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evebrief

Editorial



At item 07, we report on the consultation document regarding changes to the detailed treatment of minor amendments to planning permissions. These changes, likely to come in this October will be of interest to developers.

There will be a new procedure for minor material changes to permissions. Under ss73 of the 1990 Planning Act, one will be able to apply to modify conditions which control the development ie "the development must be in strict accordance with the drawings hereby permitted", to enable amendments to be approved. This is subject to the scale and nature of the proposed amendment not being substantially different to the approved scheme (and acceptable in general planning terms).

The provisions related to non-material changes were included in the 2008 Planning Act (section 96A). There will be a procedure for formal confirmation of the amendments being "non-material". This will be particularly helpful when signing off completed developments and related transactions.

Note there is no definition of "non material" or "substantially differences", it is left to local authority discretion. Let's hope that the operation of this discretion is consistent and clear!

Peter Dines

Landlord & Tenant

01

High Court

Validity of break clause

* PRUDENTIAL ASSURANCE CO LTD V EXEL UK LTD
(2009) PLSCS 200 — Decision given 25.06.09

Facts: In 2002 the claimant PA granted a lease of a warehouse to E and another defendant company. The second company was dormant and a wholly-owned subsidiary of E. The defendants were entitled under the terms of the lease to determine it in March 2007 provided that they gave PA not less than nine months written notice. The notice which E's solicitor served on PA in June 2006 purporting to exercise the break notice referred only to E and not to the second defendant company.

Point of dispute: Whether the notice was valid. PA argued that it was not as it referred only to the first defendant, E. The court had to decide whether: (i) the solicitor had been authorised to serve the notice on behalf of either defendant ("the authority issue"); (ii) the notice was effective under the break clause ("the construction issue"); and (iii) PA was estopped from denying the validity of the notice ("the estoppel issue").

Held: Judgment was given in favour of the claimant, PA.

- (i) The solicitor had authority to serve the break notice on behalf of both defendants.
- (ii) To be effective a break notice served by or on behalf of a tenant had to communicate clearly and unambiguously to the landlord that the party entitled to exercise the break provision was determining the lease on the permitted date. Break notices had to be construed objectively — what had to be considered was how a reasonable person would have understood it. A mistake in a notice might not invalidate it, provided that its meaning was clear. Each case was different and the outcome would turn on the terms of the particular break clause, the particular notice and the particular contextual factors. In this case the break clause had not been validly exercised by the notice since a reasonable recipient would not clearly and unambiguously have understood it to be an effective notice. Its terms would generate doubt as to whether it had been served on behalf of the second defendant since it stated nothing to this effect.
- (iii) PA was not estopped from disputing the validity of the notice. There was no evidence of any common or underlying assumption between the parties and their solicitors that only E, the first defendant, was the tenant and could exercise the break clause.

02

CLG Research

Monitoring the 2007 Code for Leasing Business Premises

This research is concerned with monitoring the dissemination, awareness and use of the 2007 Code for Leasing Business Premises. In particular, it aimed to identify:

- how the Code has been disseminated into the market as demonstrated by awareness of it among landlords and tenants and their advisors;
- the extent to which the Code is being used in negotiations;
- sources of advice to tenants on the Code; and
- the perceptions of landlords, tenants and their advisors on the impact of the Code on leasing

Within these objectives the research aimed to distinguish between large and small tenants, and also between major and smaller landlords. The evidence indicates that awareness of the 2007 Code is no better than it was of the 2002 Code, and in the case of smaller business tenants and landlords awareness may be even lower. Many professional advisors are not well informed about the Code and it is rarely specifically referred to in negotiations or used as a tool in the negotiation of new leases. There is, however, some evidence to suggest that the Code informs the leases of major landlords and provides the parameters for tenants' amendments. <http://www.communities.gov.uk/documents/citiesandregions/pdf/1273120.pdf>

Planning

03

Court of Appeal

Apparent bias

* ORTONA LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) PLSCS 195 — Decision given 24.06.09

Facts: O was refused planning permission to redevelop a former bus station site. The inspector who heard O's appeal against that decision, who had previously worked for the local council for many years, dismissed it on the grounds that (i) the loss of the bus station would in the absence of adequate alternative facilities be contrary to structure and local plan policies on transport; and (ii) O had failed to show that there was no realistic prospect that the use of the station might resume in the future. The inspector's decision was overturned by a judge on O's application to the court under s288 of the Town and Country Planning Act 1990, the judge finding that (i) the inspector had made no valid finding about the prospects of a resumption of use of the bus station; and (ii) his decision was vitiated on the grounds of apparent bias in the light of his former employment with the local council.

