# EVEBRIEF

## Legal & Parlimentary

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## EDITORIAL

**Peter Dines**
**Editor**

The new National Planning Policy Framework (NPPF); leaner, fitter and more relevant planning policy to guide and encourage growth whilst care is taken of our valued environment.

The Government is setting out its stall quite clearly in the publication of the first National Planning Policy Framework; planning policy can be a positive force for sustainable economic growth and environmental common sense. The much reported pro–growth agenda of the NPPF is not a "green light" for reckless, unsupported and unpopular development, it is intended as a vehicle for the promotion of growth helped by less unnecessary and often ambiguous planning policy. The objective is to achieve a national planning policy that, now and in the future, encourages economic development to secure higher living standards while protecting and enhancing the environment.

The Government is reforming the planning system so that it supports growth and sustainable development. The NPPF is a clear, tightly focused document, setting out national priorities only where necessary to do so. It replaces over 1000 pages of existing policy with a 59-page "planning policy bible". It contains a powerful presumption in favour of sustainable development to underpin all local plans and decisions, and will localise choice about the use of previously developed land, ending nationally imposed targets. This reinforces the position of up to date, relevant local authority development plans

Generally the NPPF restates in a more concise form current National planning policy. Changes from the draft clarify protection for the open countryside and provide a "period of grace" within which local authorities should get their own planning policies in place otherwise they will carry less weight in decision making.

This document is part of the Government's ongoing plan to deregulate and simplify the planning system. This includes; the reduction of information requirements on planning proposals; amendments to the Use Class Order and the associated permitted development rights to make changing the use of buildings easier; and new permitted development rights for micro–renewable energy installations.

This is a vital statement of the Government's recognition that planning has to be at the centre of this country's sustainable growth agenda. It provides a clear message to all those involved and will help in creating the right type of development in the right location at the right time. Without such development, we shall not have the homes, places to work and social and physical infrastructure required to meet the demographic, economic and environmental challenges that we face – what we need is the right encouragement and direction to enable us to meet these.

GERALDEVE

## LANDLORD & TENANT

01 Court of Appeal

**Alterations to flat – landlord granting licence to alter flat by laying of wooden floors with underfloor heating – noise complaints**

*FAIDI V ELLIOTT CORPORATION
(2012) PLSCS 66 – Decision given 16.03.12

**Facts:** The appellant and the respondent owned flats in the same block, the appellant's flat being immediately below the respondent's. Their leases were in similar terms, each containing a covenant, made with the landlord "… with and for the benefit of the flat owners", to observe the regulations set out in a schedule, with the lessors reserving the right to "modify or waive such regulations in their absolute discretion". The regulations included a requirement "at all times to cover and keep covered with carpet and underlay the floors of the demised premises other than those of the kitchens and bathrooms". The respondent's predecessor carried out extensive works to his flat, including removing the carpets and laying wooden floors with under–floor heating and approved noise insulation material. The works were approved in a licence to alterations granted by the landlord which contained the following clause 7.3: "The obligations on the part of the tenant and the conditions contained in the lease which are now applicable to the premises shall continue to be applicable to the same when and as altered as permitted by this licence and shall extend to all additions made to the premises in the course of the tenant's works". The appellant complained of the noise from the respondent's flat which he claimed was caused by the lack of carpeting.

**Point of dispute:** Whether the appellant's appeal should be allowed against the ruling of the court below that the respondent was not obliged to carpet his flat. The judge held that by agreeing to the alteration works the landlord had waived the carpeting requirement as it was inconsistent with permitting the laying of new wooden floors and under–floor heating.

**Held:** The appeal was dismissed. To be effective the clause in the lease would require the whole flat (apart from the kitchen and bathrooms) to be re–covered with carpet and underlay and an intermediate solution requiring carpeting of just some areas was not possible. Laying carpet and underlay over the timber floors would be absurd and would render the under–floor heating ineffective. By consenting to the laying of timber floors the landlord had precluded itself from insisting on carpeting. The general provision of Clause 7.3 in the alterations licence could not prevail over the specific effect of the landlord's agreement to the leaseholder carrying out works that were incompatible with the continued enforceability of the obligation to carpet.

02 Upper Tribunal: Lands Chamber

**Unpaid service charges – whether legal and surveyors' costs of proceedings recoverable from respondent under terms of lease**

*TWENTY TWO CLIFTON GARDENS LTD V THAYER INVESTMENTS SA
(2012) PLSCS 76 – Decision given 07.03.12

**Facts:** The appellant company owned a block of five flats and the tenants were all shareholders in the appellant. The respondent was one of the tenants. The service charge provisions in the leases provided for the tenants to pay a proportion of the appellant's costs incurred in performing the obligations set out in a schedule. The appellant brought proceedings in the LVT to determine the respondent's liability for unpaid service charges.

Point of dispute: Whether the appellant's legal and surveyor's costs were recoverable from the respondent as service charge.

**Held:** The appellant's appeal against the LVT's ruling that these costs were not recoverable from the respondent as service charge was dismissed. One of the appellant's obligations under the leases was: taking all reasonable steps "to enforce the observance and performance by the Lessee of other flats in the block of the covenants and conditions in the leases of the other flats which fall to be observed and performed by the Lessee" (para 10). This clause made it clear that the costs of carrying out enforcement fell on non–defaulting tenants. Para 11, which obliged the appellant to provide "such other services as it shall in its reasonable discretion deem necessary for the better use and enjoyment of the property by the Lessee and other occupiers of the Building", did not assist either. This clause related to other services, not the enforcement matters already dealt with in para 10.

