Legal & Parliamentary

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evebrief

Editorial

In the last edition at Item 09 we reported on the introduction of legislation to end the twin tracking of planning applications. Since 6 April LPAs have been able to refuse to consider similar planning applications made at the same time. Futhermore, the effect of the new legislation allows LPAs to refuse to determine twin-tracked applications made in the period leading up to 6 April. This removes a valuable tactical tool used by developers to appeal one application at the earliest opportunity following non-determination and allow continued negotiations with the LPA in relation to the second. Although it is a tool used less frequently in recent years, removal of the right will potentially cause significant delays for developments and incur additional costs in terms of time and money to developers.

At item 29 we report on a decision by the European Court of Justice concerning EU procurement requirements. It is not the case itself but its interpretation in the UK that is causing a problem and is likely to lead to delays in regeneration and development schemes. The case has cast doubt on whether agreements entered into without a formal financial tendering process are lawful.

Rather than risk being sued, authorities are now requiring schemes to be re-tendered and in one scheme in Kingston the developer incurred £450,000 in wasted costs. The BPF is now quite rightly demanding that the Government clarify the circumstances where a tendering process via the OJEU process is necessary.

Steve Hile

GeraldEve

Landlord & Tenant

01

Court of Appeal

Assignment of lease — appellant tenant covenanting to guarantee liability of assignee under tenant's covenants — liquidator of assignee disclaiming lease — whether appellant remaining liable to respondent landlord in respect of tenant's covenants

***** DOLEMAN V SHAW
(2009) PLSCS 113 — Decision given 01.04.09

Facts: In 2004 the appellant was granted a tenancy of a retail unit for a term of ten years from March 2004 at a rent of £16,000 a year. The lease contained tenant covenants in respect of liability to pay insurance, rent, costs etc. In 2005 the appellant entered into an authorised guarantee agreement (AGA) with the then landlord (the respondent's mother) after it assigned the lease to a third party. The terms of the license to assign included a covenant by the appellant, in the form of the AGA, to guarantee the performance of the tenant covenants by the corporate assignee. Following her mother's death the respondent became entitled to the freehold reversion. The corporate assignee fell into arrears, vacated the premises and went into liquidation. The liquidator disclaimed the lease and the respondent sought to make the appellant liable under the AGA for rent and other payments under the lease.

Point of dispute: Whether the appellant's appeal should be allowed against the judgment of the county court that she was liable for the arrears of rent, insurance rent, costs, fees and interest under the lease. The appellant argued that her guarantee liability under the AGA terminated with the liquidator's disclaimer that terminated the lease.

Held: The appeal was dismissed. The effect of s178(4) of the 1986 Insolvency Act was that although the tenant (or an assignee) ceased to be liable for any of the tenant's covenants following disclaimer, the guarantor remained liable on the guarantee. The tenant's obligations were deemed to continue insofar as the guarantee agreement was concerned.

02

Administrative Court

Determination of rent for assured tenancy — Local Government and Housing Act 1989 — Housing Act 1988 — whether words to be read into statutory provisions so as to permit disregard of improvements

***** HUGHES V BORODEX LTD
(2009) PLSCS 111 — Decision given 25.03.09

Facts: H was the tenant of a flat in Chelsea which she had originally held on a long underlease at a rent of £195 per annum under Part 1 of the Landlord & Tenant Act 1954. When that tenancy came to an end H remained in possession under an assured periodic tenancy pursuant to s186 and Schedule 10 of the Local Government and Housing Act 1989. H's rent was determined by a rent assessment committee at £1,668 per month, disregarding improvements that she had carried out during the long tenancy. B served a notice of increase of rent pursuant to s13 of the Housing Act 1988, whereupon the rent assessment committee determined the rent at £2,340 per month, taking the view that it should not disregard the tenant's improvements because of the wording of s14(3)(b) of the 1988 Act. This provided that improvements not carried out during the claimant's current tenancy could be disregarded only if "at all times during the period beginning when the improvement was carried out and ending on the date of service of the notice, the dwelling house has been let under an assured tenancy". The committee considered that this requirement could not be met since assured tenancies had not existed prior to their creation by the 1988 Act. The effect of that decision was not only to increase the amount of rent that H had to pay, but also to deprive her of security of tenure as the new rent was above the £25,000 threshold above which the tenancy would cease to be an assured tenancy.

Point of dispute: Whether H's appeal against the rent determination should be allowed. She argued that so far as the relevant statutory provisions removed protection that had previously existed under the 1954 Act, this was contrary to the statutory purpose of giving security to those whose long tenancies came to an end and the court should construe the provisions so as to give effect to that purpose.