Point of dispute: Whether the Sec of State's appeal should be allowed against the decision of the judge in the court below.

Held: The appeal was dismissed. (i) The inspector had not erred on the issue of the resumption of bus station use. (ii) The fact that the inspector had worked for the council for many years would not be sufficient to give rise to an inference of apparent bias, but because he had been responsible for formulating transport policies and had been actively involved in their implementation and practical application at a local level apparent bias did arise. In these circumstances a fair minded observer would have concluded that the inspector had a real possibility of favouring, albeit unconsciously, the policies on which he had worked.

04

Administrative Court

Environmental Impact Assessment

* R (ON THE APPLICATION OF CATT) V BRIGHTON AND HOVE CITY COUNCIL
(2009) PLSCS 196 — Decision given 22.06.09

Facts: C lived near to a football stadium which had been used by a football club under a series of temporary planning permissions. Its use of the stadium was intended only to be a short term measure until the club could find a permanent home. In 2005 it applied to BHCC for a further permission for continued use of the stadium until 2008, including additional seating, new changing and stewards' rooms, new turnstiles and relocating a hospitality unit. BHCC's screening opinion stated that no environmental impact assessment (EIA) was required for the development as it was unlikely to have significant environmental effects. Following C's challenge to BHCC's decision to grant planning permission the Court of Appeal found that BHCC were correct to find that the development would not detrimentally affect the environment and that an EIA was not required.

Point of dispute: Whether C's application for judicial review of BHCC's decision to grant planning permission for continued use of the stadium, including the construction of one staff building, should be allowed. C argued that BHCC should have carried out an EIA and that they had failed to take into account the cumulative effect of the development. C asked the court to make a reference to the European Court of Justice (ECJ) to determine preliminary issues relating to the extent to which a local authority should consider the environmental effects of a proposed development and the mitigation measures that might be taken into account for the purposes of Council Directive 85/337 on the EIA of public and private projects.

Held: C's application was dismissed. It was only appropriate to make a reference to the ECJ if this was necessary to enable the court to give a judgment in the proceedings before it, which was not the issue in this case. The question BHCC had to answer when deciding whether a screening opinion was necessary was whether the club's continued use of the stadium for a further three years would have significant effects on the environment by virtue of its nature, site or location. None of these factors had changed since the Court of Appeal's decision, by which BHCC were bound. Neither the High Court, the Court of Appeal nor the House of Lords had found it necessary to refer the case to the ECJ, nor had any of the parties involved.

05

Administrative Court

Certificate of lawful use for use of airfield for general aviation purposes

* R (ON THE APPLICATION OF NORTH WILTSHIRE DISTRICT COUNCIL) V COTSWOLD DISTRICT COUNCIL
(2009) PLSCS 194 — Decision given 24.06.09

Facts: Following complaints from local residents CDC issued an enforcement notice in respect of the use of an airfield, alleging that it had materially changed from maintenance, repair and storage of aircraft to general flying activities. The interested parties, who ran the airfield, then applied for and were granted a certificate of lawfulness of existing use on the grounds that the site had been used for general aviation purposes for at least ten years prior to the application. The certificate stated that the primary use of the land was for general aviation purposes.

Point of dispute: Whether NWDC's application for judicial review of the decision to issue the certificate would be allowed. NWDC argued that the term "general aviation purposes" was too general, and that the decision was illegal as it had been taken without regard to a material consideration, namely the need for precise identification contained in Circular 10/98.

Held: The application was dismissed. The term "general aviation purposes" was well recognised and understood within the aviation industry and it was open to CDC to issue the certificate so long as at the time of the application of the described use it was satisfied as to its lawfulness. The certificate was not rendered unlawful merely because it had referred to a map of the entirety of the land on which the site was situated. The brevity of the reasons given for issuing the certificate had not prejudiced NWDC and CDC's conclusion that "having regard to the evidence the defendants were satisfied that the airfield had been in continuous use in excess of ten years" was sufficient.