## PLANNING

03 Supreme Court

**Interpretation of planning policy – sequential test – site suitability**

**TESCO STORES LTD V DUNDEE CITY COUNCIL
(2012) PLSCS 69 – Decision given 21.03.12

**Facts:** DCC granted planning permission to a third party for a food superstore, café and petrol station on a derelict former factory site next to the A90 near Dundee. Although the proposal did not accord with the development plan DCC took the view that the grant of permission was nonetheless justified by other material considerations. The appellant, T, a rival store to the third party, challenged the grant of permission contending that DCC had misunderstood the relevant development plan policy which applied a sequential test to the positioning of new retail developments such that permission should not be granted for an out–of–centre site unless there was no "suitable" site within the city, town or district centre or on its edge. T contended that DCC should have considered suitability for meeting identified deficiencies in retail provision in the area and had failed correctly to identify the extent of the proposal's non–conformity with the development plan.

**Point of dispute:** Whether T's appeal would be allowed against the findings of the courts below which accepted DCC's argument that the meaning of the development plan was a matter for the planning authority and that the court should not interfere unless the planning authority's view on the matter had been perverse or irrational.

**Held:** T's appeal was dismissed.

i. The meaning of planning policy (contained in a development plan or otherwise) is not in principle a matter which decision makers is entitled to determine from time to time as it pleases, subject only to limits of rationality. The interpretation of planning policy is a matter of law, its meaning to be ascertained objectively in accordance with the language used, read in the proper context. However, this did not mean that development plans should be construed as if they were statutory or contractual provisions and many policy statements are framed so as to require an exercise of judgment in their application which is a matter for the decision maker. Nevertheless planning authorities could not make the development plan mean whatever they wanted it to mean.

ii. Care must be taken with the sequential test because:

a. National policy statements, although all directed at the promotion of town centres, are substantially different in their drafting; and

b. The court will be primarily concerned with the proper interpretation of just one part of the relevant development plan which gave expression to the sequential test.

iii. In the context of this case "suitability" meant suitable for the development proposed by the Applicant provided it has had sufficient regard for the need for flexibility.

04 Administrative Court

**Application for planning permission for housing development on residential garden land**

*DARTFORD BOROUGH COUNCIL V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2012) PLSCS 71 – Decision given 16.03.12

**Facts:** Following a decision of the defendant Sec of State, outline planning permission was granted for the demolition of two bungalows and the development of eight detached houses and a new access road on residential garden land. The claimant lpa, DBC, had refused permission for the development as being contrary to PPS 3 and its policy statement H4. The Government had previously amended PPS3 to exclude private residential gardens from the definition of "previously developed land" in PPS3 to stop "garden grabbing". The interested party argued that the proposed development of the site would contribute to DBC achieving its housing supply target and could be treated as a "windfall site", but DBC argued that a windfall site had to be on previously developed land to be classified as such.

**Point of dispute:** Whether DBC's application to quash the Sec of State's decision to grant permission for the development would be allowed. The inspector had recommended the grant of permission on the basis that the land was suitable as a windfall site – little emphasis could be placed on policy H4 since it had not been adopted, and secondly the gardens were large and did not appear to be intensively used.

**Held:** DBC's application was allowed.

i. The inspector's reasoning behind his view that there were inconsistencies between policy H4 and PPS3 was obscure. There was nothing in the PPS3 amendments to support the idea that only small and intensively used gardens should not be grabbed.

iv. Where the decision–maker had taken into account an irrelevant factor, even though it might not be his dominant reason, the court should quash the decision unless it was clear that the same conclusion would have been reached in any event. There was no reason to justify the grant of planning permission in this case.

05 Administrative court

**Enforcement notice for unauthorised change of use**

*R (ON THE APPLICATION OF HARBIGE) V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2012) PLSCS 74 – Decision given 21.03.12

**Facts:** The claimant, H, owned a flat next door to a property owned by P who granted a leasehold interest in it to R. H complained about the late night noise from P's property which resulted from R's use of it as a place of worship within class D1 of the Town and Country Planning (Use Classes) Order 1987. The local authority issued an enforcement notice against P for breach of planning control. It acknowledged that planning permission had been granted more than ten years before for use as a place of worship but contended that as certain conditions precedent had not been satisfied R's use of the property was unlawful. P appealed against the notice on the ground that the time for taking enforcement action had expired. (s171B(3) of the Town and Country Planning Act 1990).

**Point of dispute:** Whether H's appeal would be allowed against the decision of the inspector appointed by the Sec of State that there had been no material change of use requiring planning permission in the ten–year period prior to the issue of the enforcement notice. H argued that the inspector had misinterpreted s55(2)(f) of the 1990 Act and article 3(1) of the 1987 Order since the provision that a change of use from one use within a use class to another use within the same class "shall not be taken for the purposes of the [1990] Act to involve development of the land" only applied where the existing use was lawful.

**Held:** H's application for judicial review was dismissed. Unlawful changes of use within the same class were capable of conferring immunity. The language of the 1990 Act did not permit the inference of the word "lawfully" into s55(2)(f). It would be wrong for an event which did not constitute development to recommence the running of a ten year limitation period and changes of use were possible within each class for the purposes of the 1987 Order. The inspector had been entitled to conclude that after ten years of use within D1 the local authority could not take enforcement action.

06 Statutory Instrument

**SI 2012/748 The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2012**

This Order, which comes into force on 6.04.12, amends Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 in relation to permitted development rights in England for the installation of certain microgeneration equipment.

- Parts 6 and 7 of Schedule 2 are amended to clarify that permitted development rights apply to buildings on agricultural or forestry land to house microgeneration equipment and in particular to house hydro turbines, to house biomass boilers and anaerobic digestion systems and to store associated waste and fuel, as long as the fuel or waste is produced on the agricultural or forestry land or by the boiler or system.
- A new Part 43 of Schedule 2 to the Order is inserted which confers permitted development rights for the installation of specified types of microgeneration equipment on or within the curtilage of buildings other than dwelling houses or blocks of flats subject to certain criteria. Six new classes of permitted development rights to install certain types of microgeneration equipment are introduced: solar panels (Class A), stand–alone solars (Class B), ground source heat pumps (Class C), water source heat pumps (Class D), biomass heating system flues (Class E) and combined heat and power system flues (Class F).

