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evebrief

Editorial



The first National Policy Statements (NPSs) were published on the 9 November 2009 in draft for public consultation and parliamentary scrutiny. The Department for Transport (DfT) published its draft NPS for Ports and the Department of Energy and Climate Change (DECC) published its draft NPSs on energy (See items 05 and 06). The energy suite comprises an Overarching NPS for Energy (EN1) plus ones on Fossil Fuel Electricity Generating Infrastructure (EN2); Renewable Energy Infrastructure (EN3); Gas Supply Infrastructure and Gas and Oil Pipelines (EN4); Electricity Networks Infrastructure (EN5) and Nuclear Power Generation (EN6).

This is the first taste of the 2008 Act planning regime which includes the establishment of the Infrastructure Planning Commission (IPC) and the publication of NPSs across a range of infrastructure types — energy, transport, water, waste water and hazardous waste. The aim of the new planning regime is a faster, fairer and more efficient system for the consideration of proposals for nationally significant infrastructure projects.

The IPC will be the decision-making body on applications for nationally significant infrastructure projects, as defined in the Act and NPSs are the statements of Government policy that the IPC will use to determine those applications. NPSs are therefore at the heart of the new planning regime for nationally significant infrastructure. The intention is that NPSs

will operate as the primary policy document for the IPC, applicants and other interested parties when considering applications for development consent made under the Act.

NPSs bring together the Government's objectives for infrastructure provision with its strategic environmental, social and economic policy objectives, including its climate change objectives, in order to help to deliver sustainable development. The intention of NPSs is to make clear Government policy on the need for new nationally significant infrastructure projects (NSIPs) thereby eliminating the need to debate this at public inquiries. NPSs will give the Infrastructure Planning Commission (IPC), applicants and those affected by development proposals, greater clarity about what forms of development are, or are not, in line with Government policy. This will therefore provide the IPC with a clear framework for decision making.

It is intended that the IPC will be able to receive applications from the energy and transport sectors from 1 March 2010 irrespective of whether the NPSs have been finally designated.

A faster planning system for major infrastructure projects is surely a "must have" in this age of an increasingly demanding global economy and with the climate change agenda requiring urgent attention.

Peter Dines

GeraldEve

Landlord & Tenant

01

Central London County Court

Business lease — application for new tenancy — landlord applying under s24(1) Landlord and Tenant Act 1954 — tenant notifying court that no new tenancy required — s29(5) — whether landlord's application dismissed as at date of defendant's notification

* NM PENSIONS LTD V LLOYDS TSB BANK PLC
(2009) PLSCS 297 — Decision given 15.10.09

Facts: NMP was the landlord and LTSB the tenant of business premises let for a term expiring in March 2008 at an annual rent of £1m. NMP served a notice, under s25 of the Landlord and Tenant Act 1954, not opposing the grant of a new tenancy and in September 2007 it applied to the court for the grant of a new tenancy under s24(1). LTSB acknowledged service of that claim and applied for determination of the interim rent, but in April 2009 it informed NMP that it no longer wanted to take a new tenancy and that it was filing a notice of discontinuance to terminate the new tenancy proceedings. On the same day it filed the notice at court stating its reliance on s29(5) by which the court is required to dismiss an application by a landlord under s24(1) if the tenant has informed the court that it does not want a new tenancy.

Point of dispute: When the tenancy would determine. LTSB considered that it would determine in July 2009, three months after the final disposal of the application, whereas NMP took the view that the tenancy would determine only once LTSB had obtained a court order dismissing the proceedings and that in the meantime LTSB would be liable to pay rent.

Held: LTSB was granted a declaration that the claim for a new tenancy had been dismissed in April 2009. Under s29(5) of the 1954 Act if a tenant informs the court that it does not want a new tenancy the landlord's application is automatically dismissed. The court should dismiss the application for a new tenancy immediately upon receipt of the tenant's notice and the relevant date for that purpose was the date of receipt by the court of the tenant's letter. It was not appropriate for a tenant to have to serve a notice of discontinuance in respect of the landlord's proceedings.

Planning

02

Administrative Court

Enforcement notice — whether on dismissing an appeal against notice inspector had the power to enlarge the area of land subject to the notice

* HOWELLS V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) All ER (D) 102 (Oct) — Decision given 12.10.09

Facts: In 2006 the relevant local planning authority served an enforcement notice on H alleging a breach of planning control following a change of use of part of H's farm where it was alleged that the land was being used for the importation, storage and crushing of concrete and other waste materials. H's appeal against the notice was dismissed, and using the powers available to him under s176(1) of the Town and Country Planning Act the inspector amended the plan attached to the original enforcement notice so as to enlarge the area of land affected by it.

Point of dispute: Whether H's appeal would be allowed against the inspector's decision. H argued that the inspector had exceeded his powers by adding more land to the enforcement notice and that the rules of natural justice had been breached by his failure to give H any opportunity to comment in advance.

Held: H's appeal was dismissed. Under s176 a planning inspector had power to enlarge an area of land shown on an enforcement notice when disposing of an appeal under s174. Under that section the inspector could amend both the enforcement notice and the relevant plan. On the facts there had not been a breach of the requirement of fairness. The inspector had expressly stated his reasons as to why no injustice would be caused to H if some extra land were added to that in the original notice.

03

Administrative Court

Section 106 Town and Country Planning Act 1990 agreement in respect of additional works to airfield not included in original planning application — whether council erred in approach to environmental impact

* R (ON THE APPLICATION OF BROWN) V CARLISLE CITY COUNCIL
(2009) 42 EG 177 — Decision given 16.10.09

Facts: The interested party, who held a long lease of Carlisle airport, sought planning permission for extensive works including replacing the runway, and "airside works" comprising the construction of a new passenger terminal, new offices and hangars. When the application was called in by the Sec of State it was withdrawn and replaced by one for reduced works, which omitted the airside works ("the application development"). An environmental statement was submitted in respect of the effects of the application development. Taking the view that the application development would accord with the development plan provided that the airside works could be secured by way of a s106 agreement CCC considered that no referral to the Sec of State was necessary and granted permission for the application development. A s106 agreement was concluded for the airside works.