Held: H's claim was dismissed. On the initial reference to a rent assessment committee, following the creation of an assured tenancy under Schedule 10 to the 1989 Act, the assessment was made pursuant to para 10(2) of that Schedule and para 11 applied to require the disregard of tenant's improvements carried out during the course of a long residential tenancy. However, the tenant could not take advantage of that provision on any subsequent reference since this would be made under s13(4) of the 1988 Act; therefore, s14(3) of that Act would apply and Schedule 10 to the 1989 Act would not.

Planning

03

Court of Appeal

Economic viability

***** SAMUEL SMITH OLD BREWERY (TADCASTER) V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) PLSCS 94 — Decision given 16.03.09

Facts: SS owned a pub near to a derelict industrial site located on the Selby to Leeds railway line that had formerly been used for purposes connected with the coal industry. The original 1976 permission for this use contained a condition requiring the site to be restored once that use ceased. Following cessation of coal production in 2004 many of the structures on the site were demolished but a number of buildings, landscaping infrastructure and railway sidings remained. The owner of the site applied for planning permission to retain and reuse some of the structures with the railways to be used as a sustainable form of transport. The Sec of State called in the application and following a public inquiry, when SS questioned the economic viability of the proposals, planning permission for the development was granted, subject to a condition that the buildings be removed if they were not brought into use within five years. The decision letter acknowledged that the proposals conflicted with the development plan and government policy on sustainable development but considered the benefits of bringing a valuable asset back into use and concluded that the risk of harm presented by unoccupied buildings in the countryside would be sufficiently mitigated by the condition.

Point of dispute: Whether SS's appeal should be allowed against the decision of the court below rejecting its challenge to the grant of planning permission. SS argued that the the Sec of State had not properly considered the evidence supporting its proposition that it would not be economically viable to convert the structures and there was no evidence of demand to use them. It also argued that the decision to grant permission had been based upon speculation as opposed to a real prospect that a suitable occupier could be found within a specified period.

Held: SS's appeal was dismissed. The Sec of State had taken into account all material circumstances and was entitled to reach the conclusion that she had. The question of economic viability had formed part of the entire case considered together with "need" and "demand". A "real" prospect of finding an occupier within five years did not have to be probable or likely, a possibility would suffice. The inspector and the Sec of State had recognised that it was uncertain whether a suitable occupier would be found, but had been entitled to conclude that they could not rule out that possibility and that the potential benefits of refurbishing the site justified the grant of planning permission.

04

Court of Appeal

Enforcement notice — whether swimming pool and tennis courts permitted development — extent of curtilage

****** BARNETT V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) PLSCS 110 — Decision given 23.03.09

Facts: In1995 B was given planning permission to build a house on agricultural land in accordance with approved drawings and plans which showed the application site outlined in red. In 1998 he obtained permission to extend the original dwelling, but the plans submitted with that application showed the site as being larger than in the 1995 plans. Subsequently, B carried out further development on the site including constructing a swimming pool, pool house and a tennis court. The lpa issued enforcement notices alleging a breach of planning control and requiring removal of those structures.

Point of dispute: Whether B's appeal should be allowed against the decision of the court below upholding the enforcement notices and refusing retrospective planning permission for the development. B argued that the development was permitted within the curtilage of the existing dwelling which had implicitly been extended by the 1998 permission to cover the area outlined in red on the plans submitted with that application. The inspector's view, which was upheld in the court below, was that the curtilage was defined in the 1995 permission.

Held: B's appeal was dismissed. The general rule, established in *R v Ashford Borough Council ex parte Shepway District Council [1999] PLCR 12*, was that when construing an outline planning permission the court had to have regard only to the permission unless the application had been expressly incorporated. Where a full planning permission for the construction of buildings had been granted the approved plans and drawings formed part of the full planning permission unless expressly excluded. The 1998 permission did not permit new use beyond the residential site and the curtilage as defined by the 1995 site plan had not changed. Since there had been no application for change of use the site plan for the original permission still defined the extent of the curtilage and it had not been extended merely by submitting a plan which covered a larger area.

05

Administrative Court

Economic and environmental effects of airport expansion

***** BARBONE V SEC OF STATE FOR TRANSPORT
(2009) PLSCS 92 — Decision given 13.03.09

Facts: B and others represented a group which opposed the expansion of Stansted airport. The operation of the airport was governed by a 2003 planning permission which contained conditions limiting the throughput of air passengers to 25 million and the annual number of air traffic movements (ATMs) to 241,000. In December 2003 the Government's White Paper on the future of air transport in the UK was published setting out the strategic framework for development of airport capacity in the UK. It supported the growth of Stansted and on appeal the airport operator was granted permission to expand the airport's capacity with the number of passengers being limited to 35 million per annum and 264,000 ATMs.