**http://www.legislation.gov.uk/uksi/2012/748/contents/made**

07 Statutory Instrument

**SI 2012/749 The Town and Country Planning (Compensation) (England) Regulations 2012**

s108 of the Town and Country Planning Act 1990 provides for the payment of compensation in certain cases where planning permission for development granted by a development order or a local development order is withdrawn and where on an application for planning permission for that development the application is refused or permission is granted subject to conditions. s108(2A) and (3A) to (3D) (inserted by s189 of the Planning Act 2008) limits the circumstances in which compensation is payable. These Regulations, which came into force on 06.04.12, prescribe types of development for the purposes of s108(2A) and (3C), prescribe the manner in which planning permission is to be withdrawn and prescribe the manner and maximum period in which notice of withdrawal, revocation, amendment or directions is to be given. The prescribed development now includes the installation on non–domestic migrogeneration equipment. These Regulations replace the 2011 Regulations.

**http://www.legislation.gov.uk/uksi/2012/749/contents/made**

08 Statutory Instrument

**SI 2012/767 The Town and Country Planning (Local Planning) (England) Regulations 2012**

Part 2 of the Planning and Compulsory Purchase Act 2004 established a system of local development planning in England. These Regulations, which came into force on 06.04.12, make provision for the operation of that system.

- They prescribe the bodies (in addition to lpas and county councils) which are subject to a duty to co–operate in relation to planning of sustainable development.
- They prescribe the form and content and process for preparation of local plans and supplementary planning documents and prescribe which documents are to be local plans.
- They prescribe the steps to be followed in the supplementary planning document procedure. Provisions for the withdrawal or revocation of supplementary planning documents are also included.
- They prescribe the steps to be followed in the local plan procedure and provisions for the withdrawal or revocation of local plans.
- They include provisions relating to joint development documents, the content of monitoring reports, and the availability of documents and copies.
- Various earlier Regulations are revoked by these Regulations.
- The Regulations apply to county councils for the purposes of minerals and waste development planning as they apply to lpas for local planning purposes.

**http://www.legislation.gov.uk/uksi/2012/767/contents/made**

09 Statutory Instrument

**SI 2012/787 The Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2012**

These Regulations which come into force on 13.04.12 amend the 2009 Regulations, the main changes being set out below:

- An amendment to clarify that any person may ask the Sec of State to exercise the power of direction;
- An amendment so that a person who proposes to make a subsequent application is no longer required to provide an updated environmental statement. However the relevant authority may require one if the environmental information already before them is not adequate to assess the environmental effects of the subsequent application;
- A requirement for the reasons for the negative screening decisions to be provided in writing; and
- The removal of unnecessary criminal offences.

**http://www.legislation.gov.uk/uksi/2012/787/contents/made**

10 CLG Planning Policy

**National Planning Policy Framework (NPPF)**

The new NPPF was published on 27.03.12. It sets out the Government's planning policies for England, how these are to be applied and provides a framework within which local communities and councils can produce their own local and neighbourhood plans. The NPPF must be taken into account in the preparation of local and neighbourhood plans and is a material consideration in planning decisions. The Framework:

- does not contain specific policies for nationally significant infrastructure projects (which are determined in accordance with the framework set out in the Planning Act 2008);
- should be read in conjunction with the Government's planning policy for traveller sites (see item below);
- does not contain specific waste policies – national waste planning policy will be published as part of the National Waste Management Plan for England; and
- should be read in conjunction with the Technical Guidance for development in areas at risk of flooding and in relation to mineral extraction (see item below).

In both plan–making and decision–taking there is a presumption in favour of sustainable development, which means that:

- lpas should positively seek opportunities to meet the development needs of their area;
- Local Plans should meet objectively assessed needs with sufficient flexibility to adapt to rapid change, unless:
    - Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits; or
    - Specific policies in the Framework indicate development should be restricted.
- Approving development proposals that would accord with the development plan without delay;
- Where the development plan is absent, silent or relevant policies are out–of–date, granting permission, unless:
- Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits; or
- Specific policies in the Framework indicate development should be restricted.

Lpas are required to set out policies that specifically support the growth and vitality of town centres and should apply the sequential test to planning applications for main town centre uses that are not in an existing centre and are not in accordance with an up–to–date local plan.

**http://www.communities.gov.uk/publications/planningandbuilding/nppf**

11 CLG Guidance

**Technical Guidance to the National Planning Policy Framework**

This document provides additional guidance to local planning authorities to ensure the effective implementation of the planning policy set out in the National Planning Policy Framework on development in areas at risk of flooding and in relation to mineral extraction. This guidance retains key elements of PPS–25 and of the existing minerals policy statements and minerals planning guidance notes which are considered necessary and helpful in relation to these policy areas. The retention of this guidance is an interim measure pending a wider review of guidance to support planning policy.

**http://www.communities.gov.uk/publications/planningandbuilding/nppftechnicalguidance**

12 CLG Publication

**Neighbourhood planning regulations: Consultation – Summary of responses**

The Localism Act 2011 empowered parish councils and communities to shape the development and growth of their local area through the production of a Neighbourhood Development Plan or Neighbourhood Development Order or, where communities wish to bring forward development themselves, by giving them a Community Right to Build. Between 13.10.11 and 05.01.12 the Government consulted on new regulations for designating neighbourhood areas and neighbourhood forums or Community Right to Build organisations and the preparation of Neighbourhood Development Plans, Neighbourhood Development Orders and Community Right to Build Orders. This document is a summary of the responses to that consultation.

**http://www.communities.gov.uk/publications/planningandbuilding/neighbourhoodplansresponse**

13 CLG Impact Assessment

**Localism Act: Neighbourhood Plans and Community Right To Build – Impact Assessment**

This document assesses the impact of neighbourhood planning introduced by the Localism Act 2011, through Neighbourhood Development Plans, Neighbourhood Development Orders and the Community Right to Build.