Point of dispute: Whether B's application for judicial review of the planning permission would be allowed. B argued that CCC had failed to comply with Regulation 3(2) of the Town and Country Planning Environmental Impact Assessment (England and Wales) Regulations 1999 because it had considered only the environmental impact of the application development rather than the cumulative effect of that and the s106 airside works.

Held: The application was refused. It was arguable that CCC had failed to address the issue of whether the airside works formed an integral part of the development such that the cumulative environmental impact of all the works, including the airside works, should be assessed. However, even if the permission was found to be flawed in that respect, the court would not grant the relief sought as if the s106 works did fall within the ambit of regulation 3(2) they would have to be the subject of an environmental impact assessment. If the permission were quashed and a renewed application made with an environmental statement extending to the s106 works it would contain no material that would prevent the application from succeeding.

04

Administrative Court

Established use certificate — whether previous High Court ruling relevant to certificate application — whether inspector bound by ruling confirming lawful use of land

* MID SUFFOLK DISTRICT COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) PLSCS 284 — Decision given 20.10.09

Facts: In 2006 MSDC sought an injunction to prevent the second defendant from using land on his farm for any purpose other than agriculture, requiring in particular the cessation of industrial animal rendering activities in a cooking plant. It was determined that the 1999 planning permission for the farm only permitted the use of the plant for rendering as part of agricultural operations, and not for industrial purposes. In a subsequent action in 2006 a permanent injunction was granted over the area covered by the cooking plant. Subsequently, MSDC refused the second defendant's application for established use certificates for mixed use industrial and agricultural activities on part of the farm, including the area covered by the earlier injunction but on appeal an inspector allowed the application, the inspector taking the view that the court decision in the 2006 injunction proceedings was irrelevant to the issue before him.

Point of dispute: Whether to allow MSDC's application for the established use certificate to be quashed. MSDC contended that the inspector had erred in his approach to the earlier High Court decision which had established the lawful use of the cooking plant.

Held: MSDC's application was allowed. The judge had interpreted the 1999 planning permission in the 2006 injunction proceedings as meaning that the only lawful use for the cooking plant was for agricultural purposes. That decision had not been appealed or set aside, and accordingly it was not open to the inspector to conclude that the plant could be used for a non-agricultural purpose unless he found as a matter of law that the 1999 permission allowed a use other than agriculture, and the second defendant would have had to have argued the point at the inspector's inquiry. The inspector had not been entitled to find that a mixed use of the land and buildings was lawful.

Editor's note: It should be noted that the court declined to express any general view as to whether as a matter of law it was open to an inspector to reopen a decision of the court.

05

Department for Energy and Climate Change

Consultation on National Policy Statements for Infrastructure

Deadline for Comments: 22.02.10

This consultation seeks views on the following six draft National Policy Statements for energy infrastructure:

- The draft Overarching National Policy Statement for Energy (EN-1)
- The draft National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (EN-2)
- The draft National Policy Statement for Renewable Energy Infrastructure (EN-3)
- The draft National Policy Statement for Gas Supply Infrastructure and Gas and Oil Pipelines (EN-4)
- The draft National Policy Statement for Electricity Networks Infrastructure (EN-5)
- The draft National Policy Statement for Nuclear Power Generation (EN-6)

In future these National Policy Statements will be the primary consideration for the Infrastructure Planning Commission when it makes decisions on applications for development consent for nationally significant energy infrastructure in the future.

Information on this consultation, the six draft energy National Policy Statements and their supporting documents are all available at <https://www.energynpsconsultation.decc.gov.uk/>

06

Department for Transport

Developing a Ports National Policy Statement: Consultation Document

Deadline for Comments: 15.01.10

This consultation invites views on the draft National Policy Statement for ports which the Sec of State for Transport proposes to designate under the Planning Act 2008, and various accompanying documents as listed below:

- a draft National Policy Statement (NPS) for Ports;
- a consultation stage Appraisal of Sustainability of the draft NPS;
- a consultation stage Appropriate Assessment (AA) of the draft NPS under the provisions of the Habitats Directive (EU Directive 92/43/EEC);
- a consultation stage Impact Assessment (IA) for the NPS.

<http://www.dft.gov.uk/consultations/open/portsnps/>

07

Office of Government Commerce (OGC) Guidance

Procurement Policy Note — preliminary guidance on the application of the public procurement rules to development agreements

This guidance concerns the applicability of the EU Public Procurement Directive (2004/18/EC) regarding development agreements (including planning obligations) made between public authorities and developers in the UK. The Directive requires that where a contract for supplies, works or services is entered into by a public sector body, and the value of that contract, or contracts, will exceed a prescribed threshold, then certain procedures have to be followed for the advertising of the proposed procurement and the selection of the supplier so as to ensure fair and proper, EU-wide competition.

Although the guidance is welcome, it is felt in some quarters that there is a risk that typical development and planning agreements will be more likely to be made subject to public procurement procedure following this note. It has been prepared because this issue is currently of concern to local authorities and others following the decision of the European Court of Justice in the case of "Jean Aurox and others v Commune of Roanne". This case concerned an agreement between the municipality of Roanne and a semi-public company SEDL, whereby the latter would undertake certain works, some of which would be put to public use and others would be sold to third parties. The operative part of the ECJ judgment made it clear that:

- a contracting authority does not necessarily have to become the eventual owner of a work for the contract to comprise a public works contract;
- for the purposes of deciding whether a contract exceeds the works threshold, the total value from the point of view of the tenderer is the relevant figure, including any sums to be received from third parties; and
- the fact that both parties to an agreement are contracting authorities and the second authority will procure any consequent contract to physically carry out the work in accordance with the public procurement rules will not exempt the original agreement from the rules.

The basic test as prescribed in the OGC guidance is that if there is:

- a work or works required or specified by a contracting authority;
- an enforceable obligation (in writing) on a contractor to carry out that work or works; and
- some pecuniary interest for carrying out this work (not necessarily a cash payment) which exceeds the threshold,

then the agreement or arrangement is likely to be subject to the procurement rules.