06

Town and Country Planning Association Policy Advice Note

Inland Waterways

The purpose of this PAN is to:

- identify the different types of waterways that form the inland waterway network;
- promote the contribution that inland waterways make to economic, social and environmental agendas;
- demonstrate how inland waterways contribute to the Government's key policy objectives;
- highlight the public benefits generated by waterways;
- identify key planning policy challenges and issues that need to be tackled in order to fully unlock the economic, social and environmental benefits of inland waterways;
- promote the need for a supportive planning policy framework for inland waterways at all levels; and
- make recommendations to policy makers and planners on how the planning system can help to secure the long term future, and support the development, regeneration and improvement of the inland waterways network

<http://www.tcpa.org.uk/data/files/waterways.pdf>

07

CLG Consultation

Greater flexibility for planning permissions: Consultation

Deadline for Responses: 13.08.09

The aim of this consultation paper is to consider whether a mechanism should be introduced for extending time limits for implementation of existing planning permissions, and to consider how to implement the procedure for making non-material amendments under s190 of the Planning Act 2008. Possible changes to the procedure for applications for minor material amendments under s73 of the Town and Country Planning Act 1990 are also considered.

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1259498.pdf>

08

CLG Publication

Initial review of the implementation of Planning Policy Statement 25: Development and Flood Risk

PPS 25 was published in December to ensure that flood risk is taken into account at all stages in the planning process. In his inquiry into the 2007 floods Sir Michael Pitt recommended that there should be a presumption against building in high flood risk areas in accordance with PPS 25, and this report considers the progress that has been made in implementing the PPS 25 policy package. The review comprises the following elements:

- the annual High Level Target 5 (HLT5) Development and Flood Risk report produced by the Environment Agency on the impact of the Agency's technical advice to planning authorities on flood risk for the period April 2007 — March 2008;
- research jointly managed by Defra and CLG on the preparation of strategic flood risk assessments by local planning authorities and results from a survey of local flood risk management conducted at the end of last year by the Local Government Association and Defra;
- assessment by CLG and regional government offices of the application of the Flooding Direction; and
- assessment of the implementation of PPS 25 policies in emerging local development frameworks (LDFs)

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/initialreviewpps25.pdf>

09

CLG Letter

Letter to Chief Planning Officers: UK Climate Projections 2009

This letter advises planning officers of the publication of the UK Climate Projections 2009 which describe how the UK's climate might change and the implications of this for the planning process. The projections are provided as aggregated results for administrative regions and river catchments and they show the climate for one of seven 30-year time slices, moving forwards in time with an increment of ten years (ie 2010-2039, 2020-2049 etc until 2070-2099). Within each 30-year time period projections are given for changes in monthly, seasonal and annual averages (eg average monthly rainfall) as well as future emissions levels. The letter also contains advice on how to handle this data. The projections indicate that the South East will see average summer temperatures rise by between 2 and 6 degrees Celsius by the 2080s and a 22% decrease in average summer rainfall, while the North West will see average winter rainfall rise by 16%. With high greenhouse gas emissions temperatures are, in fact, likely to rise by even more than this.

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1258280.pdf>

10

English Heritage News Release

English Heritage launches Campaign to save Britain's Neighbourhood Heritage

English Heritage's latest edition of its *Heritage at Risk* register reveals that one in seven of England's conservation areas is at risk of neglect, decay or damaging change. The main threats are perceived to be as follows:

- plastic windows and doors;
- poorly maintained roads and pavements;
- street clutter;
- loss of front garden walls, fences and hedges;
- unsightly satellite dishes;
- the effects of traffic calming or traffic management;
- alterations to fronts, roofs and chimneys of buildings;
- unsympathetic extensions;
- impact of advertisements; and
- neglected green spaces

English Heritage is now launching a *Conservation Areas at Risk* campaign whose aim is to encourage residents, local groups and councils to work together to improve these damaged conservation areas. In particular, it calls for local councils to make wider use of Article 4 directions to protect original details such as windows, doors and front gardens.

http://www.english-heritage.org.uk/upload/pdf/caar_nat_release.pdf?1245917919

11

CLG Statistical Release

Planning Applications: March Quarter 2009 (England)

- The number of planning applications received by district level planning authorities decreased by 30% when compared with the March 2008 quarter.
- District level planning authorities also saw a decrease of 29% in the number of applications decided when compared with the same quarter a year ago.
- Decisions on planning applications for residential developments decreased by 36% in the March quarter 2009 compared with the same quarter in 2008. Decisions on major residential developments (ten or more dwellings) fell by 46% over the same period.
- The percentage of major applications determined within the 13-week target was 71% compared with 72% in March 2008.
- Authorities that undertake county level planning activity determined 393 applications, an increase of 15% when compared with the same quarter a year ago.