**http://www.communities.gov.uk/publications/planningandbuilding/neighbourhoodplansimpact**

14 CLG Planning Policy

**Planning policy for traveller sites**

This new planning policy will come into effect at the same time as the National Planning Policy Framework and should be read in conjunction with that document. When it comes into force Circular 01/06: Planning for Gypsy and Traveller Caravan Sites and Circular 04/07: Planning for Travelling Show people will be cancelled. The Government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community.

**http://www.communities.gov.uk/publications/planningandbuilding/planningpolicytravellers**

15 Greater London Authority Supplementary Planning Guidance

**Green Infrastructure and open environments: The All London Green Grid (ALGG)**

The concept of a "green grid" – an integrated network of green and open spaces together with the Blue Ribbon Network of rivers and waterways – is at the centre of the London Plan's approach to the provision, enhancement and management of green infrastructure. The ALGG aims to promote the concept of green infrastructure and to increase its delivery by boroughs, developers and communities, recognising the benefits that London's network of green spaces bring to its residents, workers and visitors. The ALGG looks at the green grid as a whole, providing a range of social, health, environmental, economic and educational benefits for London, and as such requires an integrated approach to its management, enhancement and extension.

**http://www.london.gov.uk/publication/all–london–green–grid–spg**

16 CLG Impact Assessment

**Permitted development rights for installations of microgeneration equipment on non–domestic premises: Impact assessment**

This is the final impact assessment for permitted development rights for installations of microgeneration equipment on non–domestic premises.

**http://www.communities.gov.uk/publications/planningandbuilding/microgenerationimpactassessment**

17 CLG – Government Response

**Permitted development rights for small scale renewable and low carbon energy technologies and electric vehicle charging infrastructure consultation: Summary of responses and Government response**

These reports set out respectively a summary of responses and the Government's response to this consultation.

**http://www.communities.gov.uk/publications/planningandbuilding/electricvehicleresponses**

**http://www.communities.gov.uk/publications/planningandbuilding/electricvehiclegovernment**

18 CLG – Government Response

**Tree preservation orders: proposals for streamlining – Government response to the consultation**

This consultation took place between 28.09.10 and 30.10.10 and since then the Government has been considering how best to simplify the tree preservation order system in England. This document summarises the consultation responses and identifies the changes to the draft proposals that it has decided to make in taking forward the legislation.

**http://www.communities.gov.uk/publications/planningandbuilding/treestreamliningresponse**

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19 CBI Report

**Minor measures, major results – Fine–tuning the major infrastructure planning system**

This report is based on the premise that investment in infrastructure is crucial to securing economic growth in the UK, with £200bn of investment being needed by 2015. The major infrastructure planning system has a significant role to play since as well as delivering major infrastructure projects it must also secure the confidence of investors to make applications. Four main areas where the system needs to be improved have been identified by CBI members:

- uncertainty at pre–application stage;
- simplification of the non–planning consent landscape;
- the system should allow for greater flexibility; and
- improvement in the timeliness of decisions.

This brief sets out a nine point plan to fine–tune the system and ensure that it delivers for both business and the public.

**http://www.cbi.org.uk/media–centre/press–releases/2012/03/fine–tuning–of–planning–system–would–reap–big–rewards–in–major–infrastructure–investment–cbi/**

## RATING

20 CLG Letter

**Business Rates Information Letter (5/2012): Interest Rates for 2012/2013 and Discounts in Enterprise Zones**

1. The Non–Domestic Rating (Payment of Interest) Regulations 1990 provide that the rate of interest payable on refunds of overpaid rates, arising from alterations to the rating list, should be set for any year at one percentage point below the standard rate at 15 March (or the next business day) in the preceding year. On 15.03.12 the standard rate was 0.5%, the rate of interest to be applied for 01.04.12 to 31.03.13 is 0%.
2. The Non–Domestic Rating Contributions (England) (Amendment) Regulations 2012 came into force on 31.03.12 and apply to the financial year 2012/13. The following should be noted:

i. The Government has committed to fund 100% business rates discount for a five year period up to state aid de minimis levels for businesses that move into Enterprise Zones before 2015.

ii. Authorities will provide the discount using the new local discount powers contained in s47 of the Local Government Finance Act 1988, as amended by s69 of the Localism Act 2011. Use of the power is entirely a matter for the relevant billing authority, but the Government is encouraging authorities to discuss with the Local Enterprise Partnership that has overall responsibility for the zone.

iii. In 2012–13 the Government will fund discounts through the above amendment to the contribution regulations which provide for the costs of any discount under s47 (i.e. including discounts to existing business and empty properties) granted in the zone, provided it complies with state aid de minimis limits, to be offset against the billing authority's contribution to the central pool.

iv. Apart from the usual part funded relief billing authorities will have to fund any use of the local discount powers outside of the zone.

v. From 2013–14 onwards, central Government will fund the discount under the new retention scheme.

**http://www.communities.gov.uk/publications/localgovernment/bril52012**

## LEASEHOLD ENFRANCHISEMENT

21 Upper Tribunal: Lands Chamber

**Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") – relativity – LVT adopting relativity percentage derived from graph of Midlands LVT – whether alternative graph providing better evidence of relativity**

*RE COOLRACE LTD AND OTHERS' APPEALS
(20120 PLSCS 70 – Decision given 29.02.12

**Facts:** These appeals concerned applications for lease extensions of five properties in the Midlands under the 1993 Act. In each case the appellant was the freeholder. In the course of determining the premium payable for the new leases, the LVT applied a freehold to leasehold relativity of 86%, preferring the evidence advanced by the lessees derived from the "Midlands graph of relativity" constructed by West Midlands firm Lawrence & Wightman. This graph used only Midlands LVT decisions extracted from the composite "LEASE graph" of relativity compiled by the Leasehold Advisory Service from LVT decisions between 1994 and 2007. The appellant had relied on the Nesbitt & Co graph of relativity contained in a 2009 RICS research paper which included Greater London, some south coast and Midlands provincial towns and also included settlement evidence. The LVT had rejected that graph on the basis that Midlands information should be preferred to graphs which drew heavily on information from the South East and particularly London.