Point of dispute: Whether B's application to quash the grant of planning permission would be allowed. B contended that the Sec of State had failed to carry out a full and proper evaluation of the proposal to expand the airport in accordance with the ministerial statements made after publication of the White paper and had overlooked its economic, noise and climatic effects from CO_2 emissions.

Held: B's claim was dismissed. The inspector and the Sec of State had adequately addressed the economic and noise effects and the CO_2 emissions and had reached conclusions that had been open to them. They had correctly proceeded on the basis that the appeal should be determined in accordance with relevant and up-to-date national policy. The White Paper established the need for additional runway capacity and supported the greater use of Stansted, a material consideration to which they were entitled to attach considerable weight. B's arguments on climate change were an attack on national transport policy as the White Paper had adopted a policy of seeking to offset the climate-change aspect of the environmental effects of the development of air transport against commensurate changes elsewhere in the economy.

06

Administrative Court

Extension to dwelling house in Green Belt — whether inspector erring in application of PPG 2 and local plan policy

***** EAST DORSET DISTRICT COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) PLSCS 101 — Decision given 20.03.09

Facts: In 1994 EDDC granted permission for a new 137 sq m bungalow to replace an existing 80 sq m bungalow on a site in the green belt. In 2006 an application for retrospective permission for a 30 sq m conservatory addition was refused on the grounds that the development was contrary to Green Belt policies in PPG 2 and the local plan following which EDDC issued an enforcement notice.

Point of dispute: Whether EDDC's appeal should be allowed against the finding of the inspector on appeal that the conservatory was acceptable under the terms of para 3 of PPG 2. That policy allowed an extension if it did not materially change the effect of the dwelling on the openness of the Green Belt or dominate the existing dwelling through its height or bulk, and referred to some "general guidelines" of 50% of the gross residential floor area of the dwelling, as it was at the time when the Green Belt was designated in 1980, or 140 sq m as the size of property that could reasonably provide for modern standards of living. The inspector found that the conservatory complied with that policy as although the floor area of the extended bungalow was more than 100% of the original, it was only 27 sq m over the 140 sq m guideline and did not result in disproportionate additions over and above the size of the original building.

Held: EDDC's appeal was dismissed. The inspector had not misapplied local plan policy or made an error in reaching his decision. He had understood that the 50% guideline referred to in the policy required a comparison with the original building as it was in 1980, rather than the building as it was at the time of the application, but had also taken into account that this was a guideline only and that an extension of less than 50% would not necessarily be acceptable. The effect of the policy was to make a development of up to 140 sq m an appropriate one in the normal course of events, and accordingly the inspector had been entitled to take into account the amount by which the development exceeded that size.

07

Administrative Court

Planning permission to use Green Belt site for paintballing purpose

***** GASS V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) All ER (D) 23 (Mar) — Decision given 25.11.08

Facts: G was refused planning permission to use a site within the Green Belt for the purpose of paintballing. On appeal the inspector appointed by the Sec of State found that the nature of the development and its "sustainability" failed to satisfy para 1.6 of PPG 2 on the objectives which had to be fulfilled in respect of using Green Belt land in terms of its appropriateness.

Point of dispute: Whether G's application to quash the inspector's decision should be allowed. G argued that the inspector had erred in law in that he had misdirected himself when he had been considering whether the development at issue was "appropriate" Green Belt development within the meaning of PPG 2.

Held: G's application was dismissed. The inspector had not erred in law. His interpretation of PPG 2 had not been incorrect. He had been entitled to conclude that this kind of development was objectionable in planning terms, in relation to both its nature and its sustainability.

