

EVEBRIEF

Legal & Parliamentary

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01	Planning	16	Contract
10	Leasehold Enfranchisement	17	Environment
11	Housing	18	General
14	Real Property		

LULL BEFORE THE STORM



Steve Hile
Partner

As we await the new Government's legislative programme in a few weeks' time there is little of major significance in terms of Central Government legislation to report on. However, it is still managing to issue vast quantities of statutory instruments – fine tuning or adding another layer to earlier primary legislation – and various guidance /discussion papers, including one rather appropriately named “Where does all the money go?” reported at item 06. This comes from the Planning Advisory Service but could have come from any Government Department or Agency. Whilst this paper was looking at benchmarking the costs associated with processing planning applications it is clear that in the months and years ahead much of Government will be reviewing whether it is delivering value for money. Last week Suffolk County Council announced that it is contracting out all its services and this is likely to be just the beginning in a move that will change Local Government beyond recognition in the next few years.

In a similar vein, at Item 8 we report on how the Campaign to Protect Rural England (CPRE) is calling on Ministers not to abandon strategic planning in their desire to drive forward their localism agenda. As they point out, it is important to be able to see the bigger picture and have regard to the national or regional benefits of a particular scheme such as a high speed rail link or housing that local decision making could easily ignore through ‘nimbyism’. It is vital therefore, whilst reviewing the planning system and other parts of local administration, that bad or inefficient practice is changed but not to the detriment of the wider community at a regional or national level.

Steve Hile

PLANNING

01 Statutory Instrument

SI 2010/2134 The Town and Country Planning (General Permitted Development) (Amendment) (No 2) (England) Order 2010

This Order, which comes into force on 01.10.10, amends Class I of Part 3 (changes of use) of Schedule 2 to the 1995 General Permitted Development Order to grant permitted development rights for changes of use from buildings used as dwellinghouses to buildings used as small scale houses in multiple occupation.

http://www.legislation.gov.uk/uksi/2010/2134/pdfs/uksi_20102134_en.pdf

02 Statutory Instrument

SI 2010/2135 The Town and Country Planning (Compensation) (No 3) (England) Regulations 2010

Section 108 of the Town and Country Planning Act 1990 provides for the payment of compensation in certain cases where planning permission for development granted by a development order or a local development order is withdrawn and where on an application for planning permission for that development, the application is refused or permission is granted subject to conditions. Sections 108(2A) and (3A) to (3D) (inserted by s189 of the Planning Act 2008) limits the circumstances in which compensation is payable. These Regulations, which come into force on 01.10.10 and replace the Town and Country Planning (Compensation) (No 2) (England) Regulations 2010 (SI 2010/1220), prescribe types of development for the purposes of s108(2A) and (3C), prescribe the manner in which planning permission is to be withdrawn and the manner and maximum period, in which notice of withdrawal, revocation, amendment or directions is to be given. The prescribed development now includes changes in use of houses in multiple occupation to dwellinghouses and of dwellinghouses to houses in multiple occupation.

http://www.legislation.gov.uk/uksi/2010/2135/pdfs/uksi_20102135_en.pdf

03 Statutory Instrument

SI 2010/2184 The Town and Country Planning (Development Management Procedure) (England) Order 2010

This Order, which comes into force on 01.10.10, consolidates with amendments the provisions of the Town and Country Planning (General Development Procedure) Order 1995 ("the 1995 Order") and subsequent amending instruments. It provides for procedures connected with planning applications, consultations in relation to planning applications, the determination of planning applications, appeals, local development orders, certificates of lawful use or development, the maintenance of registers of planning applications and other related matters. The main changes are as follows:

- clarification that National Park authorities are responsible for local planning authority functions in their National Parks;
- the updating or removal of references to bodies where such bodies no longer exist or where their functions have been transferred to other bodies;
- the inclusion in a separate Schedule (Schedule 7) of a form of notice for a proposal for a local development order granting planning permission, instead of the form having to be a form substantially to the same effect as one set out in Schedule 2; and
- amendments to the provisions relating specifically to applications for the grant of a replacement planning permission subject to a new time limit.