<http://www.communities.gov.uk/documents/statistics/pdf/1265894.pdf>

12

Royal Town Planning Institute (RTPI) Good Practice Note

Delivering Healthy Communities

Planners aim to create safe, healthy and attractive places to live and in order to deliver sustainable development that effectively meets the needs of all sections of the community, the health of a community must be considered at all stages of the planning process. Planning professionals have for a long time worked with environmental health professionals to reduce and mitigate the impacts of activities that negatively affect human health. Whilst in the past this has focused on avoidance of pollution or danger, more recently attention has turned to the provision of infrastructure and services which have a positive impact on human health, such as quality open space. Going forward, it is likely that there will be an increasing funding gap between the demand for health services and the health sector's ability to deliver these services, and to address this gap requires long term and strategic action, reducing the demand for health services by promoting a healthier population.

http://www.rtpi.org.uk/download/6443/GPN5_final.pdf

13

Campaign for the Protection of Rural England (CPRE) Report

Brownfield Market Signals

This report focuses on the determinants of housing development viability at local level and explores how the supply of greenfield land with planning permission for residential development affects the economics of brownfield redevelopment. The research found that brownfield viability is worst affected in areas which have significantly more greenfield than brownfield land supply.

<http://www.cpre.org.uk/news/view/614>

Rating

14

Act of Parliament

Business Rate Supplements Act 2009 c7

This Act which received Royal Assent on 02.07.09 gives local authorities the power to levy a local supplement to the business rate and retain the proceeds for economic development. The legislation follows public debate on reform to business rates in England and the conclusions of the Lyons inquiry into local government. In 2007 ministers published the business rates supplement white paper and the review of sub-national economic development and regeneration alongside the comprehensive spending review. Local authorities can levy the first supplements by April 2010. Authorities will be able to set a supplement on the current national business rate of up to 2p per pound of rateable value. The Act makes provision to exempt business properties with a rateable value of £50,000 or less.

http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga_20090007_en.pdf

Real Property

15

Court of Appeal

Trespass — oil pipelines beneath defendant's property — assessment of damages

** BOCARDO SA V STAR ENERGY UK ONSHORE LTD
(2009) PLSCS 182 — Decision given 15.06.09

Facts: Part of SE's oilfield in Surrey extended beneath an estate owned by B. Pipelines laid from the well head close to the estate's boundary extended 800 feet below sea level beneath the sub strata of the estate, but B had never given permission for these pipelines to be laid and no wayleave had been granted.

Point of dispute: Whether SE's appeal should be allowed against the ruling of the judge in the court below that SE had no right to access B's land for the purposes of extracting the oil and his award of damages based on 9% of the value of the income SE received from the well from 2000 until such time as the oilfield was exhausted. SE argued that the drilling of the wells did not amount to a trespass as they were so deep and thus too far removed from B's ownership of the estate and the soil beneath it and that its pipeline did not affect B's use and enjoyment of the land.

Held: The appeal was allowed in part. (i) The registered freeholder of the surface of the land also owns the strata beneath the surface, including minerals, although any oil belonged to the Crown. (ii) Drilling for the pipelines was an intrusion into the strata and an interference with B's possessory rights of B and consequently a trespass. (iii) The trespass was purely technical since it did not interfere with B's use and enjoyment of the land. (iv) Damages would be awarded for SE's past trespass and in lieu of an injunction of future trespass. They would be assessed by considering how much B could have obtained under s8(2) of the Mines (Working Facilities and Support) Act 1966 as compensation for the grant of an ancillary right to access the strata within its land to drill and lay the pipelines and to extract petroleum from the reservoir within that land. The sum would reflect the price that a reasonable person would be prepared to pay for the right, following hypothetical negotiations that took place before the trespass occurred. The question under s8(2) was what would constitute fair and reasonable compensation or consideration between a willing grantor and a willing grantee for the right to drill three pipelines, or, what was the value that B had lost by granting the right to drill to SE? The other factor to be taken into account was SE's special position as licensee of the right to drill for and extract petroleum from this reservoir. A court would have assessed compensation for the ancillary right at £82.50, but taking into account the hypothetical negotiations that would have taken place SE would have been prepared to pay up to £1,000 in order to avoid dispute and delay. Damages would be awarded in this sum.