**Point of dispute:** Whether the appellant's appeal against the LVT's decision would be allowed. It contended that the best evidence was the LEASE graph.

**Held:** The appeal was allowed. The LVT had been correct to reject the evidence from the Nesbitt & Co graph, but should not have based its determination on the Lawrence & Wightman Midlands graph which was based on a small sample from the LEASE graph, and was out of kilter with any of the graphs produced in the RICS research paper. The LEASE graph was the most suitable since it was a broad geographical analysis of a large number of LVT decisions. Although this meant relying on a graph that was based only on past LVT decisions it was the only available option and was more representative of appropriate relativities than the Midlands graph. The decision should not, however, set a precedent for other cases where other more reliable evidence than the LEASE graph was available.

## HOUSING

22 CLG Publication

**House Price Index – January 2012**

The latest house price index statistics produced by the Department for Communities and Local Government were released on 13.03.12. They are based on mortgage completions during January 2012. Key points from the release are as follows:

- In January UK house prices increased by 0.2% over the year but decreased by 0.7% over the month (seasonally adjusted);
- The average mix–adjusted UK house price was £206,523 (not seasonally adjusted);
- Average house prices increased by 0.2% over the quarter to January, compared to an increase of 0.6 over the quarter to October (seasonally adjusted);
- Average prices decreased over the year by 0.5% in Wales, by 1.7% in Scotland and by 7.6% in Northern Ireland. In England prices increased by 0.4%;
- Prices paid by first time buyers were 0.8% higher on average than a year earlier but there was no change in prices paid for former owner occupiers; and
- Prices paid for new properties were 8.8% higher on average than a year earlier whilst prices for pre–owned dwellings decreased by 0.4%.

**http://www.communities.gov.uk/publications/corporate/statistics/hpi012012**

## REAL PROPERTY

23 Upper Tribunal (Lands Chamber)

**Discharge or modification of restrictive covenant**

**RE STANBOROUGH'S APPLICATION
(2012) PLSCS 62 – Decision given 29.02.12

**Facts:** The applicant, whose property in Poole, Dorset, was affected by a restrictive covenant imposed in 1955, applied for the modification or discharge of the covenant so as to enable him to implement a planning permission to demolish the existing house and to replace it with three four–storey detached houses. The grounds for the application included ground (aa) in s84(1) of the Law of Property Act 1925 that the restriction impeded the reasonable user of the land and did not secure to the persons entitled to its benefit any practical benefits of substantial benefit or advantage. The land on which the objectors' bungalow stood did not benefit from the covenant as it had formed part of the vendors' retained land under the 1955 conveyance, but a part of their garden added in 1979 on which a garden room had been built did benefit from it.

**Point of dispute:** Whether the application would be allowed. The issue to be considered was whether, for the purpose of ss84(1)(aa) and 84(1A) the consideration of practical benefits extended to the whole of the objectors' land or just the part with the benefit of the covenant.

**Held:** The application was dismissed.

i. Most of the objectors' land did not benefit from the restriction and, in the absence of a building scheme, it did not become entitled to benefit by virtue of common ownership with the land which did enjoy the benefit of the covenant. No account could be taken of any benefits that the restriction secured in respect of the objectors' use and enjoyment of the major part of their property, and, in particular, from their occupation of the bungalow.

ii. However, the applicant's proposed development scheme would detract from the sea view enjoyed by the garden room and would adversely affect the visual amenity and quiet ambience of the additional garden land generally. The restriction secured to the objectors practical benefits of substantial advantage in relation to the additional garden land and garden room and discharge or modification of the restriction should therefore be refused.

24 Court of Appeal

**Interference with right of way**

*ZIELENIEWSKI V SCHEYD
(2012) PLSCS 55 – Decision given 6.03.12

**Facts:** The appellant claimed that he had a right by prescription to cross a triangular area of hardstanding belonging to the respondents in order to access a field, but that the respondents had interfered with that right by erecting a wall and fence leaving just a narrow strip of land along the edge of the triangular area making it impossible for the appellant to turn and manoeuvre vehicles. In the county court the judge held that a right of way for agricultural purposes existed but that the appellant had no right to use the triangular area for turning and manoeuvring. He refused to grant an injunction or damages on the ground that the wall and fence did not interfere with the exercise of the appellant's right of way.

**Point of dispute:** Whether the appellant's appeal against the county court ruling would be allowed. Although he accepted the judge's decision on the extent of the right of way, he contended that there had been an actionable interference with it as a tractor pulling a conventional baler which made small square hay bales could no longer successfully negotiate the strip, notwithstanding that a more modern type of baler which produced large round bales was able do so.

**Held:** The appeal was allowed. Not every interference with a right of way was actionable and the owner of the right could only object to activities that substantially interfered with such exercise of the defined right as it reasonably required for the time being. If it was not unreasonable or perverse of an owner of the right to exercise it in a particular way any obstruction would be an actionable interference even if there were other reasonable ways of exercising the right that would be preferred by most people. It was well established that a vehicular right of way acquired by prescription did not confine the owner to enjoyment only by the types of vehicle in current use during the period when the easement was acquired. Where developments in technology meant that more modern types of agricultural machinery were the most used this did not mean that the owner was deprived of his right to use a right of way with more old–fashioned machinery, so long as his actions were not unreasonable or perverse. The appellant still had a right to access the field with an old–fashioned conventional baler if he wanted to and that right had been interfered with.