08

CLG Consultation Paper

The Planning (Hazardous Substances) (Amendment) (England) Regulations 2009: Consultation
Deadline for Comments: 18.05.09

This consultation is concerned with the proposal to amend the Planning (Hazardous Substances) Regulations to comply with the requirements of EC Directive 96/82/EC on the control of major accident hazards involving dangerous substances (the Sevesco II Directive), as amended by Directive 2003/105/EC.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/hazardousconsultation.pdf

09

CLG Consultation Paper

Planning Act 2008: Consultation on the Pre-Application Consultation and Application Procedures for Nationally Significant Infrastructure Projects
Deadline for Responses: 19.06.09

This consultation relates to draft regulations and guidance documents on the procedures for pre-application consultation on nationally significant infrastructure projects, and the information that an application submitted to the Infrastructure Planning Commission should contain.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/consultationpreapplication.pdf

10

CLG Statistical Release

Planning Applications: December Quarter 2008 (England)

- The number of planning applications received by district level planning authorities decreased by 26% compared with the December 2007 quarter.
- District level planning authorities saw a decrease of 22% in the number of applications decided compared with the same quarter a year ago.
- Decisions on planning applications for residential developments decreased by 25% in the December quarter 2008.
- The percentage of major applications determined within the 13 week target remained unchanged when compared with the same quarter last year.
- Authorities that undertake planning matters on a county level determined 361 applications, a decrease of 7% compared with the same quarter a year ago. The proportion of applications granted increased from 92% a year ago to 93%.

http://www.communities.gov.uk/documents/statistics/pdf/1186630.pdf

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CLG Direction

Letter to Chief Planning Officers: New Town and Country Planning (Consultation) (England) Direction 2009 and cancellation of obsolete planning documents

http://www.communities.gov.uk/documents/planningandbuilding/pdf/letterconsultationdirect.pdf

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Government Response to Consultation Replies

Review of 'Call-in' Directions: Government response to consultation replies

This document contains the Government's response to the replies received to its January 2008 consultation on its proposals to reduce the number of planning applications automatically referred to Government for consideration of whether they should be "called in" for ministerial assessment.

http://www.communities.gov.uk/documents/planningandbuilding/pdf/callinresponses.pdf

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CLG Circular

Circular 02/09: The Town and Country Planning (Consultation) (England) Direction 2009

This Direction comes into force on 20.04.09 and applies to all applications for planning permission relating to England. It sets out the types of development on which local planning authorities in England will be required to consult the Sec of State before granting planning permission. A number of other planning circulars and guidance documents which have become obsolete are cancelled and replaced by this new direction, while a new requirement relating to development which may adversely impact on World Heritage Sites is introduced. The purpose of this Circular is to ensure that ministerial involvement takes place only where necessary and that all decisions are taken at the appropriate level.

http://www.communities.gov.uk/documents/planningandbuilding/pdf/circularconsultationdirect.pdf

Rating

14

Lands Tribunal

Valuation of lounges at Heathrow airport following terrorist attacks of 11.09.01 in New York which affected passenger numbers and aircraft movements — whether matters physically manifest in locality

****** IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LONDON (NORTH WEST) VALUATION TRIBUNAL BY KAREN KENDRICK (VO)

RA/59/2007 — Before The President of the Lands Tribunal — Decision given 16.03.09

Property: Two passenger lounges at Heathrow airport, the rating assessments for which were reduced by 10% on appeal by the ratepayer to the Valuation Tribunal to reflect the effects on the values of the hereditaments of the events of 11 September 2001 in New York.

Issues: Whether to allow the VO's appeal against the decision of the Valuation Tribunal. The ratepayer had argued that the events which occurred in New York on 11.09.01 were a material change of circumstances which had significantly reduced the rateable value of the hereditament.

Held: The appeal was allowed and the original rateable values were restored. The Valuation Tribunal had erred in deciding that the events of 11.09.01 were "matters" physically manifest in the locality of the hereditament under para 2(7)(d) of Schedule 6 of the Local Government Finance Act 1988. The events were a past happening and did not exist on the date of the proposal. The consequences of the attacks and the attitude of passengers to air travel could constitute a "matter" but in the circumstances could only be measured by expert study and not from mere observation of passenger and aircraft movements.

15

House of Lords
Proprietary estoppel

** THORNER V MAJORS
(2009) PLSCS 104 — Decision given 25.05.09

Facts: Since 1976 T had worked without pay on a farm owned by the deceased. In 1997 the deceased made a will leaving his residuary estate to T; he later cancelled that will in order to exclude another legatee, but failed to make another one which meant that he died intestate in 2005. T's claim against M, the personal representative of the deceased, that he was entitled to the farm under the doctrine of proprietary estoppel, was upheld in the High Court, the judge finding that the deceased had represented by various indirect remarks made from 1990 onwards that T would inherit it and that T had relied upon those representations to his detriment. M's appeal against that decision was allowed by the Court of Appeal, on the ground that the oblique assurances given to T by the deceased in 1990 were insufficient to found a proprietary estoppel since they were not clear and unequivocal and there was no evidence that the deceased had intended them to be relied upon as a promise.