http://www.legislation.gov.uk/uksi/2010/2184/pdfs/uksi_20102184_en.pdf

04 Statutory Instrument

SI 2010/2185 The Planning (Listed Buildings and Conservation Areas) (Amendment No 2) (England) Regulations 2010

These Regulations, which come into force on 01.10.10, amend regulations 3 and 3A of the 1990 Regulations which relate to applications for listed building and conservation area consent. Their effect is to modify certain procedural requirements for consent applications which are related to planning applications to which article 18 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 ("the DMPO") refers. The DMPO consolidates and revokes, in relation to England, the Town and Country Planning (General Development Procedure) Order 1995 ("the GDPO"). Article 18 of the DMPO replaces article 10B of the GDPO which similarly provided for consultation in relation to applications for planning permission for development without compliance with conditions previously attached and to applications for development not begun but for which planning permission was granted on or before 01.10.09 subject to a statutory time limit, which has not expired. Article 18 now extends to certain outline permissions where development has begun.

http://www.legislation.gov.uk/uksi/2010/2185/pdfs/uksi_20102185_en.pdf

05 Practice Guide

Using Mineral Extraction and Archaeology: A Practice Guide in conjunction with Planning Policy Statement 5: Planning for the Historic Environment

In March 2010 the Government issued PPS 5: Planning for the Historic Environment which in England replaced and cancelled Planning Policy Guidance Note 15: Planning and the Historic Environment. This short document describes the implications of this change in national planning policy with regard to the planning guidance contained in Mineral Extraction and Archaeology: A Practice Guide.

<http://www.helm.org.uk/upload/pdf/Using-MEAPG-PPS5.pdf?1283779574>

06 Planning Advisory Service report

Where does all the money go?

The Planning Advisory Service assists local councils to maintain their performance levels by providing relevant and comparable information about costs, performance and methods. This project considered the following questions:

- What do local authorities spend their money on?
- How does an individual authority's services, performance and productivity compare with that of other authorities?
- What are the main reasons for the differences?
- What could authorities learn from others that would improve their productivity and the value for money they give to their customers?

<http://www.pas.gov.uk/pas/aio/689916>

07 CLG Letter to the Chief Planning Officer and local planning authorities in England

Amendments to the planning rules for houses in multiple occupation

On 17.06.10 the Government announced proposals to amend the planning rules for houses in multiple occupation (HMOs) and confirmed that it would seek the views of key partners on the proposed changes. This letter confirms the Government's intention to proceed with the amendments as announced, which means that changes of use from family houses to small HMOs will not require planning permission. Where there is a need to control the number of HMOs local authorities will be able to use their existing powers, in the form of article 4 directions, to require planning applications in their area. The statutory instruments to give effect to these changes are SI 2010/2134 and SI 2010/2135 (see items above).

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1708912.pdf>

08 CPRE Report

The Bigger Picture: the case for strategic planning

The CPRE is calling on Ministers not to abandon strategic planning in their drive to move forward the Government's localism agenda. This report sets out how the loss of strategic planning, without a viable replacement, would be detrimental to environmental protection, for the countryside and for the development of necessary infrastructure. The Government has made it clear that it intends to revoke Regional Strategies and it is encouraging the creation of Local Enterprise Partnerships to promote economic development across local authority boundaries. The publication of this Report coincides with the deadline for submitting proposals for possible schemes and CPRE is concerned that these Partnerships will be too narrowly focused to address broad strategic planning issues, such as providing affordable housing in suitable locations, protection of the Green Belt and delivery of adequate transport links.

<http://www.cpre.org.uk/news/view/700>

09 CLG Letter to the Chief Planning Officer and local planning authorities in England

The Town and Country Planning (Development Management Procedure) Order 2010

A consolidated version of the Town and Country Planning (General Development Procedure) Order 1995 will come into force on 01.10.10. This Order will include an amendment that will allow, in certain circumstances, applicants with partially implemented planning permissions to apply for a replacement planning permission with a new time limit. The November 2009 guidance is shortly to be revised in order to reflect this change. The revised guidance will also update the legal position in respect of appeals against refusal or non-determination by local authorities of applications for non-material amendments to existing planning permissions.