The note makes it clear that the guidance is preliminary and is subject to review pending further feedback from the Commission following the EC's investigation of some further UK cases.

http://www.ogc.gov.uk/documents/PPN_11_09_Development_Agreements.pdf

08

CLG Statistical Release

Development Control Statistics 2008-09: England

- In 2008/09 there were 507,000 district level applications, a decrease of 22% compared to the previous year.
- There were 489,000 decisions (granted or refused), 18% lower than the previous year.
- Permissions amounted to 387,000, 83% of decisions. This rate has remained approximately the same since 2005/06.
- 71% of major applications were decided within 13 weeks, a rate that has remained the same since 2006/07.
- At county level planning authorities received 1,667 applications, 8% lower than the previous year.
- 1,507 county level decisions were made of which 92% were permissions. This rate has remained stable since 2001/02.

<http://www.communities.gov.uk/documents/statistics/pdf/1368876.pdf>

Leasehold Reform

09

CLG Guidance

Right to manage (RTM) companies under the Commonhold and Leasehold Reform Act 2002: new form of constitutional document

The right to manage (RTM) introduced by the Commonhold and Leasehold Reform Act 2002 gave long leaseholders the right to join together to take over the management of the premises containing their flats. In order for this right to be exercised an RTM company had to be formed and the 2002 Act provided for regulations to be made concerning the content and form of its memorandum and articles of association. The Companies Act 2006, which came into force on 01.10.09, contained various reforms to company law including replacing the memorandum and articles of association of new companies with a single document (the articles). New prescribed articles for RTM companies came into force on 09.11.09 based upon the 2006 model articles for private companies limited by guarantee.

<http://www.communities.gov.uk/documents/housing/pdf/1365596.pdf>

10

RICS Research Report

Leasehold Reform: Graphs of Relativity

The aim of this research was to address the problems faced by valuers in assessing marriage value when making valuations under leasehold reform legislation where a lease has 80 years or less unexpired. Two values are required:

- the freehold value, or, in the case of a new lease, the new leasehold value, and
- the value of the existing lease.

Both of these values must be arrived at on the assumption that there are no statutory rights to enfranchise ("the no-Act world") and secondly any increase in value due to tenant's improvements is to be disregarded. As there are very few leases which do not qualify for a new lease or enfranchisement valuers do not have the benefit of market evidence on which to base their valuations of the existing leasehold interests. This difficulty was addressed by the Lands Tribunal in the case of "Arrowdell Ltd v Coniston Court (North) Hove Ltd 2006, LRA/72/2005" who requested the RICS to produce graphs of relativity which could be applied by valuers when carrying out enfranchisement valuations. The RICS set up a working group to consider that request, but ultimately it was not possible for its members to agree upon definitive graphs that could be used.

This report draws together the various graphs of relativity that are in existence (including the Gerald Eve graph) together with details of the data that lies behind each in the hope that these may be of some guidance to practitioners using them.

http://www.rics.org/site/download_feed.aspx?fileID=4699&fileExtension=PDF

Housing

11

CLG Statistical Release

House Price Index — August 2009

- UK house prices were 5.6% lower than in August 2008 but 0.5% higher than in July 2009 (seasonally adjusted).
- The mix-adjusted average house price in the UK stood at £196,510 in August 2009 (not seasonally adjusted).
- UK house prices rose by 2.6% in the quarter ending August 2009. This compares with a fall of 1.7% for the quarter ending May 2009 (seasonally adjusted).
- Annual average house prices fell in England by 5.9%, by 3.2% in Wales, by 0.8% in Scotland and by 11.5% in Northern Ireland.
- Average house prices paid for new properties in August 2009 were 9.9% lower than a year ago. Prices paid for pre-owned dwellings were only 5.3% lower.

<http://www.communities.gov.uk/documents/statistics/pdf/1355477.pdf>

12

CLG Statistical Release

House Building: June Quarter 2009, England (Revised)

The previous CLG June quarter house building release has been withdrawn due to errors.

- There were an estimated 21,580 seasonally adjusted housing starts in England in the June quarter 2009, up 18% on the previous quarter but 34% lower than the June quarter of 2008.
- Private enterprise housing starts were 24% higher than in the March quarter 2009 and 37% lower than in the June quarter 2008.
- Annual housing starts figures have continued to decline. In the 12 months to June 2009 there were 78,570 starts, down 47% compared with the 12 months to June 2008 and 58% below their 2005/06 peak.
- Housing completions were 6% lower in the June quarter 2009 compared with the previous quarter.
- Private enterprise completions were 2% lower in the June quarter 2009 than the March quarter 2009 and 22% lower than the June quarter 2008.
- In the 12 months to June 2009 there were 126,500 completions, a fall of 22% compared with the year to June 2008.

<http://www.communities.gov.uk/documents/statistics/pdf/1367801.pdf>

13

CLG Publication

Housing market renewal (HMR) and private sector developers

This study, which was carried out in 2007, examined the following:

- the characteristics of developers involved in the HMR programme;
- the scale, focus and phasing of development programmes in pathfinder areas;
- the institutional arrangements or partnerships set up to plan, deliver and monitor the programme;
- funding mechanisms used to support HMR schemes and the extent of private sector leverage involved; and
- measures of risk assessment employed by developers, HMR teams or other stakeholders.

<http://www.communities.gov.uk/documents/housing/pdf/1362845.pdf>

14

CLG Publication

Key messages and evidence on the housing market renewal (HMR) pathfinder programme 2003-2009

The HMR pathfinder programme was established in 2002 in order to tackle issues associated with low or changing demand for housing. Originally there were nine pathfinders, but in 2005 three additional areas of low demand were added. This paper provides an overview of key evidence relating to this programme from 2003 to the present. It outlines progress that has been made against key housing market indicators, the programme's key activities and development, and considers the challenges that may be faced by pathfinders in the future.

<http://www.communities.gov.uk/documents/housing/pdf/1362819.pdf>

15

CLG Publication

National evaluation of housing market renewal (HMR) pathfinders 2005 to 2007

In 2005 CLG commissioned a consortium of academics and consultants to develop a framework for a national evaluation of the nine housing market renewal pathfinders established in 2002, and to carry out an evaluation of the programme between 2005 and 2007. This report contains an overview of the programme, a market assessment and a review of the development of the programme over time. Since 2002 HMR has invested over £1bn in housing markets in the north of England and in the Midlands. It is perceived that the programme has produced effective policies and programmes for the restructuring of these markets.