Point of dispute: Whether T's appeal against the Court of Appeal's decision should be allowed. T argued that the "clear and unequivocal" test did not apply to proprietary estoppel. M contended that: (i) the meaning of the words used by the deceased was a question of law, not of fact, and it had not been reasonable for T to rely upon them as he had; and (ii) even if the other elements of proprietary estoppel were made out, the land to which the deceased's assurances related was not identified with sufficient certainty because the extent of the farm had changed over the years.

Held: T's appeal was allowed.

(i) The doctrine of proprietary estoppel was based upon three main elements: (a) a representation or assurance made to the claimant; (b) reliance upon it by the claimant; and (c) detriment to the claimant in consequence of his reasonable reliance. There was authority for the view that the "clear and unequivocal" test did not apply to proprietary estoppel — the relevant assurance had to be sufficiently clear and that would greatly depend upon the context. The deputy judge had listened carefully to the evidence of witnesses and considered the unusual circumstances of the case, but the Court of Appeal had concentrated too much on the 1990 assurance which, although it marked a transition from hope to expectation, did not stand alone and formed part of a continuing pattern of conduct by the deceased for the remaining 15 years of his life. There was no sufficient reason for the Court of Appeal to reverse the careful findings and conclusion reached by the deputy judge.
(ii) It was a necessary element of proprietary estoppel that the assurances given to the claimant should relate to identified property owned, or maybe about to be owned, by the defendant. Promissory estoppel had to be based upon an existing legal relationship, but this was not the case with proprietary estoppel. The property to which the assurance related had to be sufficiently identified. Both the deceased and T had understood the assurance to relate to the farm, whatever that might comprise at the time of the deceased's death.

16

Court of Appeal
Rights of common pasture — whether rights of common attached to farm passed to tenant with tenancy of farm

* HALL V MOORE
(2009) PLSCS 100 — Decision given 18.03.09

Facts: H became the tenant of a farm owned by the trustees of Stanbrook Abbey upon his father's death who had held a series of yearly tenancy agreements since 1961. H claimed that he was entitled to graze livestock on some adjoining common land owned by the trustees. The trustees of the abbey were entitled to registered rights of common over the land for a defined number of cattle, horses and sheep, which were registered as attached to the farm. The trustees fenced off the common land so that H could not graze his livestock on it.

Point of dispute: Whether H's appeal should be allowed against the judge's finding that H had no rights of common to graze livestock on the common land by virtue of his tenancy. The judge concluded that his tenancy had expressly reserved the rights of common to the trustees since they fell within para 4 of Schedule 2 which reserved the benefit of all existing and future wayleaves, easements and rights affecting the farm and all rents and moneys payable in respect thereof. In addition the rights of common had been waived by an agreement between the landowners and a committee representing the commoners.

Held: H's appeal was allowed. If as a matter of interpretation the trustees' rights of common were properly regarded as rights affecting the farm para 4 was sufficient to reserve them. However, the context of that paragraph indicated that the word "affecting" did not refer to rights benefiting the farm but to rights which burdened it. The word "rights" in para 4 was not referring to the rights of common attached or appurtenant to the farm and in respect of which the farm was the dominant tenement and thus those rights could not be interpreted as being reserved to the trustees. The commoners' committee was not a statutory body with statutory powers to bind the commoners and it had no power to waive or suspend the proprietary rights of the commoners.

Tort

17

High Court

Abuse of process

****** LAND SECURITIES PLC V FLADGATE FIELDER
(2009) PLSCS 107 — Decision given 25.03.09

Facts: FF, a firm of solicitors, occupied offices opposite a building (site A) which LS intended to demolish and replace with a ten-storey structure, works which were expected to take three years. FF was concerned that they would adversely affect its turnover and plans to relocate by damaging the marketability and value of its residue lease that was due to expire in 2013. FF decided that it might have recourse to judicial review in respect of the local planning authority's (lpa) proposal to waive the requirement of 30% affordable housing by "crediting" LS with over-provision on another site (site B). Negotiations between the parties to try and resolve the situation broke down. FF applied for judicial review of the grant of planning permission for site B whereupon LS withdrew their reliance upon the affordable housing credit and submitted new planning applications for both developments in which they proposed a payment to the lpa's affordable housing fund. Upon these applications being granted FF withdrew its application for judicial review in respect of site B and obtained permission to apply for judicial review for site A.

Point of dispute: Whether FF's application to strike out LS's claim for damages against FF in the sum of £17m should be allowed. LS contended that FF's objections and review claims were an abuse of process having been motivated by the collateral and improper purpose of procuring a financial benefit. FF argued that there was no tort of abuse of process.