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

LEASEHOLD ENFRANCHISEMENT

10 Upper Tribunal: Lands Chamber

Leasehold Reform Act 1967 – price payable for freehold of house converted into bedsits and let to students – whether deferment rate should start at 4.75% rate for houses or 5% rate for flats

* POLYDOROU V MANAGEMENT NOMINEES (REVERSIONS) LTD (2010) PLSCS 239 – Decision given 23.07.10

Facts: P applied to acquire the freehold of a late 19th century mid-terrace property in London of which they held a long lease. The house was originally built as a house with a basement, raised ground floor and four upper floors, but subsequently it had been arranged as two self-contained basement flats with the remainder used as bedsits and ancillary accommodation. The valuation date was May 2006 at which time P occupied the rear basement flat, a statutory tenant occupied one room and the other basement flat was rented out to a university as administrative offices. The remainder of the property was sublet to a company which had an arrangement with the same university to permit students to occupy the bedsits from October to June.

Point of dispute: The deferment rate to be applied on reaching the correct price for the freehold. The LVT had determined the price at £883,955 applying the generic 4.75% deferment rate for houses laid down in *Earl Cadogan v Sportelli*.

Held: The characteristics of the appeal property could compare more closely with flats than with a single house and therefore following *Sportelli*, 5% was the appropriate deferment rate. To this should be added 0.5% to allow for the fact that a 2% real growth rate (one of the constituents of the 5% deferment rate for flats in *Sportelli*) might not be achieved from an investment in this particular property because it was a house in multiple occupation without permission for change to residential C3 use. The evidence showed that the values of buildings with HMO/hostel user had grown substantially less than C3 residential units over a lengthy period. No further adjustment should be made for obsolescence. The enfranchisement price was determined at £606,861.

HOUSING

11 Homes & Communities Agency (HCA) Bulletin

HCA Monthly Housing Bulletin – 31.08.10

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

- House prices were broadly stable in July.
- Savills are now forecasting that house prices will fall by 2.5% in 2010 and by 1.0% in 2011 due to the slow recovery of the mortgage market and economic uncertainty.
- Mortgage lending continues to make a gradual recovery with 52,000 loans for house purchases in June, up 14% on a year earlier according to the Council for Mortgage Lending.
- GDP rose by 1.2% in Q2 2010, its third quarterly rise since the end of the recession, but economic prospects are uncertain in the new climate of fiscal austerity.
- The Bank of England expects inflation to remain above its 2% target until the end of 2011, partly due to the rise in VAT to 20% at the start of next year.
- Interest rates remain at the record low of 0.5%.
- House builders are starting to buy land again.
- Housing starts rose in every region in the year to Q2 2010 as a result of public spending in this area as well as improved market conditions for house builders.

http://www.homesandcommunities.co.uk/public/documents/Housing_Market_Bulletin_August2010.pdf

12 Policy Exchange Report

Making Housing Affordable

This report considers how levels of home ownership and employment could be improved while at the same time saving the Government £20bn a year. These savings would come from:

- reducing existing expenditure on social/affordable housing;
- selling off existing stock on the open market or into a "Path to Ownership" model, while building more new social houses;
- over time, saving money on Housing Benefits as rents rise more slowly; and
- over time, reduced welfare dependency for social tenants.

http://www.policyexchange.org.uk/images/publications/pdfs/PX_Housing_WEB.pdf

13 DCLG Statistical Publication

House Price Index – July 2010

These statistics, based on mortgage completions in July 2010, were released on 14.09.10.

- Average UK house prices were 8.4% higher than in July 2009, but 0.3% lower than in June 2010 (seasonally adjusted).
- The mix-adjusted average house price in the UK stood at £212,878 in July (not seasonally adjusted).
- UK house prices rose by 0.8% in the quarter to July 2010, compared to an increase of 1.1% in the April quarter (seasonally adjusted).
- Over the year to July 2010 average house prices increased in England by 9%, in Scotland by 3.7% and in Wales by 10.1%. They fell in Northern Ireland by 17.1%.
- Average prices paid by first time buyers increased by 7.5% over the year to July whilst prices paid by former owner occupiers increased by 8.7%.
- Average prices paid for new properties were 9.5% higher than a year ago and prices paid for pre-owned dwellings were 8.3% higher.