16

High Court

Profit a prendre

* POLO WOODS FOUNDATION V SHELTON-AGAR
(2009) PLSCS 190 — Decision given 17.06.09

Facts: PWF owned a farm on which it reared ponies. For many years the ponies had grazed on a piece of land called The Triangle adjacent to land owned by SA, which PWF thought that it owned. SA became aware that it belonged to a third party and bought it.

Point of dispute: Whether PWF's appeal should be allowed against the finding of the adjudicator, on PWF's application to register a profit a prendre right to graze up to ten ponies on The Triangle between the hours of 5.30pm and 6am from March to October each year, that PWF had failed to establish such a right. The adjudicator found that the benefit to the dominant land was too slight to establish a profit in its favour. PWF argued that the adjudicator had incorrectly applied the test of "real benefit to the estate" when considering whether an easement or a profit a prendre subsisted in law since there was no authority for this test. The correct test was one of "connection": whether a right could be the subject matter of a grant was a question of the nature or quality of the right and not the degree of benefit.

Held: PWF's appeal was allowed. Four conditions had to be satisfied for a valid easement or profit a prendre to arise: (i) there had to be a dominant and servient tenement; (ii) the easement or profit had to accommodate the dominant tenement; (iii) the dominant and servient tenements could not be owned or occupied by the same party; and (iv) the easement or profit had to be capable of forming the subject matter of a grant. The word "accommodate" meant that the profit had to be reasonably necessary for the normal enjoyment of the dominant tenement, but this only meant that the profit had to be connected with the normal enjoyment of the property. It was in the nature of a profit that something would be taken from the land. It was wrong to say that because a farm could operate successfully without the profit of grazing the profit did not exist. The adjudicator had been wrong to apply the single test of benefit to the land, she should have distinguished between accommodation and the needs of the estate and she had misinterpreted the meaning of accommodation. The matter would be remitted to the adjudicator for further determination.

Contract

17

Court of Appeal

Payment of commission on introduction of property

* ANANHALL ADVISORY & CONSULTANCY SERVICES LTD V ADLER
(2009) PLSCS 186 — Decision given 18.06.09

Facts: The respondent offered to purchase an office block for £3.6m. Several floors of the property were let to the same tenant under eight leases for terms expiring in 2017, subject to tenant's break clauses. When the respondent found that he was unable to fund the purchase the appellant, an experienced commercial property dealer, agreed to take over the contract. The parties entered into an introductory agreement setting out the terms of the respondent's remuneration for the deal. He would be paid 1% of the purchase price in the event of a completed transaction, together with a further £75,000 if the respondent succeeded in negotiating a waiver of the break clauses. That sum was also payable if, prior to achieving a satisfactory outcome, the appellant withdrew its instructions to the respondent to negotiate the waivers. Contracts were exchanged for £3.6m and the respondent secured an offer by the tenant to waive four of the break clauses. The appellant did not consider this to be satisfactory and refused to complete. The vendor forfeited the deposit and refused to complete.

Point of dispute: Whether the appellant's appeal should be allowed against the decision of the judge at first instance to uphold a claim by the respondent for £36,000 on the grounds that the appellant had breached an implied term that it would not willingly impede the sale so as to prevent payment of the commission. He also found that the appellant's conduct amounted to the "pulling" of its instructions and ordered it to pay a further £75,000.

Held: The appeal was allowed. The introductory agreement did not contain an implied term whereby the appellant would not willingly impede the sale so as to prevent the respondent from earning commission. The appellant's promise of payment was expressly conditional on the appellant or his company completing the transaction, but it did not contain any assurance that this would necessarily happen.

Housing

18

CLG Guidance

The Home Information Pack (No 2) Regulations 2007 (as amended) Procedural Guidance

This guidance on The Home Information Pack (No 2) Regulations 2007, as amended by the 2008 and 2009 Regulations is aimed at property professionals who are involved with the compilation of home information packs.

<http://www.communities.gov.uk/documents/housing/pdf/hipregsguidance.pdf>

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RICS Publication

RICS Housing Market Survey May 2009

This survey of the UK housing market provides evidence that activity levels are continuing to pick up, albeit from historic lows. New buyer enquiries have now increased for seven months in a row and there are definite signs that the pickup in enquiries is translating into increased numbers of transactions. However, the number of new instructions to surveyors to sell properties has continued to fall and it is thought that the change in the rules governing Home Information Packs that were introduced in April may have contributed to this situation.

http://www.rics.org/NR/rdonlyres/F0CA11E6-25FC-42D9-9DF1-0834976C69E8/0/hms_0509.pdf