<http://www.communities.gov.uk/documents/housing/pdf/1362833.pdf>

16

CLG Paper

Policy alignment and partnership working in housing market renewal (HMR) pathfinders

This paper reviews the extent to which housing market renewal pathfinders are aligned to the policy frameworks in the regions, sub-regions, districts and neighbourhoods within which they operate, and how they participate in partnerships with other agencies involved in the development and implementation of those frameworks. The review is based on accumulated evidence from the national evaluation of housing market renewal pathfinders, other recent evaluations, and consultations with all nine pathfinders.

<http://www.communities.gov.uk/documents/housing/pdf/1362856.pdf>

17

CLG Paper

Value for money issues and the evaluation of the housing market renewal pathfinder (HMR) programme

This report examines the conceptual and practical measurement problems that arise when considering whether the HMR programme is delivering value for money against its aims and objectives.

<http://www.communities.gov.uk/documents/housing/pdf/1362861.pdf>

18

CLG Paper

Wider performance measures for the housing market renewal programme — national evaluation of housing market renewal pathfinders

This paper presents the results of a thematic study which aims to identify wider performance measures relating to the housing market renewal (HMR) programme. These measures relate specifically to the sustainability of local housing markets and neighbourhoods. The paper reviews the availability and suitability of existing data sources.

<http://www.communities.gov.uk/documents/housing/pdf/1362868.pdf>

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CLG Statistical Release

Land Use Change Statistics (England) 2008 — provisional estimates (October 2009)

In 2008 it is provisionally estimated:

- 80% of dwellings were built on previously-developed land, compared to 77% in 2007;
- new dwellings were built at an average density of 44 dwellings per hectare, compared to 43 dwellings per hectare in 2007;
- 2% of dwellings were built within the Green Belt (unchanged since 2004) and 6% of land changing to residential use (from any use) was within the Green Belt (an increase from 5% in 2007); and
- 9% of dwellings were built within areas of high flood risk and 6% of land changing to residential use was within areas of high flood risk.

<http://www.communities.gov.uk/documents/statistics/pdf/1362889.pdf>

20

CLG Note

English Housing Survey Dissemination Strategy: Your chance to have your say Deadline for comments: 02.12.09

This note sets out preliminary proposals for the release of information from the new English Housing Survey launched in April 2008 which brought together the two former surveys — the Survey of English Housing and the English House Condition Survey. The English Housing Survey comprises an interview with approximately 17,000 households a year and a follow up inspection of 8,000 respondents' homes to assess the condition and energy performance of the property. An independent market valuation is also undertaken. The first results from the 2008/09 English Housing Survey are likely to become available in Jan/Feb 2010 and the following outputs are anticipated:

- annual headline report;
- annual report on changing housing trends and circumstances;
- annual report on changing condition and energy characteristics of the housing stock;
- annual technical report;
- supporting tables on the web;
- publicly available data sets; and
- information and advice service.

<http://www.communities.gov.uk/documents/housing/pdf/1371753.pdf>

21

CLG Statistical Publication

Housing and Planning Key Facts — November 2009

This publication contains data on households and population projections, housing stock, vacancy rates, house prices, local authority and registered social landlord lettings, rents, sales of council houses, homelessness, planning statistics, decent homes and energy efficiency.

<http://www.communities.gov.uk/documents/statistics/pdf/1374699.pdf>

22

Homes and Communities Agency (HCA) Publication
Monthly Housing Market Bulletin — 30 October 2009

This bulletin provides HCA staff with the latest information on housing market trends, the economy and the housebuilders' industry.

- The housing market has now seen several months of house price rises and both the Halifax and Nationwide recorded house price rises in September. However, according to the Halifax, house prices are still 18.1% less than their August 2007 peak.
- The house price to earnings ratio remained above its long-run average of 4.0 at 4.48 in September, according to the Halifax, despite the economy being in recession.
- Mortgage lending is starting to recover — there were 52,700 loans for house purchases in August 2009, 29% higher than a year earlier according to the Council of Mortgage Lenders, but still significantly lower than the August average of the seven years before the credit crisis which was 100,000 loans.
- Residential building land values have fallen by 40% in England and Wales, but excluding London, from their peak in January 2008 to July 2009, according to the Valuation Office Agency.
- Housing starts were slightly up, by 2% in Q3 2009 in England over the previous year according to NHBC.
- The UK is still in recession with GDP having fallen by 5.2% over the past year and unemployment now stands at 7.9%.

<http://www.homesandcommunities.co.uk/public/documents/Monthly-Housing-Bulletin-Oct-2009.pdf>

23

RICS Research Paper

An examination of the housing needs and supply for an ageing society

This report was commissioned by the RICS to investigate the demographic group of older home owners living in larger homes and in good health to explore their attitudes and preferences for housing in later life. It is estimated that in 2006 there were about 5.6 million households in England aged 65 or over and as the death rate is falling the numbers of people in this age group is rising. The number of households aged 65 and over is projected to increase by 2.3 million between 2006 and 2026. This report contains a demographic analysis of older households, considers the housing assets of elderly households, older people's attitudes towards downsizing and policy implications for the RICS.

http://www.rics.org/site/download_feed.aspx?fileID=4559&fileExtension=PDF

Technical Appendix : Older households and their Housing — The Present Picture and Future Prospects

http://www.rics.org/site/download_feed.aspx?fileID=4560&fileExtension=PDF

Taxation

24

The College of Estate Management (CEM) Occasional Paper

Occasional Papers – Tax Incremental Financing

This paper discusses Tax Incremental Financing (TIF) as a method of raising revenue to pay for regeneration. TIF relies on future increases in land values to finance current improvements, which will (to a certain extent) achieve those increases in land values and thus generate increased tax revenues, initially to pay off the debt and subsequently to increase the revenue to a relevant tier of government. TIF was developed initially about 50 years ago in California and its use has spread across the USA and beyond. In the USA it has been widely used as a funding mechanism to make up for reductions in government subsidies for redevelopment and regeneration purposes. Revenue for TIF can be generated by either:

- selling bonds which are guaranteed by the anticipated revenue from the increased value the project creates; or
- a "pay and you go" scheme under which revenues are spent as they are received without incurring debt.

