EVEBRIEF

Legal & Parliamentary

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A WEEK IS A LONG TIME IN POLITICS…

Steve Hile
Partner

It is clear from this edition of Evebrief that the Government, along with the rest of the population, has been seriously distracted from day to day matters by the election over the last few weeks, although the Courts have partly made up for some of this lack of activity. At item 07 we report on a leasehold enfranchisement case in which Gerald Eve partner Julian Clark gave evidence and which follows on from the Sportelli decision (Evebrief 19 November 2007). At Item 08 we report on a decision eagerly awaited by both makers and some 'recipients' of compulsory purchase orders, in which the Supreme Court has held that compulsory purchase powers cannot be exercised against one competing landowner / developer in favour of another simply because the latter has promised to undertake regeneration of another, unconnected, site.

Nevertheless the new Government has wasted no time in making a number of policy statements, particularly where there is a significant change from the previous administration or the property market needed reassurance. Support for Crossrail has been confirmed, albeit it will be subject to value for money checks, which one would rather hope were in place anyway. Heathrow, Gatwick and Stansted will have no new runway capacity, which may be good for local residents but does not answer critics who argue that these airports are close to capacity. The proposed High Speed Rail network is years off and it is arguable how much pressure this will take off the airports. Home Information Packs will apparently be scrapped, but if this is to happen then it needs to happen quickly to avoid properties being kept off market until the new law is in place. A welcome announcement for ratepayers is that the enormous rate bill that Port companies were facing is to not to be backdated, but this will of course have to be funded by savings or cuts elsewhere. All in all quite an eventful week and I am sure there will be many more changes in the months to come, for example those proposed to the Planning system.

LANDLORD & TENANT

01 Court of Appeal

Break clause – assignment of lease without landlord's prior consent – whether right to break revived on reassignment of lease

** AVIVA LIFE & PENSIONS UK LTD (FORMERLY KNOWN AS NORWICH UNION LIFE & PENSIONS LTD) V LINPAC MOULDINGS LTD
(2010) PLSCS 112 – Decision given 22.04.10

Facts: Units on an industrial estate were let under two 99-year leases from 1972, each of which contained a covenant against assigning or subletting without the landlord's prior consent, not to be unreasonably withheld. The leases were assigned to the appellant in 1986 with the landlord's consent, each of the licenses to assign containing a break clause, which was personal to the appellant, permitting it as "the assignee" to terminate the leases in December 2010 by giving 18 months prior notice. The appellant assigned the leases to an associated company with the landlord's consent but after that the company went into administration and the administrators wished to reassign the leases to the appellant so that it could exercise the break clause. By this time the estate had become run down with many units having been demolished.
The landlord refused consent to the reassignment as it did not wish to lose its secure income of £600,000 pa, but it went ahead nevertheless, and the appellant gave notice to terminate the leases.

Point of dispute: Whether the appellant's appeal would be allowed against the declaration of the judge in the court below that it had irretrievably lost its right to break the leases when it assigned them to the associated company.

Held: The appeal was dismissed. There was no reported case where the court had interpreted a contractual provision as entitling a party to break a lease when it was neither the landlord nor the tenant. If the parties intended differently the legal documentation would be drawn up in such a way as to make it clear that a party would be entitled to break a lease not only when it was the tenant, but even after it had assigned the lease.

02 Court of Appeal

Assured tenancy – whether improvements to be disregarded on assessment of rent

* HUGHES V BORODEX LTD
(2010) PLSCS 118 – Decision given 27.04.10

Facts: H was the tenant of a flat, the freehold of which was owned by B. Originally she had held the flat under a long underlease at £195 pa, but when this tenancy came to an end in 2003 she remained in possession under an assured periodic tenancy pursuant to s186 and Schedule 10 to the Local Government and Housing Act 1989 (which replaced Part I of the Landlord and Tenant Act 1954). The rent assessment committee determined H's rent at £1,668 per month, disregarding improvements she had carried out during the long tenancy. Later it was decided that the improvements should not be disregarded and the rent was put up to £2,340 per month. This was because of the wording of s14(3)(b) of the Housing Act 1988 which provided that improvements not carried out during H's current tenancy could be disregarded only if "at all times during the period beginning when the improvement was carried out and ending on the date of service of the notice, the dwelling house has been let under an assured tenancy". The committee took the view that this requirement could not be met since assured tenancies had not existed prior to their creation by the 1988 Act. However, this meant that H lost her security of tenure as the new rent exceeded the £25,000 threshold above which the tenancy would cease to be an assured tenancy.