<http://www.communities.gov.uk/publications/corporate/statistics/hpi072010>

REAL PROPERTY

14 High Court

Construction of contract – fixtures and fittings removed from property between purchaser's inspection and exchange of contracts – whether purchaser entitled to abatement of purchase price – whether sale included fixtures and fittings present at date of inspection or date of exchange

* WICKENS V CHEVAL PROPERTY DEVELOPMENTS LTD (2010) PLSCS 240 – Decision given 08.09.10

Facts: In June 2006 W inspected a property which was being sold by CPD as mortgagee in possession. W agreed to buy the property, having noted that part of the hall fireplace had been removed, that the dining room fireplace was missing and that some renovation works were required. In July CPD's agent telephoned W to inform him that the price had risen by £100,000 and pressing for an early exchange of contracts. Contracts were exchanged on the same day, the sale agreement incorporating the Standard Conditions of Sale (3rd ed) and various special conditions, including: (i) by Special Condition 4 that the buyer had inspected the property and had not been induced to enter into the contract by any warranty made by the seller other than those contained in written replies to enquiries raised by the buyer's solicitor; (ii) by Special Condition 13 that the sale included all fixtures and fittings; and (iii) by Special Condition 16 that the property was sold in its "present state and condition". Later W discovered that a number of items had been removed from the property including stair rods, a chandelier, three fireplaces, doors and kitchen and bathroom equipment.

Point of dispute: Whether W was entitled to an abatement of the sale price on the basis that the fixtures and fittings included in the sale were all those present in the property at the date of his June 2006 inspection rather than on the date of exchange. He argued that the June 2006 inspection had led him reasonably to believe that what he saw at the property was what he was contracting for and that CPD should be selling on that basis, even if it was unaware of the subsequent removal of items from the property. CPD took the contrary view, relying on Special Conditions 4, 13 and 16 of the contract.

Held: Judgment was given in favour of CPD. CPD was not bound to sell on the basis of W's June 2006 inspection unless W could establish fraud on CPD's part. If a vendor knew about the removal of certain items from the property in the intervening period before exchange it was bound to disclose that information, but it was not required to disclose something it did not know about. W acknowledged that he had been informed about damage to a fireplace after his initial inspection, but he had assumed this related to the damage of which he was already aware, when he should have realised that this information raised the possibility of damage having occurred to another fireplace, and that other damage could also have occurred. A reasonable purchaser would have carried out a further inspection. In the absence of any fraudulent misrepresentation the expressions "the property" and "fixtures and fittings" in the sale contract should be read as meaning the property and the fixtures and fittings as they stood at the date of exchange.

15 High Court

Easement to light – claimant’s development of adjoining building interfering with light to defendant’s property – whether defendant entitled to injunctive relief

* HKRUK II (CHC) LTD V HEANEY
[2010] All ER (D) 1010 (Sep) – Decision given 03.09.10

Facts: In 2003 H purchased the former head office of the Yorkshire Penny Bank in the centre of Leeds, a Grade II listed five-storey Victorian building. H spent considerable sums of money on restoring and converting the building into a conference and banqueting venue with offices and residential accommodation on the top floor. In 2007 HKRUK, the claimant, acquired a building which was adjacent to the side elevation of the former bank. This building was five storeys high with a mansard roof, and its former owners had obtained planning permission to construct two further floors. HKRUK admitted that an easement of light existed in favour of the windows of the former bank and that by adding two additional floors to its building it would commit an actionable interference with the access of light to the former bank. H did not accept HKRUK’s offer to settle, but it did not carry out its threat to issue proceedings seeking an injunction to prevent HKRUK from carrying out the proposed works. HKRUK completed the building works in 2009.

Point of dispute: Whether H was entitled to an injunction for the removal or modification of the two extra floors. HKRUK argued that H would be adequately compensated by a small money payment.