Held: FF's application was granted. The tort of abuse of process did exist and could apply to judicial review proceedings. A property owner was entitled to use judicial review proceedings for the protection of its interest in and enjoyment of property, even though the remedy was often of limited scope and prima facie might appear to bear no relation to the property being protected. The property owner was entitled to compare the diminution in the value of its interest and enjoyment with the substantial development gain that the developer would enjoy from his development. It was not a "collateral purpose" to seek to use any negotiating position it might have to recover the lost value by recovering it from the developer who caused the situation to arise. FF had not been pursuing a collateral or improper purpose in seeking to use its negotiating position to obtain a financial advantage from LS. The fact that FF had not objected to the site A development in principle, but only objected because of the negative effect upon its own property did not affect that conclusion. FF's attack on the site B development and the affordable housing "credit" was a natural way for it to defend its own premises as it was an essential link in the planning application for the site A development. FF had not acted out of an ulterior purpose unrelated to the subject matter of the litigation but had pursued an objective that was reasonably related to obtaining some redress for its grievance.

Housing

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Statutory Instrument

SI 2009/724 The Houses in Multiple Occupation (Management) (England) Regulations 2009

Under the 2006 Regulations one of the duties of the manager of a house in multiple occupation (HMO) is to supply to the local housing authority within seven days of receiving a request in writing from the authority the latest gas appliance test certificate that the manager has received in relation to the testing by a "recognised engineer" of any gas appliance at the HMO. These Regulations, which came into force on 13.04.09, replace the definition of "recognised engineer" in the 2006 Regulations and the 2007 Regulations. The new definition refers to an engineer who is approved under Regulation 3 of the Gas Safety (Installation and Use) Regulations 1998.
http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090724_en.pdf

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Statutory Instrument

SI 2009/801 The Abolition of the Commission for the New Towns and the Urban Regeneration Agency (Appointed Day and Consequential Amendments) Order 2009

This Order appoints 01.04.09 as the day on which, by virtue of sections 49 and 50(1) of the Housing and Regeneration Act 2008 the Commission for the New Towns (CNT) and the Urban Regeneration Agency (URA) will cease to exist. Most of the Homes and Communities Agency's powers were commenced on 01.12.08 by virtue of the Housing and Regeneration Act 2008 (Commencement No 2 and Transitional, Saving and Transitory Provisions) Order 2008 (SI 2008/3068) and that Order contained provisions which ensure as far as necessary that anything done by CNT and URE is treated as if done by the Homes and Communities Agency and that anything that was being done by those bodies immediately before 01.12.08 may be continued by it.
http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090801_en.pdf

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Statutory Instrument

SI 2009/803 The Housing and Regeneration Act 2008 (Commencement No 4 and Transitory Provisions) Order 2009

This Order brings into force various provisions of Parts 1, 2 and 3 of the Housing and Regeneration Act 2008. The provisions commenced in Articles 2 and 7 relate to preparatory steps in advance of the new regulatory regime coming into force. The provisions commenced in Articles 3 and 8 are those relating to the abolition of the Commission for the New Towns (CNT) and the Urban Regeneration Agency (URA) and the dissolution of the Housing Corporation, while Articles 4 and 6 are transitory provisions concerning the preparation and auditing of final accounts.
http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090803_en.pdf

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CLG Publication

Government response to Matthew Taylor review of Rural Affordable Housing and Economy

This Review, published in 2007, looked into the issues faced by rural communities and made practical recommendations for change and improvement. The Government agrees with and accepts nearly all of the Review's recommendations, particularly seeing them in the context of the creation and maintenance of sustainable communities and the need to plan for economic recovery in which a streamlined planning system will be a significant factor.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1184991.pdf

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CLG Statistical Release

House Price Index — January 2009

- in January this year house prices were 11.5% lower than in January 2008;
- the mix-adjusted average house price in the UK was £195,724 in January (not seasonally adjusted);
- UK house prices fell by 3.9% in the quarter ending January 2009, this compares with a fall of 5.2% for the quarter ending with October 2008;
- annual average houses prices fell in England by 11.8%, in Scotland by 6.3% and in Northern Ireland by 14.3%; and
- the average house price paid by a first-time buyer was 15.4% lower than a year ago, while the average price paid by former owner occupiers was only 10% lower

http://www.communities.gov.uk/documents/statistics/pdf/1176201.pdf

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CABE Publication
No more toxic assets — Fresh thinking on housing quality