Point of dispute: Whether to allow H's appeal against the ruling of the judge in the court below that in determining the new rent H's improvements should not be disregarded.

Held: H's appeal was dismissed. Her argument that the relevant statutory provisions should be interpreted so as to disregard her improvements, because of the effect on her security of tenure position failed.

PLANNING

03 High Court

Service charge – qualifying long term agreement – s20ZA Landlord and Tenant Act 1985

* PADDINGTON BASIN DEVELOPMENTS LTD V WEST END QUAY ESTATE MANAGEMENT LTD
(2010) PLSCS 110 – Decision given 20.04.10

Facts: WEQEM, the first defendant, was the estate management company for three blocks of flats in the Paddington Basin development while the second defendant was one of the tenants. Under the terms of their leases the tenants were obliged to pay a service charge, part of which was an estate service charge payable to WEQEM and included "any payments to be made by the Landlord and/or the relevant Management Company to the company… which manages and maintains the whole area known as Paddington Basin". That company was the third claimant, which managed the whole development on behalf of PBD who was the long leaseholder. Under a 2005 estate management deed WEQEM was obliged to make payments to the third claimant for the costs of maintaining the common areas of the development. For the first few years WEQEM made the payments that were demanded but it stopped paying in March 2006. The defendants contended that the claimants could not recover the arrears because: (i) it was an implied term of the 2005 deed that WEQEM only had to pay what it could lawfully recover from the individual lessees of the flats; and (ii) the deed was a qualifying long term agreement for the purposes of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements (England)) Regulations 2003, and that the necessary consultation requirements had been neither complied with nor dispensed with so that the lessees' contribution was capped at £100.

Point of dispute: As a preliminary issue, whether the 2005 deed was a qualifying long term agreement within the meaning of the legislation.

Held: The preliminary issue was determined in favour of the defendants. An agreement was a qualifying long term agreement, as defined in s20ZA of the 1985 Act if it was entered into by or on behalf of the landlord or a superior landlord and it was for a term of more than 12 months. The estate management deed was an "agreement" because it contained contractual rights and obligations that bound the parties. WEQEM, as a management company with the right to enforce the payment of a service charge, was a "landlord" within the extended definition of that term in s30. The deed could not be terminated until 25 years had expired so it was an agreement for more than 12 months. All the elements of the s20ZA definition were satisfied.

04 Administrative Court

Appeal against grant of permission for conversion of hotel into residential units with no affordable housing element – whether inspector failing to deal with principal issue of economic viability

* KENSINGTON AND CHELSEA ROYAL LONDON BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2010) PLSCS 113 – Decision given 22.04.10

Facts: A developer was refused permission by KCRLBC ("the council") to convert a hotel into nine residential units, a project which did not include any element of affordable housing. The key issue in the developer's appeal against the refusal of permission, which was heard by a planning inspector appointed by the Sec of State, was whether the provision of affordable housing on the site, or a financial contribution to its provision elsewhere, would make the development an unviable financial proposition. The London Plan stated that affordable housing should normally be provided on sites with capacity for ten or more homes but that this target should be applied flexibly, depending on economic factors. It referred to a "Toolkit" programme into which various input values could be fed to produce an analysis of the economic viability of affordable provision, but it was not a requirement to use this. Both the developer and the council produced a Toolkit analysis but with widely differing results owing to the use of different input figures. The inspector concluded that these analyses were unreliable and therefore attached little weight to them. Considering other factors to be more important, such as the Mayor's policy of encouraging residential development and the practical difficulties of incorporating affordable housing into this development, he came to the conclusion that it would not be reasonable to require affordable housing and allowed the developer's appeal.