## TORT

25 Court of Appeal

**Notices to complete**

*DHAND V OAKGLADE INVESTMENTS LTD
(2012) PLSCS 60 – Decision given 13.03.12

**Facts:** The respondent, D, entered into three underwriting agreements with the appellant, OIL, under which he agreed to purchase three adjacent residential properties from OIL at a reserve price in the event that they did not achieve that sum at auction. D paid deposits under these agreements. When D became entitled and bound to purchase the properties at the reserve price a dispute arose as to the sums payable as OIL contended that there had been an oral agreement to increase the reserve price for each property by £10,000. D failed to complete on the agreed completion date and did not comply with notices to complete served by OIL, which indicated the higher sum as being due on completion. OIL purported to rescind the contracts and forfeit D's deposits.

**Point of dispute:** Whether OIL's appeal should be allowed against the findings of the court below that the notices to complete were not effective because there had been no agreed variation of the reserve price, that the lesser sum was payable and that the OIL had not been ready to complete at the agreed price. D was held to be entitled to have his deposits returned since his failure to complete was due to OIL's breach of contract in refusing to complete for the lower sum, which meant that OIL itself was not ready, willing and able to complete when it served the notices to complete. OIL's counterclaim for forfeiture of the deposits and damages for breach of contract had also been dismissed.

**Held:** The appeal was dismissed. The notices required D to complete contracts that were different to those he had actually entered into with OIL. D was not in breach of contract for failing to comply with notices to complete that required him to pay larger amounts than he was contractually bound to pay. The notices were invalid since they were not notices to complete the original agreements at the reserve prices but instead related to non–existent contract terms. At the time of the serving the notices OIL were not "ready to complete" the contracts that had been agreed and were legally binding and the notices to complete amounted to repudiation by OIL of the contracts that had been agreed.

26 Court of Appeal

**Nuisance – appellant householders seeking damages in nuisance for odours from waste disposal site**

*BARR V BIFFA WASTE SERVICES LTD
(2012) PLSCS 67 – Decision given 19.03.12

**Facts:** The respondents, BWS, a waste disposal company, operated a landfill site in a mixed use neighbourhood under a 1980 planning permission. In 2004 it started to tip more odorous "pre–treated" waste on the site pursuant to a waste management permit issued by the Environment Agency. The appellants, residents on a nearby housing estate, claimed damages in nuisance in respect of odour coming from the site between 2004 and 2009. BWS claimed that it had a defence of statutory authority as it had a permit from the Environment Agency under Regulation 10 of the Pollution Prevention and Control (England and Wales) Regulations 2000 which were enacted pursuant to the Integrated Pollution Prevention and Control Directive. The residents did not allege that BWS was negligent or in breach of its waste management permit, but argued that given the character of the neighbourhood the use of the site for landfill was automatically an unreasonable use of the land.

**Point of dispute:** Whether the residents' appeal would be allowed against the ruling of the judge in the court below that the landfill use was not automatically unreasonable in a mixed use neighbourhood and that the carrying out of permitted waste disposal activities did not give rise to liability in nuisance in the absence of any negligence or breach of the permit. He considered that in an odour nuisance case a threshold had to be set identifying the set number of days on which inconvenience had to be accepted over the year.

**Held:** The appeal was allowed.

1) The case was governed by the following well–settled conventional principles of the law of nuisance:

a) it was a question of degree whether the interference was sufficiently serious to constitute a nuisance;

b) there had to be a real interference with the comfort or inconvenience of living;

c) the character of the neighbourhood had to be taken into account;

d) the duration of the interference was a relevant factor;

e) statutory authority could only be a defence to nuisance if the authority to commit a nuisance was given expressly or necessarily implied; and

f) public utility of the activity in question was not a defence.

Judged by these principles the case against BWS was clear–cut.

2) Short of express or implied statutory authority to commit a nuisance, there was no basis for using a statutory scheme to cut down individuals' private law rights. The permit did not change the character of the neighbourhood and did not purport to authorise the emission of smells.

3) There was no general rule requiring or justifying the setting of a threshold in nuisance cases and, by setting such a threshold, the judge had deprived some of the appellants of the right to have their individual cases assessed on their merits.

The case should be remitted to an appropriate forum for a consideration of the individual claims.

## CONTRACT

27 High Court

**Breach of contract for sale of land**

*BAHT V MASSHOUSE DEVELOPMENTS LTD
(2012) PLSCS 68 – Decision given 15.03.12

**Facts:** In 2007 the defendant developer, MD, entered into contracts with the claimants for the off–plan sale and purchase of some flats that it was going to build in Birmingham with the intention that they would be finished by April 2009. Deposits under the agreements were paid by the claimants. After the main contractor went into administration in October 2008 work on the development stopped and the full enabling works package was not completed until the end of April 2010, by which time the claimants had already notified MK that they were treating the contracts as having been repudiated, and requiring return of their deposits. MK refused to do this and the development was finally completed, two years late, in April 2011. MK served notices to complete on the claimants; subsequently, it sought to rescind the contracts as the claimants had failed to complete and forfeited their deposits.

**Point of dispute:** The claimants brought proceedings to recover their deposits; MK counterclaimed for its right to retain them and damages for breach of contract. The court was asked to decide whether:

i. MK was in breach of an implied term that it would complete the flats within a reasonable time;

ii. MK was in breach of an express term requiring it to arrange completion of the flats "with all due diligence"; and

iii. whether the claimants were entitled to treat MK as having repudiated the contracts.

**Held:** The claim was allowed and MK's counterclaim was dismissed.

i. It was for the party alleging breach of the obligation to complete within a reasonable time to establish what a reasonable time would be. The 30 months that it took MK to complete the development after the main contractor went into administration was not reasonable. In a building contract, time was not essential until it was expressly made so; in the present case the contracts only made time essential when a notice was served to complete the sale and purchase of the apartment. On the facts of this case, however, there may already have been a repudiatory breach of contract by the time that MK put in hand enabling works towards the construction of the block in January 2010.

ii. By June 2009 there was nothing to prevent the commencement of the enabling works and MK finding a new main contractor. However, because of the economic situation in 2008/09 MK had started to consider alternative schemes and as a result it procrastinated with this development until December 2009 – this meant that it was in breach of the express term in the contracts requiring the flats to be completed with due diligence.

iii. In all the circumstances MK's breach was repudiatory. Its failure to progress the works for several months was not mere delay in the circumstances of this case, but signalled its intention not to be bound by the contracts. The claimants were entitled in February and March 2010 to treat the contracts as at an end by reason of MK's repudiation.