TIF is generally introduced following the "but for" test ie once it is established that "but for" TIF regeneration would not take place.

http://www.cem.ac.uk/uploadedFiles/Our_Research/web-pdf.pdf

Real Property

25

Central London County Court

Easement of parking

* SAFESTORE V RSN PROPERTY LTD
(2009) PLSCS 292 — Decision given 01.10.09

Facts: The claimants owned properties on either side of a private road at the end of which the defendants operated a dairy business. Originally the defendants' access over the road was pursuant to a right of way contained in a 1968 transfer of the dairy site but they acquired the road in 2007. Although the defendants acknowledged that the claimants enjoyed certain rights of access and loading and unloading over the road, they sought to prevent the claimants from parking on it, which they had done for many years.

Point of dispute: Whether the claimants had acquired a right to park on the road by prescription under the Prescription Act 1832 or by lost modern grant.

Held: The claim was allowed. (i) A prescriptive right could be obtained by long use, even though that use had been illegal throughout the time in the sense of being tortious. The fact that the user was in breach of covenant did not prevent a prescriptive right from being acquired. The owners of the dairy site had acquiesced in the breach. Acquiescence in a breach of covenant should not be treated differently from acquiescence in a tort, which was the basis of prescription. (ii) The alleged right to park was not impossible on the grounds of insufficient definition since the easement claimed was confined to particular parts of the road on which parking had taken place. It had continued for over 20 years and was obviously connected with the businesses being conducted in the adjacent buildings. A right to park had been acquired by each of the adjoining owners for itself, its tenants and staff and customers, to park on that part of the road immediately adjacent to its own building.

Tort

26

Court of Appeal

Surveyors' negligence in leasehold enfranchisement claim

* LITTLEWOOD V RADFORD (FORMERLY T/A BOSTON CARRINGTON PRITCHARD)
(2009) 42 EG 176 — Decision given 13.10.09

Facts: L retained R, a firm of surveyors, to act for her in connection with her application to extend the lease of her flat. In March 2000 L served a notice under s42 of the Leasehold Reform, Housing and Urban Development Act 1993 exercising her right to extend the lease. By 05.06.00 all terms had been agreed, apart from the amount of the premium to be paid and the deadline for referring the dispute regarding the premium to the LVT was 08.11.00. In August 2000 R informed L that if their invoice was not paid they would not be able to continue to act on her behalf. L missed the 08.11.00 deadline which meant that the original s42 notice was deemed to have been withdrawn and L had to pay over £100,000 more for an extended lease one year later than she would have done had she proceeded in 2000.

Point of dispute: Whether L's appeal would be allowed against the ruling of the court below that R had not acted negligently by not making or advising L to make an application to the LVT by 08.11.00. The county court found that R had not breached their retainer since it had terminated in June 2000 and they had advised L of the importance of making an LVT application.

Held: L's appeal was allowed. There was no evidential basis for the judge's conclusion that R's retainer had been terminated in June 2000. If the retainer continued after June R was under an implied duty to remind L about the November deadline, and in the normal course of practice R admitted this is what they would have done. In view of L's inexperience in this field she relied upon her professional advisers to remind her about the steps that she needed to take to protect her position.

Contract

27

Court of Appeal

Estate agent's commission

* HARBOUR ESTATES LTD V CHARANIA
(2009) PLSCS 295 — Decision given 27.10.09

Facts: In 2002 HE, a firm of estate agents, entered into a sole agency agreement with C to sell his property. In accordance with article 5(1)(b) of the Estate Agents (Provision of Information) Regulations 1991, made pursuant to s8 of the Estate Agents Act 1979, the contract provided that C would be liable to pay remuneration if unconditional contracts for the sale were exchanged with a purchaser that HE had introduced during the period of the sole agency or with whom it had had negotiations during that period. HE marketed the property and arranged many viewings, including four to the eventual purchaser (Y). However, during the period of the sole agency the property remained unsold and C terminated the agreement with HE. Some time later C's niece, who lived in the block, was approached by the porter and introduced to Y who was interested in buying a property in the block. Y did not tell her that he had previously viewed the property and indicated that he wanted to deal direct with C and not through an estate agent. C accepted Y's offer, contracts were exchanged and the sale completed.

Point of dispute: Whether HE could recover commission from C for the sale of the property to Y.

Held: C's appeal against the judge's decision that commission was payable was dismissed. C's argument that the judge had erred in law by giving insufficient weight to the interval of time that had elapsed between Y's last viewing of the property and his approach to the porter (16 months) was rejected. In order to succeed HE had to show that it had introduced the purchaser to the purchase and not merely to the property, and the test was whether the purchaser had purchased as a result of the introduction by the estate agent. The judge had been correct to conclude that Y had purchased the property as a result of HE's introduction to C. There was a causal link between the introduction and the eventual purchase.

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High Court

Agreement for lease — whether planning condition fulfilled

* GREGORY PROJECTS (HALIFAX) LTD V TENPIN (HALIFAX) LTD
(2009) PLSCS 291 — Decision given 27.10.09

Facts: GPH proposed to carry out a large retail, commercial and leisure development which included a tenpin bowling alley. In Feb 2007 it entered into a conditional agreement to grant a lease of the bowling alley to TH. The agreement was subject, inter alia, to the obtaining of an acceptable planning permission. GPH was to apply for permission, notify TH of the outcome and forward a copy of the decision notice. Within ten days the parties were to notify each other whether they considered the permission to be acceptable and once all the conditions were fulfilled the agreement would become unconditional with an end date of February 2009 specified for that purpose, failing which either party could rescind by written notice. Planning permission was granted in Oct 2008. TH was notified but not sent a copy of the decision and changed its mind about taking the lease. It purported to rescind the agreement.

Point of dispute: Whether GPH should be granted a declaration that TH was not entitled to rescind. GPH contended that the planning condition had been fulfilled by the end date. TH argued that it should have seen a copy of the planning decision at least ten days before the end date to enable it to decide whether the permission was acceptable and if not whether to exercise its right to rescind.