Point of dispute: Whether the council's appeal against the inspector's decision would be allowed. It argued that he had failed to deal with the issue of economic viability which was the main controversial issue between the parties.

Held: The appeal was allowed. The parties themselves had relied on the Toolkit analyses as their main tool for assessing economic viability and therefore the inspector should have come to a conclusion on the question of the economic viability of affordable housing provision in the development. Although he had looked at both parties' evidence in their Toolkit analyses he had made no effort to determine which he preferred. His failure to determine the issue of economic viability properly or at all, when it was the principal issue between the parties, was an error of law which vitiated his decision.

05 CLG Publication

Local Planning Authority Green Belt Statistics: England 2009/10

This release contains estimates of the area of Green Belt land in England by region and by local authority as at 31.03.10. The key points are as follows:

- It is estimated that on 31.03.10 there was 1,639,560 hectares of designated Green Belt land in England, about 13% of the total land area.
- It is now estimated that the amount of designated Green Belt land on 31.03.09 was 1,639,650 hectares, 810 hectares more than the previous estimate published in April 2009. This revision is due to corrections, improved measurements and Positional Accuracy Improvements from several authorities.
- Between 01.04.09 and 31.03.10 there has been a net decrease of 80 hectares when compared with the latest 2008/09 estimates. This is because two authorities adopted new plans which resulted in a real net decrease in the area of Green Belt.
- Over the longer term, since these statistics were first compiled in 1997, there has been an increase in the area of Green Belt after taking account of the redesignation of some Green Belt as part of the New Forest National Park in 2005.

http://www.communities.gov.uk/documents/statistics/pdf/12103991.pdf

06 CLG Statistical Publication

Housing and Planning Key Facts – May 2010

This is a quarterly quick reference leaflet containing a snapshot of the main housing and planning data. More detailed data can be found in the live tables.

http://www.communities.gov.uk/documents/statistics/pdf/1553724.pdf

LEASEHOLD REFORM

07 Upper Tribunal: Lands Chamber

Leasehold Reform Act 1967 – enfranchisement of house with unusual long headlease interest between freehold and respondent's lease – approach to calculating core value of head leasehold and freehold interests

** GROSVENOR ESTATE BELGRAVIA V KLAASMEYER (2010) PLSCS 104 – Decision given 26.03.10

Facts: K, who held an underlease of a house with 35.39 years unexpired, applied under the 1967 Act to acquire the freehold. GEB, the appellant, owned a headlease of the entirety of the Grosvenor Belgravia Estate for a term of 200 years, expiring in 2184. This headlease contained an absolute covenant against assigning part of the estate, although an assignment of the whole or underletting of the whole or part was permissible with the freeholder's consent, not to be unreasonably withheld. For the first 42 years of the term the annual rent was £1,000, thereafter the rent was to be calculated based on an increasing proportion of the fines or premiums received by GEB for granting underleases ("the escalator clause"). From year 43 until 2026 the proportion was 5%, increasing thereafter by 5% annually until it reached 90% in the 60th year and for the subsequent years of the term. The LVT determined the total enfranchisement price at £1,269,249, of which £100,799 was payable to the freeholder and £1,168,450 to GEB.

Point of dispute: Whether GEB's appeal against the LVT's determination would be allowed. The issue was to identify the investment or core values of the freeholders' and GEB's respective interests in the property, which they were entitled to retain as part of the purchase price. These were different to marriage value, of which under the relevant legislation they could only retain 50% between them.

Held: GEB's appeal was allowed. The enfranchisement price was determined at £1,292,245 of which £1,290,291 was payable to GEB and £1,954 to the freeholder. This figure was arrived at by taking into account the following:

- Separate valuations of the freehold and the head leasehold interest had to be carried out to establish the core values of those interests. Those values would then be deducted from the freehold vacant possession value of the property in order to find the marriage value and to calculate the enfranchisement price.