## CONSTRUCTION

28 Statutory Instrument

**SI 2012/718 The Building (Amendment) Regulations 2012**

These Regulations, which come into force on 06.04.12, amend the 2010 Regulations. A definition of "excepted energy building" is inserted by reference to the meaning given in The Welsh Ministers (Transfer of Functions) (No.2) Order 2009 – this is relevant as functions relating to such buildings in Wales were not transferred by that Order to the Welsh Ministers and remain with the Sec of State. Thus the amendments made by Regulation 3 to Schedule 3 to the 2010 Regulations apply only to work carried out by the relevant Competent Persons Schemes in England and to excepted energy buildings in Wales.

**http://www.legislation.gov.uk/uksi/2012/718/contents/made**

29 Statutory Instrument

SI 2012/809 The Energy Performance of Buildings (Certificates and Inspections)(England and Wales)(Amendment) Regulations 2012

These Regulations, which came into force on 5th and 6th April 2012, amend the 2007 Regulations and are concerned with certain formalities relating to the production of energy performance certificates.

**http://www.legislation.gov.uk/uksi/2012/809/contents/made**

30 CLG Circular

Circular 01/2012: The Building Act 1984, Building (Amendment) Regulations 2012

The purpose of this Circular is to:

- Draw attention to the fact that the amendments apply in England and to excepted energy buildings in Wales; and
- Amend the name of the registration body Building Engineering Services Competence Accreditation Limited to Building Engineering Services Competence Assessment Limited wherever it appears in Schedule 3 to the Building Regulations 2010.

The Building (Amendment) Regulations 2012 make minor amendments to the Building Regulations 2010 (SI 2010/2214) and should be read in conjunction with the Building Regulations 2010.

**http://www.communities.gov.uk/publications/planningandbuilding/circular012012**

31 CLG Circular Letter

**The Building (Amendment) Regulations 2012**

This letter informs the building control bodies of these Regulations (SI 2012/718) which were made on 07.03.12 and came into force on 6.4.12. The changes made by these Regulations apply to England only and to excepted energy buildings in Wales. A number of changes are made to the list of competent person schemes in Schedule 3 to the Building Regulations 2010.

**http://www.communities.gov.uk/publications/planningandbuilding/divletterbuildingregulations2012**

32 DCLG Note

**DCLG Energy Performance of Buildings – Guidance & FAQs**

This note aims to answer the most popular questions on the changes taking effect on 6th April. It is not intended, however, to provide a comprehensive summary. A copy of the amendments and the Explanatory Memoranda can be downloaded at:

**http://www.legislation.gov.uk/uksi/2011/2452/introduction/made**

**http://legislation.go.uk/uksi/2012/809/regulation/1/made**

**http://www.rics.org/site/scripts/download_info.aspx?fileID=11679**

## ENVIRONMENT

33 Statutory Instrument

**SI 2012/879 The Flood and Water Management Act 2010 (Commencement No. 6 and Transitional Provisions) Order 2012**

This Order brought this Act into force on 19.3.12. Art. 3 specifies provisions of the Act which come into force on 06.04.12. These make provision for certain amendments to the Land Drainage Act 1991 in relation to flood risk management, including:

i. The removal of the following powers from the Environment Agency in relation to ordinary watercourses:
   a) concurrent flood risk management powers;
   b) default powers in relation to flooding; and
   c) enforcement powers in relation to watercourse, bridge or drainage maintenance obligations;

ii. The alteration of the prohibition on obstructions to ordinary watercourses to preclude the erection of any culvert without prior consent;

iii. The transfer of the role of the Environment Agency as the consenting and enforcement authority in areas outside an internal drainage district under ss23, 24 and 25 of the 1991 Act to the relevant lead local flood authority; and

iv. The creation of the power to attach reasonable conditions to a consent issued under s23.

34 RICS Research Report

**Non–domestic Real Estate Climate Change Model**

This research examines ways to quantify and predict the impacts of climate change on UK and European property. In particular it aimed to:

- establish the effects of external temperature rises on carbon emissions from the UK commercial real estate sector;
- establish trends for different use classes;
- identify the building–specific and locational characteristics that determine building–related emissions;
- assess the importance of the behavioural aspects of climate change;
- explore the impacts of time effects on building–related emissions; and
- establish a business case for the mandatory roll out of Display Energy Certificates across all sectors.

**http://www.rics.org/site/scripts/download_info.aspx?fileID=11619&categoryID=523%20**

## GENERAL

35 Administrative Court

**Application for registration of a tidal beach as a town or village green under section 15 of the Commons Act 2006**

* R (ON THE APPLICATION OF NEWHAVEN PORT & PROPERTIES LTD) V EAST SUSSEX COUNTY COUNCIL
(2012) PLSCS 72 – Decision given 21.03.12

**Facts:** In December 2010 the defendant local authority, ESCC, decided to register West Beach at Newhaven as a town or village green pursuant to s15 of the Commons Act 2006 on the basis of evidence that it had been used as of right by local inhabitants for sports and pastimes for at least 20 years until April 2006. At that date the applicant company, NPP, fenced off access to the beach claiming that the condition of the sea wall rendered access dangerous. An inspector appointed by ESCC reported to the commons and village green panel recommending that the application for registration be approved.

**Point of dispute:** Whether NPP's application for judicial review of ESCC's decision to register the beach should be allowed. NPP's arguments were:

i. the land was a tidal beach and as such could not be registered as a town or village green, since on a proper construction of the 2006 Act a town or village green had to be a mainly grass area on the edge of a town or village; and

ii. The beach was part of the operational land of the port and registration of it as a town or village green was incompatible with the port's statutory powers and rights.