Held: GPH's claim was allowed. A natural reading of the agreement was that the planning condition could be satisfied at any time up to the end date. The important factor was that a planning permission with the requisite characteristics had to have been granted on or before then, but resolution of any question of whether a particular permission had those characteristics could be initiated later. TH had not been entitled to rescind when it purported to do so.

Construction

29

CLG Paper

Tall Buildings — Performance of Passive Fire Protection in Extreme Loading Events — An Initial Scoping Study

The aim of this project was to develop an understanding of the performance of passive fire protection under extreme loading events in order to inform building regulations policy and, if necessary and/or appropriate, to formulate guidance for incorporation in Approved Document B in support of the fire safety aspects of the Building Regulations. It appears that the products and systems and essential test methodologies are available to enable building designers and fire safety engineers to design buildings and specify passive fire protection products and systems which can provide a higher level of protection than that currently required by the Building Regulations. Although there does not appear to be any need for detailed guidance over and above that available in Approved Document B, it may be beneficial to set out the boundaries associated with the functional requirements for fire safety currently required by the Building Regulations since designers, fire engineers, clients or insurers may choose to specify performance in excess of that needed to satisfy those regulatory requirements. A number of recommendations are given, including the monitoring of passive fire protection in real fires and for action to be considered by designers, fire engineers, clients and insurers.

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1288919.pdf>

Environment

30

Court of Appeal

Sea defences — Sites of special scientific interest (SSSI) — respondent building defence to protect his home from sea erosion

** R (ON THE APPLICATION OF BOGGIS) V NATURAL ENGLAND
(2009) PLSCS — Decision given 20.10.09

Facts: B lived next to the North Sea close to an SSSI. The land was being eroded by the sea and at their own expense B and neighbouring residents built a barrier between the cliffs and the sea to prevent further erosion. The barrier was successful, but it required maintenance. NE considered that the sea defence barrier compromised the scientific value of the site by impeding access to the cliff face and encouraging vegetation. In 2005 it enlarged the SSSI to include an area of up to 225m on the landward side of the cliffs. B was notified of the designation and informed that any future maintenance of the barrier would require NE's consent which it declined to give.

Point of dispute: (i) Whether NE's appeal would be allowed against the decision of the High Court to quash the confirmation of the site as an SSSI on the ground that the decision was invalid because NE had failed to undertake an appropriate assessment of the implications of the SSSI as a "plan or project" under the Habitats Directive (ground G). (ii) Whether B's cross-appeal against the High Court's decision on Ground A would be allowed. On Ground A the High Court had rejected B's contention that NE had acted ultra vires in designating the disputed land as an SSSI since leaving the cliffs to erode by the unrestrained operation of natural processes did not constitute nature conservation.

Held: NE's appeal on ground G was allowed and B's cross appeal on ground A was dismissed. (i) The judge had correctly rejected B's challenge on ground A. The 1981 Wildlife and Countryside Act did not define "conservation" and allowing natural processes to take their course by not preventing or impeding them by artificial means would be a well-recognised conservation technique in the field of nature conservation. (ii) The judge's conclusions on ground G had not been correct. A notification package of an SSSI under s28 of the 1981 Act was not a "plan" for the purposes of article 6(3) of the Habitats Directive and, even if it was, a party alleging that a potentially significant effect should have been considered had to produce credible evidence of a real rather than a hypothetical risk. (iii) The real purpose of these proceedings had not been to secure a protection of the special protection area but to enable the continued replenishment of B's sea defences. Constructing the barrier had not been lawful and to continue to maintain it lawfully required planning permission and a consent under s16 of the Coast Protection Act 1949.

31

Statutory Instrument

SI 2009/2902 The Groundwater (England and Wales) Regulations 2009

These Regulations, which came into force on 30.10.09 and revoke the 1998 Regulations, implement in England and Wales Article 6 of Directive 2006/118/EC on the protection of groundwater against pollution and deterioration.

http://www.opsi.gov.uk/si/si2009/uksi_20092902_en_1

32

Joint Policy Statement on Managing Urban Flood Risk

The 2007 Floods and the subsequent review led by Sir Michael Pitt stimulated extensive debate about how best to tackle the management of flood risk in the future. Against a background of creating a more joined up approach, the need for sustainable solutions and the challenges of climate change, the ICE, CIWEM, RIBA, RICS, RTPI, RUSI and the Landscape Institute have drawn up this joint policy statement to inform and guide their members and the wider industry. It considers that managing flooding in urban areas should be seen as an opportunity, not only to reduce risk, but to enhance the urban environment.

http://www.ice.org.uk/downloads//mufr_2009.pdf

33

Natural England Paper

No charge? Valuing the natural environment

This paper argues that a healthy natural environment is indispensable to current and future economic prosperity and that conserving the natural environment is the most efficient and effective way to deliver a wide range of benefits to society.

http://www.naturalengland.org.uk/Images/nochargev2_tcm6-14259.pdf

General

34

Statutory Instrument

SI 2009/2727 The Land Registration (Proper Office) (No 2) Order 2009

This Order, which comes into force on 11.01.10, designates particular offices of the land registry as the proper office for the receipt of specified descriptions of application under the Land Registration Act 2002. It replaces the Land Registration (Proper Office) Order 2009. As a consequence of this Order Land Registry's Swansea Office will cease to be a proper office and the administrative areas previously dealt with by that Office will be administered by the Land Registry, Wales Office.

http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092727_en.pdf

35

CLG Consultation

Thames Gateway eco-quarter: Consultation Paper

Deadline for Responses: 8 January 2010

This consultation sets out proposals for an eco-quarter in the Thames Gateway. It proposes a process for Thames Gateway local authorities to bid for funding from Homes and Communities Agency to create an eco-quarter in the Thames Gateway that merits exemplar sustainability status and suggests which characteristics and standards should be met in an eco-quarter.

<http://www.communities.gov.uk/documents/thamesgateway/pdf/1358567.pdf>

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CLG Planning Statistical Release

Extent of retail development taking place in England, 2007

This release presents statistics on the amount of retail floorspace built during 2007 within town centres and within edge of town centres in England. Information from data as at 01.04.08 shows that:

In England:

- During 2007 a total of 1.2 million sq m of retail floorspace was built, similar to the amount built in 2006.