- To value the head leasehold interest it had to be assumed that the freeholders would grant a one-off permission to enable the hypothetical sale of the head leasehold interest in the open market. Any bid from the occupying tenant had to be disregarded as such a tenant would be a special purchaser who would overbid in order to achieve coalescence of all interests in the property. Thus a relevant bid would be from an underbidder (X) who would be keen to escape from the escalator clause. There were various options for achieving this, and the hypothetical purchaser who was offered the option of a sale of the severed head leasehold interest in the property to a special-purchase vehicle for occupation by its shareholders would make the highest bid – it was not necessary to assume a sale of the entirety of the headlease extending to the estate as a whole. Taking into account the risks associated with this option the bidder would reduce his bid for the head leasehold interest by 30% compared with what he would have paid if the escalator clause could be avoided without risk.
- With regard to the freehold value, the hypothetical purchaser would consider it a virtual certainty that the head leaseholder would escape the escalator clause by entering into a transaction with the occupying tenant prior to December 2040. The only party which might be prepared to pay any substantial sum for the freehold would be the head leaseholder, but since the value to that party flowed from the coalescence of the freehold and head leasehold interests it had to be disregarded when calculating the core value of the freehold – the value was therefore £1,130, being the present value of the freeholder's distant reversion.
- An increase above the agreed freehold capitalisation rate could not be justified for the years before the escalator clause became operative. Thereafter, between 2026 and 2040, a rise in the capitalisation rate by 0.75% to 5.5% was justified to reflect the obligations and risks associated with the operation of that clause. Regarding the deferment rate an increase over and above the Sportelli rate of 4.75% was appropriate when valuing the basic value that X would enjoy, being the rents to December 2026 and 22.5% of a premium for the grant of a new 143.25 year underlease. The higher rate reflected the risk to the reversion from the escalator clause, which placed the head leaseholder in the position of having to sell in December 2040 in order to avoid its operation. As to the remainder of the value of the head leasehold interest the hypothetical purchaser would be content to adopt the Sportelli generic deferment rate of 4.75%.

Editor's note: Gerald Eve partner, Julian Clark, gave evidence for Grosvenor Estate Belgravia in this case.

COMPULSORY PURCHASE

08 Supreme Court

Rival supermarkets both owning interests in site for new supermarket – local council resolving to use s226(1)(a) Town and Country Planning Act 1990 compulsory purchase powers in favour of one party – whether entitled to take into account prospect that development of CPO site would cross-subsidise development on another site

** R (ON THE APPLICATION OF SAINSBURY'S SUPERMARKET LTD V WOLVERHAMPTON CITY COUNCIL
[2010] PLSCS 133 – Decision given 12.05.10

Facts: S owned 86% of a potential development site and Tesco (T) owned the remainder. Both applied for planning permission for a mixed-use development on the site and WCC resolved to grant outline permission for both schemes. WCC then resolved to make a compulsory purchase order (CPO) under section 226 of the Town and Country Planning Act 1990 to acquire S's land in order to facilitate T's scheme. Although it considered that either scheme would bring appreciable planning benefits and improve the social, economic and environmental well-being of the city, as required under section 226(1A), it came down in favour of T's scheme because T promised that if it developed the site it would use this to cross-fund the development of another site in the city in its ownership, where WCC wished to include affordable housing and which otherwise would be financially unviable.

Point of dispute: Whether S's appeal would be allowed against the Court of Appeal's judgement, upholding the decision of the High Court, dismissing S's application for judicial review of WCC's decision to make the CPO in order to facilitate T's scheme. S contended that WCC was not entitled to take into account the benefits of developing the second site, but the Court of Appeal held that section 226(1A) required the planning authority to consider the extent to which redevelopment of a CPO site would achieve economic, social or environmental "well-being" benefits to a wider area.

Held: S's appeal was allowed (by a majority of 4:3). In a planning context the following were the relevant principles:

- The question of what constituted a material consideration was a matter of law, but the weight to be given to it was a matter for the decision-maker.
- Financial viability might be material if it related to the development.
- The financial dependency of one part of a composite development on another could be a relevant consideration.
- Off-site benefits that were related to or connected with the development would be material.

