compulsory purchase law. However, as this programme runs until 2014 the Scottish Government has undertaken a targeted programme to promote good practice under current legislation. As part of this programme it intends to publish two new circulars containing guidance on the use of compulsory purchase. The first of these will provide guidance to authorities with compulsory purchase powers on using compulsory purchase appropriately and effectively. The second will amend the Crichel Down Rules, which set out the circumstances and basis upon which surplus land that was compulsorily acquired is offered back to the former owner. This consultation seeks views on these two circulars.

http://www.scotland.gov.uk/Publications/2011/02/11121341/

04 Scottish Government Publication

Quantitative Greenhouse Gas Impact Assessment: A Tool For Spatial Planning Policy Development: Phase 1 – Feasibility Report

This project, commissioned by the Scottish Government and the Scottish Environment Protection Agency (SEPA) examines the feasibility of developing a tool to quantify greenhouse gas emissions.

http://www.scotland.gov.uk/Publications/2011/02/09142227/0

05 Scottish Government Publication – Annex to Circular

Scottish Planning Series: Planning Circular 1/2010: Annex to Circular 1/2010: Planning Agreements. Planning Obligations And Good Neighbour Agreements

This Annex to Circular 1/2010: Planning Agreements sets out Scottish Government policy in respect of planning obligations (formerly known as planning agreements) and good neighbour agreements made under s75 and 75D of the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc (Scotland) Act 2006.

http://www.scotland.gov.uk/Publications/2011/02/21110750/0

RATING

06 Statutory Instrument

SSI 2011/76 The Non-Domestic Rates (Levying) (Scotland) (No 3) Regulations 2010 Revocation Order 2011

This Order, which comes into force on 31.03.11, revokes the 2010 Regulations which made provision for the amount payable in certain circumstances as non-domestic rates in respect of non-domestic subjects in Scotland.

http://www.legislation.gov.uk/ssi/2011/76/contents/made

07 Statutory Instrument

SSI 2011/136 The Town and Country Planning (General Permitted Development) (Non-Domestic Microgeneration) (Scotland) Amendment Order 2011

This Order extends permitted development rights to the following microgeneration equipment:

a. underground pipes required in connection with ground source heat pumps and water source heat pumps;

b. solar PV or solar thermal equipment;

c. biomass equipment; and

d. anaerobic digestion.

http://www.legislation.gov.uk/ssi/2011/136/contents/made

CONSTRUCTION

08 Statutory Instrument

SSI 2011/120 The Building (Scotland) Amendment Regulations 2011

These Regulations, which come into force on 01.05.11, amend the 2004 Regulations. A new building standard is added requiring that certain buildings must be designed and constructed to one of a number of specified levels of sustainability and must have a statement of sustainability attached to them.

http://www.legislation.gov.uk/ssi/2011/120/contents/made

GENERAL

09 Scottish Government Publication

Building a Sustainable Future: Regeneration Discussion Paper

This paper is intended to be a starting point for wider debate and discussion about regeneration in the current climate. It is not an exhaustive review of regeneration policy but focuses on key challenges, opportunities and priorities going forward.

http://www.scotland.gov.uk/Publications/2011/02/07095554/0

WALES

RATING

10 Statutory Instrument

WSI 2011/197 The Non-Domestic Rating (Unoccupied Property) (Wales) (Amendment) Regulations 2011

Under s45 of the Local Government Finance Act 1988 ('the 1988 Act') non-domestic rates are payable on an unoccupied hereditament if it fulfills certain prescribed conditions. The Non-Domestic Rating (Unoccupied Property) (Wales) Regulations 2008 prescribe a class of unoccupied hereditaments on which rates are payable, consisting of all unoccupied hereditaments to which none of the conditions in Reg 4 applies. Reg 4 excludes from liability for non-domestic rates all hereditaments shown in a non-domestic rating list with a rateable value less than a specified amount. These regulations set that figure at £2,600 for the purpose of a hereditament shown in the list from 1 April 2011.

http://www.legislation.gov.uk/wsi/2011/197/contents/made

NORTHERN IRELAND

PLANNING

11 Planning Service Report

Northern Ireland Housing Land Availability Summary Report 2010

This paper, which represents the Northern Ireland Housing Land Availability Summary Report 2010, has been prepared by Planning Service HQ using Housing Land Availability Monitor information, also known as the Housing Monitor. This report uses the housing baseline established by the Regional Development Strategy for Northern Ireland 2025, which is the end of December 1998, and shows housing land availability for settlements across Northern Ireland. Each Divisional Planning Office undertakes a survey that updates housing information by site and settlement for Council Areas/Districts within their respective operational area, the findings being presented in tabular reports. The sites and settlements surveyed are identified by prevailing development plans. This Summary Report comprises tabular information abstracted from Housing Monitor data compiled by Divisional Planning Offices.

http://www.planningni.gov.uk/index/policy/dev_plans/n._ireland_housing_land_availability_summary_report_2010.pdf

RATING

12 Statutory Instrument

NISR 2011/36 The Rates (Unoccupied Hereditaments) Regulations (Northern Ireland) 2011

These regulations, which will come into force on 01.10.11, revoke and replace the 2007 Regulations. Domestic buildings and parts of buildings, as well as non-domestic buildings and parts of buildings, will be prescribed for the purpose of Article 25A of the Rates (Northern Ireland) Order 1977 (under which rates are payable on unoccupied properties that fall within a class prescribed by Regulations), which means that from 01.10.11 unoccupied domestic property will be rateable.

http://www.legislation.gov.uk/nisr/2011/36/contents/made