**Held:** NPP's claim was allowed.

i. The words used by Parliament to define "town or village green" in s15 of the Commons Act 2006 were broad enough to permit the registration of a tidal beach as a town or village green provided that the nature, quality and duration of the recreational use satisfied the statutory test. There was no requirement that such land had to be either grassy or consistent with traditional notions of what constituted a village green; nor was it excluded because it was covered with water for part of each day.

ii. However, it was not possible for the public to acquire rights by 20 years user to the likely detriment of the statutory functions pursuant to which the landowner owned the land in the public interest. If it was reasonably foreseeable that registration under the 2006 Act would give rise to a future conflict with the statutory purpose for which the claimant owned the land, namely operational use as a port, it could not be registered as a town or village green. On the evidence it was reasonably foreseeable that permitting the land to be used as of right for recreational purposes would conflict with NPP's statutory functions.

36 Statutory Instrument

**SI 2012/872 The London Thames Gateway Development Corporation (Transfer of Property, Rights and Liabilities) (Greater London Authority) Order 2012**

This Order, which comes into force on 16.04.12, makes provision for the transfer to the Greater London Authority of property, rights and liabilities held by the London Thames Gateway Development Corporation.

**http://www.legislation.gov.uk/uksi/2012/872/contents/made**

37 College of Estate Management (CEM) Paper

**Waterproof – Flood risk and due diligence for commercial property investment in the UK**

This Paper contains extracts from the CEM's major research report on this subject, published in the autumn of 2011. It provides a short introduction and outlines some of the main findings of this research into flooding.

**http://www.cem.ac.uk/OurResearch/ReportsAndPublications/ResearchPapers.aspx?id=1758**

38 London Assembly Report

**Plane speaking – air and noise pollution around a growing Heathrow Airport**

This report considers possible measures to help tackle the problem of noise and air pollution around Heathrow Airport. Of particular concern is the contribution to poor air quality made by the high numbers of people using private cars and taxis to travel to and from the airport – at present almost two thirds of the 69 million passengers using Heathrow every year travel by car and it is anticipated that passenger numbers could grow by a third to 95 million per year. The report also examines noise pollution around Heathrow – the Environment Committee considers that there could be a tighter approach to dealing with the problem of aircraft noise impact and that the trigger point at which people qualify for financial assistance with noise insulation could be lowered. The report sets out a number of actions, including the following:

- Incentives to encourage people to use buses and coaches;
- Expediting the upgrade of the Piccadilly Line and extending its operating times;
- Ensure that Heathrow is linked to the new planned high speed rail network; and
- Incentives to encourage airline operators to remove the most polluting aircraft from their fleets more quickly and to use greener and quieter planes.

**http://www.london.gov.uk/publication/tackling–air–and–noise–pollution–around–heathrow**

39 Mayor and Transport for London publication

**Leaving a transport legacy – Olympic and Paralympic Transport Legacy Action Plan**

This document sets out a series of actions to ensure that the 2012 Games transport plans leave a permanent transport legacy that will benefit future generations of people living in London. It sets out the physical and behavioural transport legacy from the Olympics and the plans to monitor and develop these in the future and also identifies potential transport infrastructure improvements necessary to deliver a longer term economic transformation in the six host boroughs in east and south east London (Barking & Dagenham, the Royal Borough of Greenwich, Hackney, Newham, Tower Hamlets and Waltham Forest) which for decades have suffered deprivation and poverty.

**http://www.london.gov.uk/publication/leaving–transport–legacy**

40 RICS Research Report

**Supply, Demand and the Value of Green Buildings**

This research report examines the effect of "green" buildings on rents and prices of commercial real estate in London in general, and on environmentally–certified real estate itself.

**http://www.rics.org/site/scripts/download_info.aspx?fileID=11662**

41 Defra Guidance

**The Commons Act 2006 and voluntary dedication of land as a town or village green**

This guidance provides advice to landowners in England on dedicating land as a town or village green and on alternative mechanisms to provide public access to land. It is non–statutory and has no legal effect.

**http://www.defra.gov.uk/publications/2012/03/22/pb13733–voluntary–registration–guidance/**

GERALDEVE

42 CLG – Government Response

**High streets at the heart of our communities: The Government's response to the Mary Portas Review**

It is clear from the recent review into the state of Britain's high streets that internet shopping and out–of–town shopping centres are here to stay, which means that for high streets to thrive they will have to offer something new and different. The drive for change must come from local communities. In the short term the Government has announced the following measures:

- It will fund twelve further pilots;
- It will invest £500,000 to help Business Improvement Districts access loans for their set–up costs;
- A High Street renovation fund of £10m is to be set up to help councils in areas blighted by empty shops and recovering from last summer's riots; and
- A £1m Future High Street X–Fund will be established to reward the areas which deliver the most effective and innovative plans to bring their town centres back to life.

Other measures include the following:

- Backing for a National Market Day on 23.06.12;
- Doubling the level of small business rate relief in England for two and a half years;
- Consulting on proposals to abolish the centrally–set minimum parking penalty charge;
- Consulting on procedures necessary to remove archaic and unnecessary byelaws; and
- Allowing the space above shops to be converted into two flats rather than just one without the need for planning permission, to encourage more people to live in town centres.

**http://www.communities.gov.uk/publications/regeneration/portasreviewresponse**

43 CLG – Invitation

**Portas Pilots Round 2: Prospectus – an invitation to become a Town Team**

Local partnerships are being offered the opportunity to become pilot areas to test the "Town Team" approach and pilot some of the ideas and recommendations set out in the Mary Portas Review of High Streets. This document describes how local partnerships can apply to become a Pilot Area and sets out the selection criteria. The closing date is 30.6.12.

**http://www.communities.gov.uk/publications/regeneration/portaspilotsprospectus2**

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THE SUNDAY TIMES 100 BEST COMPANIES TO WORK FOR 2012

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**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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