Similar considerations could apply to a compulsory purchase situation, but they would have to be more strictly applied and there had to be a real, rather than a remote, connection between the off-site benefits and the development for which the compulsory acquisition was made. Section 226(1A) did not allow an authority to take into account a commitment by the developer of a site, part of which was to be the subject of a CPO, to secure the development, redevelopment or improvement of another unconnected site so as to achieve further well-being benefits for the area. The benefits of the development the second site could not be taken into account as "material considerations" relevant to WCC's powers under s226(1)(a). A cross subsidy from a CPO site to another site was not a material consideration for a CPO, notwithstanding that it might be a highly material matter. Although compulsory purchase powers could be used to assemble a site for a preferred developer, that did not mean that a local authority could take into account unconnected benefits in deciding whether a property should be compulsorily acquired for the purpose of disposing of it to a preferred developer. WCC could not deprive S of its property by compulsory acquisition so as to derive from its disposal benefits that were wholly unconnected with the acquisition of that property.

REAL PROPERTY

09 Court of Appeal

Overriding interest – whether respondent with mental illness in actual occupation while living in an institution at time of completion of mortgage to appellant

* LINK LENDING LTD V BUSTARD (BY HER LITIGATION FRIEND) (2010) PLSCS 116 – Decision given 23.04.10

Facts: B, who had a history of mental illness and had been admitted to hospital under the Mental Health Act 1983 on a number of occasions, owned a property which she was persuaded to transfer to H in 2004. In 2008 LL granted a bridging loan to H secured against the property. After H defaulted on the loan LL sought possession of the property. B argued that the transfer of the property to H should be set aside on the grounds of her incapacity or undue influence, and that this right took precedence over LL's charge as an overriding interest held by a person in actual occupation at the time when the charge was executed.

Point of dispute: Whether LL's appeal would be allowed against the county court's decision that B had been in actual occupation of the property, even though she had been in a residential institution at the time when the mortgage was completed, since: (i) she had continued to pay all the outgoings and had kept her furniture at the property; and (ii) she wanted to return to her home and had been allowed to go there on supervised visits.

Held: LL's appeal was dismissed. The trial judge had had to decide whether B was in actual occupation of the property based on findings of primary fact. There was not a single legal test for determining whether a person was in actual occupation, but relevant factors included: (i) the degree of permanence and the continuity of presence of that person; (ii) their intentions and wishes; (iii) the length of their absence from the property and the reasons for it; and (iv) the nature of the property and the person's personal circumstances. In this case the judge had not misconstrued the Land Registration Act 2002 nor made an insupportable evaluation of B's situation with regard to the property. His conclusion that B was in actual occupation was justified and supported by evidence of: (i) a sufficient degree of continuity and permanence of occupation; (ii) involuntary residence elsewhere for which there was a satisfactory explanation; and (iii) a persistent intention to return home when possible, as manifested by her regular visits to the property.

HOUSING

10 HCA Consultation

HCA Proposed Core Housing Design and Sustainability Standards Consultation

Deadline for Comments: 17.06.10

The consultation seeks the views of stakeholders on options for core standards, their level, and how, if adopted, they should be applied and phased in to operation. The consultation responses will be used to inform final decisions on standards and their application.

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

11 RICS Report

"New trends in housing – housing requirements for changing lifestyles"

The RICS reports on a European Housing Forum lecture presented by Peter Boelhouwer on 14.04.10 on this subject in which he outlined the action that needs to be taken to make the housing stock fit for the future. It was argued that several developments have led to three different trends in housing. The developments are demographic – the changing composition of households, economic – the current financial crisis, globalisation and a structural influx of labour migrants, and socio-cultural – people having more choices in the way in which they choose to live. The housing trends are perceived to be:

- a growing interest in living in communities and in common-interest housing concepts;
- increasing internationalisation and a growing number of people owning more than one residence; and
- a trend towards amenity-based housing, ie housing that is mixed with other services such as retail, leisure and education.

These trends need to be perceived and recognised by the housing market and policy makers.