In town centres:

- 33% of the retail floorspace built in 2007 was built in town centres and 44% within town centre and edge-of-centre locations (defined by a buffer of 300m around the town centre).
- Although the proportion of retail development going into town centres and edge-of-centre locations fluctuates, a general downward trend could be seen between the early 1970s and the mid-1990s. Since the mid-1990s there has been a general upward trend in the proportion of development locating in town centres and edge-of-centre locations.

<http://www.communities.gov.uk/documents/statistics/pdf/1356176.pdf>

37

Greater London Authority Consultations

The London Plan: Spatial Development Strategy for Greater London — Consultation draft replacement plan

Deadline for Responses: 12.01.10

Strategic planning in London is the shared responsibility of the Mayor of London, 32 London boroughs and the Corporation of the City of London. Under the legislation establishing the Greater London Authority (GLA), the Mayor is obliged to produce a spatial development strategy (SDS) — which has become known as "the London Plan" — and to keep it under review. The general objectives for the London Plan, and the process for drawing it up, altering and replacing it, are set out in the Greater London Authority Act 1999 (as amended), detailed regulations and guidance in Government Office for London Circular 1/2008. The London Plan is intended to be the overall strategic plan for London, setting out an integrated economic, environmental, transport and social framework for London's development over the next 20-25 years

<http://www.london.gov.uk/shaping-london/london-plan/docs/london-plan.pdf>

The London Plan: Integrated Impact Assessment for above:

<http://www.london.gov.uk/shaping-london/london-plan/docs/ii-a-2a-final-report-oct09.pdf>

Mayor's Transport Strategy: Public Draft

Deadline for Responses: 12.01.10

The Mayor's Transport Strategy is a statutory document, developed alongside the London Plan and Economic Development Strategy as part of a strategic policy framework to support and shape the economic and social development of London over the next 20 years. It sets out the Mayor's transport vision and describes how Transport for London (TfL) and its partners, including the London boroughs, will deliver that vision. The Strategy has been developed from "Way to Go" and a consultation with the London Assembly in the autumn of 2008 and spring 2009 respectively. It is supported by a detailed evidence base, including the Travel in London Report (April 2009), strategic transport models and recommendations from the Outer London Commission.

http://mts.tfl.gov.uk/docs/MTS09_Complete.pdf

Rising to the Challenge — The Mayor's Economic Development Strategy for Greater London — Public Consultation Draft

Deadline for Responses: 12.01.10

The purpose of the Mayor's Economic Development Strategy is to set out the Mayor's ambitions for the economic development of the capital, to provide the Greater London Authority Group and other strategic organisations with a clear vision, to provide an analysis of the economy and policy directions, and to clarify roles and responsibilities with other parties who make a major contribution to developing London's economy. The Mayor's overall objectives are:

- to make London a city that excels as a world capital of business;
- to ensure that it has the most competitive business environment in the world;
- to drive London's transition to a low carbon economy and maximise the opportunities that this creates;
- to give all Londoners the opportunity to share in London's economic success; and
- to maximise the benefits to London from investment to support growth and regeneration.

<http://lda-consult.limehouse.co.uk/portal/eds/eds?pointId=972285#document-972285>

The London Plan: Economic Evidence Base — October 2009 version

This document aims to provide an economic evidence base to support the public consultation drafts of the three Mayoral strategies reported above. Its purpose is to provide an understanding of the economic forces impacting on London and some of the main issues facing London.

<http://www.london.gov.uk/shaping-london/london-plan/docs/ec-evidence-base-oct-2009.pdf>

Habitats Regulations Assessment — Screening Report

<http://www.london.gov.uk/shaping-london/london-plan/docs/hra-final-report-oct09.pdf>

38

English Heritage and Homes & Communities Agency Publication

Capitalising on the Inherited Landscape — An introduction to historic characterisation for masterplanning

This document is an introduction to historic characterisation for masterplanning. Characterisation is a technique developed by English Heritage and other bodies such as local authorities and planning consultants to assist with the management of change in the historic environment. The idea behind this concept, which supports the aims of the European Landscape Convention that came into force in 2007, is that no development site of any size is a blank sheet historically but its heritage is not necessarily a constraint. This heritage is a platform and can be a template for change and it can be used in a positive way as a legacy for the future.

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

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British Waterways publication

State of the Waterway's Heritage 2008/09

This report shows that 2008/09 was a year of steady progress for waterway's heritage. By January 2009 British Waterways (BW) employed nine heritage advisors. Considerable effort was devoted to implementing minimum safety standards across BW and this saw a significant increase of both contacts with heritage regulators and heritage consents. Numbers of Buildings at Risk continued to fall during the year and a number of important heritage assets were repaired and improved, notwithstanding the current background of recession and increasingly tight expenditure. The year also saw an increase in partnership working and in the use made of volunteers to assist BW with a wide range of heritage activities.

<http://www.britishwaterways.co.uk/media/documents/State-Of-The-Waterways-Heritage-Report-2008-09.pdf>

40

RICS Report

Valuation and Sale Price Report 2009

This is the 2009 report of the annual comparison of valuations against sale prices of commercial property in France, Germany, the Netherlands and UK, carried out for the RICS by Investment Property Databank.

http://www.rics.org/site/download_feed.aspx?fileID=4668&fileExtension=PDF

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CABE Research

Planning for places: Delivering good design through core strategies

This report considers why and how spatial planning helps deliver good quality design and argues that an efficient planning system and a good spatial plan are essential to achieving high-quality places and good design.