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Homes and Communities Agency (HCA) Publication

Monthly Housing Market Bulletin — May and June 2009

These bulletins, aimed at HCA staff, provide information on housing market trends, the economy and the housebuilders' industry. It includes information on house price changes from a number of different sources, eg Nationwide, RICS, Halifax, the Land Registry, CLG, Rightmove and Hometrack, mortgage data, housing starts and completions, and housebuilding.

http://www.homesandcommunities.co.uk/public/documents/Monthly_Housing_Bulletin_May.pdf

http://www.homesandcommunities.co.uk/public/documents/Housing_Market_Bulletin_June_2009.pdf

Construction

21

CLG Consultation

Proposed Changes to Part L and Part F of the Building Regulations: A Consultation Paper

Deadline for Responses: 17.09.09

This consultation sets out proposed changes to Part L (Conservation of Fuel and Power) and Part F (Means of Ventilation) of the Building Regulations that are planned to come into force in 2010. It also proposes a range of measures, including a strategy for training and dissemination, designed to further improve the levels of compliance and performance in buildings.

- New homes are to be net zero carbon from 2016. In order to achieve this target energy efficiency standards for new homes are to be improved by 25% in 2010 and by 44% in 2013 relative to current 2006 standards.
- In the 2008 Budget it was announced that all new non-domestic buildings should be zero carbon by 2019. Improvements are to be phased in commencing with 25% improvement in 2010.
- The energy efficiency of existing buildings is to be improved and the consultation therefore proposes certain changes in requirements when building work is carried out on existing buildings.
- With improvements in energy efficiency standards buildings will become more airtight. In order to ensure that an adequate means of ventilation is provided changes to Part F of the Building Regulations will have to be introduced.

<http://www.communities.gov.uk/publications/planningandbuilding/partlf2010consultation>

22

1. **Circular 06/2009: The Building Regulations and the Building (Approved Inspectors etc) Regulations 2000 — Building Regulations 2000, Schedule 1, Part L — Approved Documents L1A, L1B, L2A, L2B — Multi-foil insulation**
2. **CLG letter to local councils concerning the above**

This Circular is addressed to all building control bodies and other interested parties about the results of the consultation published on 05.06.08 concerning proposed new editions of the Approved Documents L, which contain practical guidance on compliance with the energy efficiency requirements of the Building Regulations. None of the consultation responses contained any new evidence that would cause the Government to change its 2006 approach to the measurement of the thermal performance of multi-foil insulation. CLG Circular 07/2007 has therefore been withdrawn, along with all previous advice on multi-foil insulation products.

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/circular062009.pdf>

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/divlettermultifoil.pdf>

Environment

23

Environment Agency Press Release

Homes at risk from flood risk

Two reports recently published by the Environment Agency (EA) show that:

- One in six homes in England is currently at risk of flooding from rivers, the sea, or overflowing surface water from overflowing drains.
- Investment in the building and maintaining of flood defences will need to almost double to £1bn a year by 2035.
- More than five million people currently live and work in 2.4 million properties at risk from rivers or the sea, 490,000 of which have a significant chance of flooding. The agency warns that if investment continues at current levels this figure will rise to 840,000.
- An additional 2.8 million properties are currently at risk of flooding from surface water. EA estimates that an additional £150m a year by 2035 will be required to help mitigate this risk.
- 55% of water treatment works and pumping stations, 14% of electricity infrastructure, 2,358 schools and 2,363 doctors' surgeries in England are situated in flood risk areas, as are 4,000 km of roads and 2,500 km of railway.

<http://www.environment-agency.gov.uk/news/108705.aspx?page=2&month=6&year=2009§or=Flood>

Minerals

24

CLG Guidance

National and regional guidelines for aggregates provision in England 2005-20

This note sets out revised national and regional guidelines for aggregates provision in England. It also indicates how the guidelines should be taken into account in the planning process and outlines arrangements for future monitoring and review. From the date of its issue it is a material planning consideration. The new guidelines replace those published in June 2003 and take account of a revised target of 65 million tonnes per annum by 2015 for alternative materials.