CONSTRUCTION

12 CLG Circular

Circular 06/2010: The Building Act 1984,The Building Regulations 2000, The Building (Approved Inspectors etc) Regulations 2000: New Approved Documents for F, J and L and guidance documents

This Circular sets out and explains the following:

- The approval and publication of six new Approved Documents: F (Ventilation), J (Combustion appliances and fuel storage systems) and L1A (Conservation of fuel and power – new dwellings), L1B (Conservation of fuel and power – existing dwellings), L2A (Conservation of fuel and power – new buildings other than dwellings) and L2B (Conservation of fuel and power – existing buildings other than dwellings);
- The publication of three new compliance guides;
- The approval of a number of the circumstances, procedures and manner of recording of results required under the Building Regulations and the AI Regulations;
- How the transitional provisions in SI 2010/719 apply to these approvals and publications; and
- The correction of an omission in Circular 02/2010.

http://www.communities.gov.uk/documents/planningandbuilding/pdf/1547982.pdf

ENVIRONMENT

13 British Council of Offices Study

Towards Zero Carbon Offices

This study aims to investigate the considerable gap between a building's design capabilities to minimise carbon emissions and the ability of occupiers to make the most of these capabilities. The Climate Change Act aims to reduce carbon emissions by 26% by 2020 and emissions of all greenhouse gases by at least 80% by 2050 compared to 1990 levels. As around half of all carbon emissions emanate from buildings the UK Government made a commitment that all new non-domestic buildings should be zero carbon from 2019. The BCO believes that the goal of a zero carbon office will involve far more than incorporating a series of "green" features or products and that the day to day behaviour of occupants and their interface with buildings will become increasingly important.

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www.newlawonline.com

Abbreviations
The following abbreviations are used in evebrief:

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

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

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

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EVEBRIEF

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01 Scotland – Planning

SCOTLAND

01 Planning

Statutory Instrument

SI 2010/171 The Town and Country Planning (Hazardous Substances) (Scotland) Amendment Regulations 2010

The Planning (Control of Major-Accident Hazards) (Scotland) Regulations 2009 implemented in relation to Scotland, the land use planning provisions of Directive 96/82/EC on the control of major accident hazards involving dangerous substances ("the Seveso II Directive"). As part of the implementation of this Directive, the 2009 Regulations substituted a new Schedule 1 to the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993. These Regulations, which come into force on 01.06.10, correct an error in the substituted Schedule 1 and confer transitional immunity from prosecution and contravention proceedings for a period of six months from 01.06.10, during which time an application for consent may be made.

02 Scottish Government Consultation Paper

Tree Preservation Orders (TPOs) Consultation Paper

Deadline for Comments: 09.07.10

This consultation seeks views on the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 2010 and the Model Tree Preservation Order (TPO). A research report undertaken in 2002 examined the effectiveness of TPOs in Scotland following which proposals for some minor legislative changes were brought forward in a 2004 consultation paper. The primary legislation for these was contained in the Planning etc (Scotland) Act 2006 while this paper is concerned with the secondary legislation.

http://www.scotland.gov.uk/Resource/Doc/309697/0097679.pdf

03 Scottish Government Consultation Paper

Consultation on Planning Obligations and Good Neighbour Agreements Regulations 2010

Deadline for Comments: 30.07.10

This consultation seeks views on two sets of proposed regulations that will further implement the Planning etc (Scotland) Act 2006, specifically ss23 and 24 which respectively amend and extend s75 of the Town and Country Planning (Scotland) Act 1997 and introduce Good Neighbour Agreements. The consultation is not concerned with policy on the use of planning agreements or good neighbour agreements, but the content and purpose of the Regulations required to implement the provisions of ss23 and 24. Section 23 will introduce a new revised s75 into the 1997 Act:

- planning agreements will in future be known as planning obligations;
- the developer/landowner will be able to propose the obligation rather than the planning authority;
- obligations involving the continuing payment of financial contributions will be allowed;
- obligations can be set for a future date at which they would come into effect or they can be triggered by a specific event; and
- planning authorities will be given powers to take direct action to carry out work where there is a breach of an obligation and costs can be recovered from a responsible person.

Section 24 introduces a set of new sections into the 1997 Act concerning the concept of good neighbour agreements. These sections are similar in layout and scope to the sections covering planning obligations.

http://www.scotland.gov.uk/Publications/2010/04/26150418/4