CABE has been warned by housebuilders, professionals and the public sector to have low expectations about design quality when the housing market recovers from the current recession. There is a growing consensus that the old model of housebuilders as traders may not continue to exist when the economy begins to recover and that instead new models may emerge based around longer term investment, a stronger role for the public sector and more variety of tenure. This pamphlet examines some of the problems created by the downturn and considers areas of change that could present opportunities for good design as the economy recovers.
http://www.cabe.org.uk/files/No-more-toxic-assets.pdf

24
CABE Publication
Selecting design and development partners

This client briefing contains supplementary guidance to CABE's *Creating successful masterplans* client guide and describes how briefing, evaluation and selection processes can be structured to deliver successful well-designed places. The briefing should be read in conjunction with *Agreeing a procurement strategy*, reported below.
http://www.cabe.org.uk/files/selecting-design-and-development-partners.pdf

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CABE Publication
Agreeing a procurement strategy

This client briefing offers supplementary guidance to CABE's *Creating successful masterplans* client guide. It outlines the importance of long term procurement strategy for delivering high quality development and sets out how to establish and achieve this. The briefing should be read in conjunction with its partner briefing, *Selecting design and development partners*, reported above.
http://www.cabe.org.uk/files/agreeing-a-procurement-strategy.pdf

Contract

26
Court of Appeal
Construction of contract for sale of land

***** ANGLO-CONTINENTAL EDUCATIONAL GROUP (GB) LTD V CAPITAL HOMES (SOUTHERN) LIMITED
(2009) PLSCS 96 — Decision given 17.03.09

Facts: ACEG owned two houses which CH had agreed to buy with a view to converting them into 14 flats. The agreement was conditional upon planning permission being obtained within a contractual timetable but CH could, on notice, waive that condition. Completion would take place 28 days after the agreement became unconditional. The property was also subject to various restrictive covenants preventing development and the agreement stated that the purchase price was £862,000 "less the amount… required to obtain a deed of release/variation of the covenants…to enable the Development to be implemented". CH gave notice waiving the planning permission condition and by completion the beneficiaries of the covenants had indicated that a charge of £8,000-£10,000 per unit might be acceptable for agreeing to the development.

Point of dispute: The amount of the purchase price payable. ACEG contended that it should be the full £862,000 because at the completion date no sum was required to release the covenants in the absence of planning permission or an agreement with the covenantees. CH argued that a deduction should be made representing the best estimate available of the cost of obtaining a release subject to adjustment once a more definite figure became available. Both these interpretations were rejected by the High Court.

Held: Neither party's interpretation of the agreement produced a satisfactory solution. The agreement was not well drafted but if it could be interpreted in a way that made it enforceable and effective the court would prefer that interpretation and one that produced a result that the parties were likely to have agreed rather than one that was improbable. It was improbable that the parties would have agreed there should be no discount for the costs of obtaining the release of the restrictive covenants. The meaning of "development" was changeable, accommodating the possibility of change during the currency of the agreement. The court would imply a term as a matter of business efficacy that the buyer should act reasonably in formulating its proposal. The discount at the date of completion would be an amount that was reasonably required in order to obtain a release or variation of the applicable restrictive covenants to enable the development to take place.

General

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CABE Publication

Skills to grow — Seven priorities to improve green space skills

An acute shortage of people with the correct skills to plan, design, manage and maintain England's parks and green spaces has been identified, but the fragmented nature of the sector makes it very difficult to collect comprehensive and robust data for research purposes and to co-ordinate a response to the problem. Over the last few years there has been a collaborative effort by a number of organisations, co-ordinated by CABE and collectively known as the *Skills to grow* delivery board, to deliver a plan for improvement. This strategy sets out what is currently known about the skills and data shortages across the sector, identifies ways of addressing the problems in the short term and makes some proposals for longer term initiatives.
http://www.cabe.org.uk/files/skills-to-grow_0.pdf

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CABE Publication

Building excellence in the arts — A guide for clients

This guide has been produced by CABE and Arts Council England as a practical example of the way in which artists and arts organisations can be supported in the development of inspiring and sustainable buildings for the future.
http://www.cabe.org.uk/files/building-excellence-in-the-arts.pdf

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British Property Federation (BPF) and Local Government Association (LGA) Briefing note

The Roanne case and EU procurement: a barrier to regeneration

The BPF and LGA have issued this briefing in order to draw attention to a situation which they consider to be a serious threat to regeneration schemes. Before the 2007 European Court of Justice decision in *Jean Auroux and Others v Commune de Roanne* it was generally understood that the normal EU procurement requirements do not apply to public/private development partnerships or to development that is regulated by town planning law. However this case has cast doubt on whether development agreements entered into by the public sector without a formal financial tendering process are lawful. The BPF and LGA are calling on the Government to issue guidance on the circumstances in which a partnership between a local authority and a developer might require a tendering process through the Official Journal of the European Union (OJEU).
http://www.bpf.org.uk/topics/document/23609/bpf-and-lga-briefing-note-roanne-case-and-eu-procurement