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/aggregatesprovision2020.pdf>

Human Rights

25

Court of Appeal

Possession proceedings against trespassers — whether appellants had defence based on Article 8 of the European Convention on Human Rights

* CENTRAL BEDFORDSHIRE COUNCIL V TAYLOR
(2009) PLSCS 191 — Decision given 23.06.09

Facts: T occupied premises owned by CBC under a lease which expired in 2006. CBC served notice to quit on T and subsequently brought possession proceedings. It was accepted that T had become a trespasser and an order for possession was made. T wanted to raise a defence that even if he had no further legal rights, CBC's claim for possession was an unjustified interference with his rights under Article 8 of the European Convention on Human Rights (ECHR). T accepted that on the basis of the law following the judgment in *Kay v Lambeth City Council* he had no defence under Article 8, but he hoped that the then outstanding decision of the House of Lords in *Doherty v Birmingham City Council* might support his argument that in exceptional circumstances CBC might be required to take into account T's personal circumstances before seeking possession.

Point of dispute: Whether: (i) it was arguable that CBC should be obliged to consider T's personal circumstances; and (ii) in judging the lawfulness of CBC's decision the test was the strict *Wednesbury* rationality test or something wider.

Held: The appeal was dismissed. *Doherty* had extended the scope of judicial review beyond the strict rationality test, although not so far as a straightforward challenge by reference to the ECHR. A public authority should take account of the personal circumstances of the occupier of which they were aware, but that did not mean it would ever be unreasonable to seek possession against trespassers in circumstances similar to those in *Kay*. It would be unreasonable not to allow a period of time for the possession order to come into effect, but the courts had a discretion to suspend possession orders for a short period. This case would be remitted to the county court.

General

26

Defra Consultation

Consultation on Coastal Change Policy

Deadline for Responses: 25.09.09

This consultation is concerned with ways in which coastal communities can successfully adapt to the impacts of coastal change and the Government's role in supporting this. It is being launched at the same time as a pathfinder competition for local authorities to explore approaches to adaptation to coastal change by coastal communities.

<http://www.defra.gov.uk/corporate/consult/coastal-change/consultation-doc.pdf>

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CLG Consultation Paper

Urban Development Corporations' Quinquennial Review

Deadline for Responses: 18.09.09

The Government established three Urban Development Corporations (UDCs) in the London and Thurrock parts of the Thames Gateway and in the West Northamptonshire part of the Milton Keynes South Midlands Growth Area in 2004-05. It committed itself to reviewing the UDCs after five years. This Quinquennial Review, of which this consultation forms part, fulfils that commitment.

The review considers:

- whether the UDCs have fulfilled the rationale for establishing them, how well they have performed and their progress against set targets;
- whether local or regional changes affect the continuing need for a UDC, or the extent of its powers;
- the impact of national changes such as the establishment of the Homes and Communities Agency;
- efficiency; and
- whether there are any obstacles to more effective operation of UDCs

<http://www.communities.gov.uk/documents/thamesgateway/pdf/1263137.pdf>

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All Party Urban Development Group Publication

Regeneration and the recession — Unlocking the money

The All Party Urban Development Group is a cross party parliamentary body of MPs and Peers committed to progressing urban renewal and sustainable development in the UK. The recession has brought to an end the property investment boom which has helped to revitalise many city centres and run down urban areas in the UK over the last ten years. The boom was fuelled by cheap credit, a bubble in the property market and large increases in public spending. Property development and regeneration over the next ten years will be very different and cities will have to play a greater role in their regeneration. This report argues that to do this there will need to be greater devolution of decision making and financial powers so that cities have the flexibility to raise, pool and decide how to spend resources locally. This report highlights the need for cities to have additional financial tools and revenue raising options and argues that accelerated development zones (ADZs) — a UK variant on tax increment financing (TIF) which funds infrastructure from future increases in tax revenue caused by new development — should be introduced as a key step towards achieving this objective.

http://0101.netclime.net/1_5/0a5/083/1ae/APUDG6%20-%20Regeneration%20and%20the%20recession%20-%20FINAL.pdf

Gerald Eve's UK office network

Gerald Eve LLP is an independent firm of chartered surveyors and property consultants, employing more than 330 staff across the UK.

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

Useful web links

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

Abbreviations

The following abbreviations are used in evebrief:

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

The star system

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

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

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

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Parliamentary

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evebrief

SCOTLAND

Planning

01

Consultation on draft Bill

The Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill

Deadline for Responses: 14.08.09

This is a technical amending Bill that will introduce new provisions and remove barriers to the use of existing powers in order to enhance the ability of the regulatory and planning authorities to manage Scotland's historic environment in a sustainable way for the enjoyment and benefit of future generations.