<http://www.cabe.org.uk/files/planning-for-places.pdf>

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www.dft.gov.uk
www.inlandrevenue.gov.uk
www.hms.o.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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Parliamentary

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evebrief

SCOTLAND

Planning

01

Statutory Instrument

SI 2009/344 The Planning etc (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendment (No 2) Order 2009

This Order, which comes into force on 16.11.09, amends the 2008 Order. Article 2 changes the modifications applied by Article 5 of that Order to alter the circumstances in which the new s19 of the Town and Country Planning (Scotland) Act 1997 introduced by s2 of the Planning etc (Scotland) Act 2006 require an examination to be held in respect of a local plan.

http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090344_en.pdf

02

Statutory Instrument

SI 2009/378 The Planning (Control of Major-Accident Hazards) (Scotland) Regulations 2009

These Regulations, which come into force on 23.11.09, implement in relation to town and country planning in Scotland, Article 12 of EC Directive 96/82/EC on the control of major accident hazards involving dangerous substances.

http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090378_en.pdf

03

Findings in Built and Rural Environments (FIBRE) Report

Discovering Property Policy — An Examination of Scottish Executive Policy and the Property Sector

This report considers the question of whether a consideration of the property sector should form an express part of overall government policy. It examines the implicit policies pursued by the Scottish Executive towards the property sector during the period 1999 to 2007.

http://www.rics.org/site/download_feed.aspx?fileID=4552&fileExtension=PDF

General

04

Scottish Government Rural Land Use Studies

Changing Land Use in Rural Scotland — Drivers and Decision-Making — Research Findings No 8

This study analysed existing and new primary evidence to explore the factors driving change in how rural land may be used; the implications of these for a variety of land use decision-makers; and the differing influences on, and motivations of, these decision makers. The aim of the research is to increase understanding of the factors that are involved in land use decision-making, and its findings will help to inform policy and practice.

<http://www.scotland.gov.uk/Resource/Doc/290887/0089372.pdf>

Realising the Potential Contributions of Scotland's Rural Land to Delivering Sustainable Economic Growth — Research Findings No 9

This research brings together evidence on the potential contributions that Scotland's rural land can make to achieving "sustainable economic growth". Using existing and new evidence it identifies conflicts and complementarities between different rural land uses and objectives and it analyses case studies of integration in practice.

<http://www.scotland.gov.uk/Resource/Doc/290891/0089373.pdf>

The Role of the Public Sector in Realising the Benefits of Scotland's Rural Land — Research Findings No 10

This research examines the role of the public sector in facilitating approaches that deliver a wide range of benefits from Scotland's rural land resource. It brings together evidence on the rationale for public sector actions, different types of measures available and their effectiveness, and opportunities to align measures more effectively.

<http://www.scotland.gov.uk/Resource/Doc/290895/0089374.pdf>

WALES

Rating

05

Welsh Statutory Instrument

WSI 2009/2706 The Council Tax and Non-Domestic Rating (Electronic Communications) (Wales) Order 2009

This Order, which came into force on 31.10.09, amends the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989, the Non-Domestic Rating (Collection and Enforcement) (Central Lists) Regulations 1989 and the Council Tax (Administration and Enforcement) Regulations 1992 in relation to Wales. It provides for the service of certain notices and information by electronic communication on a person who has agreed to accept electronic service

http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi_20092706_mi.pdf

NORTHERN IRELAND

Planning

06

The Planning Service — Statistical Publication

Development Management Statistics Northern Ireland 2008/09 and 2009/10 First Quarterly Statistical Bulletin

These publications contain statistics and analysis of the planning process from applications received, types of development and performance on processing planning applications.

http://www.planningni.gov.uk/index/tools/about-statistics/quarterly_publication_0910_q1_v6-4.pdf

<http://www.planningni.gov.uk/index/tools/about-statistics/about-stats-annual-bulletin-0809.pdf>

07

Department of the Environment Planning Service Report

Review of Non-Householder Permitted Development Rights

This research was conducted by Entec UK Ltd into the Permitted Development (PD) rights provided by the Planning (General Development) (Northern Ireland) Order 1993 (the GDO) in relation to non-householder development. Those parts of the GDO which offer the greatest potential for extending PD rights were the starting point for the review. Recommendations are made in relation to parts of the GDO where demand for change was identified through a combination of the following factors:

- a saving in planning application numbers;
- PD rights significantly differ in the rest of the UK and the Republic of Ireland;
- stakeholder responses indicate significant demand; and
- previous reviews in Northern Ireland or the rest of the UK suggest there is a demand for change.

http://www.planningni.gov.uk/index/news/news_policy/nonhouseholder_report_part1.pdf

08

Consultation Paper

Review of Non-Householder Permitted Development Rights

Deadline for Responses: 22.01.09

This paper seeks comments and views of the public and all interested parties on changes to permitted development rights for non-householder developments in Northern Ireland.

http://www.planningni.gov.uk/index/news/news_policy/nonhouseholder_consultation_paper.pdf

Rating

09

Act

Rates (Amendment) Act (Northern Ireland) 2009 c8

This Act received Royal Assent on 03.11.09. Following the restoration of devolution in May 2007 the Northern Ireland Executive ordered a comprehensive review of the domestic rating system, aimed at making the system of local taxation more acceptable. A number of outcomes of this review were introduced in 2008 and 2009 and this Act gives effect to a number of the remaining decisions arising from the review. The following are of note:

- The introduction of a one off reduction in rates for owner occupiers who install loft or cavity wall insulation in their homes.
- A scheme has been introduced giving full rate relief to the first occupiers of new zero-carbon and new low-carbon homes for up to five years and two years respectively.
- Empty properties are to be rated at 100%.
- The maximum capital value that applies for domestic rating purposes is £400,000.
- A rates deferment scheme has been introduced for owner occupiers of pensionable age.
- In relation to data sharing, new powers have been introduced to allow relevant Government agencies to better target likely recipients of, and verify claims relating to, rate relief, the disabled persons allowance and the lone pensioner allowance.
- Valuation assessments of former public utilities are to change from being prescribed in legislation to the conventional method of assessment.
- Industrial derating. The rating liability for the manufacturing sector will remain at 30% till 2011. After April 2011 the Northern Ireland Assembly will be able to set the rating liability by subordinate legislation.
- The introduction of an enabling power to allow for a small business rate relief scheme to be introduced (temporary reduction of rates for specified hereditaments). Sub Post Offices in Northern Ireland are also to receive enhanced rate relief.

http://www.opsi.gov.uk/legislation/northernireland/acts/acts2009/pdf/nia_20090008_en.pdf

http://www.opsi.gov.uk/legislation/northernireland/acts/acts2009/en/niaen_20090008_en_1