30

CLG Publication — responses to consultation

Transforming places; changing lives: a framework for regeneration — summary of consultation responses

As part of the review of sub-national economic development and regeneration the Department for Communities and Local Government made a commitment to deliver a new regeneration framework that would provide a clearer link between neighbourhood renewal and wider regeneration and economic intervention. On 17.07.08 a 15-week consultation commenced with the Department launching a package of proposals for a new framework for regeneration in England, entitled *Transforming Places; Changing Lives: A Framework for Regeneration*. Responses were requested by 31.10.08 and this document contains a summary of the responses received.
http://www.communities.gov.uk/documents/citiesandregions/pdf/1189506.pdf

Gerald Eve's UK office network

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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

SCOTLAND

Planning

01

Planning Circular 2/09: The Town and Country Planning (General Permitted Development) (Domestic Microgeneration) (Scotland) Amendment Order 2009

This Circular explains the provisions of this Order, which came into force on 12.03.09. (see Evebrief Volume 31(03) — item 01 of Regional Supplement). The aim of the amendments to the GDPO is to enable more microgeneration equipment to be installed on existing domestic buildings without the need to apply for planning permission. The Order seeks to strike a balance between the wider environmental, social and economic benefits of microgeneration and managing adverse impacts on neighbours and amenity generally (eg noise and visual impact) by using thresholds and conditions.
http://www.scotland.gov.uk/Resource/Doc/265038/0079359.pdf

02

Planning Circular

Planning Circular 3 2009 — Notification of Planning Applications

The Annex to this Circular contains the Town and Country Planning (Notification of Applications) (Scotland) Direction 2009 which replaces the 2007 Notification Direction and subsequent amendments. The circular provides guidance on those circumstances in which planning authorities must, as a matter of routine, notify Scottish Ministers where they propose to grant planning permission. It updates and replaces the guidance previously given in SEDD Circular 5/2007 which is now withdrawn.
http://www.scotland.gov.uk/Resource/Doc/265803/0079583.pdf

03

Consultation Paper

Scottish Planning Policy (SPP) Consultative Draft
Deadline for Responses: 24.06.09

National planning policy for Scotland was first published in the 1970s and is currently expressed through a series of Scottish Planning Policies (SPPs) and National Planning Policy Guidelines (NPPGs). The Scottish government is now rationalising the SPP and NPPG series into a single statement of national planning policy. The first part of the consolidated Scottish Planning Policy was published in October 2008 and covers the core principles, aspirations and expectations for the planning system. This consultation is concerned with the final part of the SPP, which will cover community engagement, sustainable development, subject policies currently expressed through 17 separate SPPs and NPPGs, and the outcomes of the planning process.
http://www.scotland.gov.uk/Resource/Doc/266838/0079875.pdf

Housing

04

Research Report

Bringing Private Sector Empty Houses into Use: Research Findings

This study forms part of a suite of research being undertaken by the Scottish Government into the private rented sector. It follows on from the publication of its consultation paper, *Firm Foundations: The Future of Housing* in Scotland in 2007 which identified the importance of the private rented sector in helping local authorities and the Government to meet the housing needs of a range of households in urban and rural areas.
http://www.scotland.gov.uk/Resource/Doc/264862/0079319.pdf

WALES

Rating

05

Statutory Instrument

SI 2009/461 (W.48) The Non-Domestic Rating (Collection and Enforcement) (Local Lists) (Amendment) (Wales) Regulations 2009

These Regulations, which came into force on 31.03.09, amend the 1989 Regulations to make special provision in relation to the collection of certain backdated liability to rates. A new Schedule 1A is inserted into the 1989 Regulations to provide that where a ratepayer is subject to backdated liability that has not already been discharged the billing authority and the ratepayer can agree to reschedule the liability that accrued in the period between the effective date of the amendment to the rating list and the date the amendment was actually made, so that it is payable over a period not exceeding eight years. Various criteria have to be satisfied before a ratepayer can take advantage of these arrangements, in particular that the arrangements will only apply where a backdated liability arises as a result of a change to a rating list which is made on or before 31.03.10 and where the demand notice in respect of the liability was issued in the financial year beginning on 01.04.07.
http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi_20090461_mi.pdf