<http://www.historic-scotland.gov.uk/amlb-bill.pdf>

02

Consultation Paper

Consultation on Implementation of the Removal of the Duty of Planning Authorities to Notify Historic Scotland on Certain Types of Listed Building Consent Application

Deadline for Responses: 25.09.09

This consultation on the implementation of the removal of the duty of planning authorities to notify Historic Scotland on certain types of listed building consent application sets out how the pilot was conceived, administered and reviewed. It invites views on the pilot and its findings and in what form it might be offered to all planning authorities in the future.

<http://www.historic-scotland.gov.uk/consultation-on-the-implementation-of-the-removal-of-the-duty-to-notify.pdf>

03

National Planning Framework For Scotland 2

Scottish Government Publication

The National Planning Framework (NPF) is the strategy for the long term development of Scotland's towns, cities and countryside. It is concerned with how Scotland should develop over the next 20 to 25 years and the NPF identifies key strategic infrastructure needs to ensure that each part of the country can develop to its full potential. It guides Scotland's development to 2030, setting out strategic development priorities to support the Scottish Government's central purpose of sustainable economic growth. The Framework will play a key role in co-ordinating policies with a spatial dimension and aligning strategic investment priorities. It is concerned with Scotland in its wider context and addresses the major challenges of global competition, climate change and resource depletion.

<http://www.scotland.gov.uk/Resource/Doc/277169/0083228.pdf>

<http://www.scotland.gov.uk/Resource/Doc/277181/0083229.pdf>

04

Statutory Instrument

SI 2009/256 The Planning etc (Scotland) Act 2006 (Consequential Amendments) Order 2009

The provisions of this Order come into force on 2 and 3 August 2009. It makes supplementary, incidental or consequential changes to the Town and Country Planning (Scotland) Act 1997, the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, the Licensing (Scotland) Act 2005 and the Planning etc (Scotland) Act 2006 ("the 2006 Act") for the purposes of, in consequence of, or in order to give full effect to the provisions of the 2006 Act.

http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090256_en.pdf

05

Statutory Instrument

SSI 2009/257 The Town and Country Planning (Charges for Publication of Notices) (Scotland) Regulations 2009

These regulations, which come into force on 03.08.09, make provision for the recovery by the planning authority of the cost of publishing a notice in a newspaper in accordance with Regulation 20(1) of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008.

http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090257_en.pdf

06

Statutory Instrument

SSI 2009/259 The Lands Tribunal for Scotland Amendment Rules 2009

These Rules, which came into force on 01.07.09, amend the 2003 Rules. The changes make provision in relation to applications to the Lands Tribunal for Scotland for the variation, discharge or preservation of rules of a development management scheme made under the provisions of the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009.

http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090259_en.pdf

07

Statutory Instrument

SSI 2009/260 The Lands Tribunal for Scotland Amendment (Fees) Rules 2009

The Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 introduces new procedures for application to the Lands Tribunal as respects the variation or discharge of rules of a development management scheme. These rules, which came into force on 01.07.09, set new fees in respect of applications and procedure at the Lands Tribunal for such applications.

http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090260_en.pdf

NORTHERN IRELAND

Planning

08

Development Management Statistical Bulletin

Development Management Statistics Northern Ireland 2008/09 Fourth Quarterly Statistical Bulletin (January to March 2009)

The number of planning applications received during the fourth quarter of 2008/09 was 24% lower than in the corresponding quarter a year earlier, this fall being seen by all Local Government Districts. Decisions were issued on 5,374 applications, about 10% fewer than during the same period last year.

http://www.planningni.gov.uk/index/news/news_other/quarterly_publication_0809_q4_v1.pdf

Rating

09

Statutory Instrument

SRNI 2009/241 Valuation for Rating (Decapitalisation Rate) Regulations (Northern Ireland) 2009

These regulations, which come into force on 01.10.09, prescribe the decapitalisation rate to be applied when determining the net annual value of any hereditament by reference to the contractor's principle for the purposes of any NAV list coming into force on or after 01.04.10. The contractor's principle is the method of ascertaining the net annual value of a hereditament by reference to its actual or notional cost of construction or provision or to its capital value. The decapitalisation rate is 3.33% in the case of a church, defence, educational or healthcare hereditament, and 5% in any other case. The corresponding decapitalisation rates for the purposes of the valuation list which came into force on 01.04.03 were 3.67% and 5.5% respectively and provision is made for those rates to continue to have effect in relation to that list.

http://www.opsi.gov.uk/sr/sr2009/pdf/nisr_20090241_en.pdf