Held: H was entitled to an injunction. In cases of nuisance the court had a power to award damages instead of an injunction. Damages would only be substituted if: (i) the injury to the injured party’s legal rights was small; (ii) the damage was capable of being estimated in monetary terms; (iii) the injury was one which could be adequately compensated by a small money payment; and (iv) it would not be oppressive to the infringing party to grant an injunction. In this case the loss of adequately lit space to H was only 300 square feet, or 1% of its building, but the most affected areas were some of the best rooms of the former bank, including its old board room. The injury to H’s rights therefore exceeded what could properly be defined as small and was damage of a kind for which H could not be expected to be compensated by a monetary payment. Secondly, despite H’s failure to issue proceedings HKRUK could not argue that an injunction would be oppressive in the circumstances. The infringement of H’s right was neither trivial nor inadvertent, but was committed in the knowledge that what was being done was actionable. HKRUK could very easily have constructed extra floors of smaller dimensions.

CONTRACT

16 Technology and Construction Court

Enforcement of adjudicator’s award

* AEDIFICE PARTNERSHIP LTD V SHAH
(2010) PLSCS 227 – Decision given 10.08.10

Facts: S, the director and main shareholder of a company which wanted to develop a nursing home, contacted APL, a property consultant, with a view to APL managing the project. APL advised S by email that it would not invoice him until funding for the project had been secured, but it performed various services and ultimately the project fell through. APL invoiced S in respect of its fees. S considered that the invoice should have been addressed to the company and in any event it was not due to be raised at this stage. APL referred the matter to adjudication and an adjudicator was appointed, but S advised him in writing that he would not participate in the adjudication as he considered that the adjudicator had no jurisdiction to determine the dispute given that there was no contract. However, the adjudicator continued with the reference. S responded maintaining that the adjudicator did not have jurisdiction and inviting him to express his reasons if he determined otherwise. The adjudicator made an award in APL’s favour.

Point of dispute: Whether APL’s claim that the adjudication should be enforced would be allowed. APL argued that S had accepted the adjudicator’s jurisdiction, whereas S maintained that he had reserved his position on the question of jurisdiction.

Held: APL’s claim was dismissed. If there was no express agreement giving an adjudicator jurisdiction to decide whether he had jurisdiction, an implied agreement had to be proved. A principal way of determining the lack of implied agreement was if at any material stage shortly before or during the adjudication the objecting party had voiced a clear reservation concerning the adjudicator’s jurisdiction. In this case S had raised a jurisdictional objection in his letter to the adjudicator and the question was whether after that he had done anything to abandon his reservation. S’s response as a whole had to be considered: he had reserved his position on jurisdiction, even though he had previously said that he would not participate in the adjudication and had done so. It followed that the adjudicator had not been given jurisdiction to decide his own jurisdiction and there was no implied, let alone express, agreement giving him that right. S’s reservation regarding jurisdiction had been adequate, and he had maintained it throughout the adjudication.

ENVIRONMENT

17 CPRE Report

England's hedgerows: don't cut them out!

As well as lending beauty and character to the landscape, hedgerows provide many environmental benefits, including important habitats for a wide range of wildlife species. However, as management of hedgerows has declined, many are being lost not only to removal, but as they degenerate into lines of trees and shrubs. CPRE's research shows that there has been an 18% increase in the number of protected hedgerows since its last survey in 1998, but the overall length of England's managed hedgerows fell by 26,000km (6%) between 1998 and 2007. In this report CPRE calls for the current Hedgerows Regulations, which protect important hedgerows, to be improved so as to give local authorities more powers to protect hedgerows that are valued in their local landscape but may not meet the narrow qualification criteria to be deemed "important" under the current regulations. It is a criminal offence to remove an important hedgerow, with possible fines of up to £5,000.

<http://www.cpre.org.uk/news/view/698>

GENERAL

18 Report

Property Data Report

This document has been produced by the following bodies, all of which are members of the Property Industry Alliance:

- The British Council of Shopping Centres;
- The British Council for Offices;
- The British Property Federation;
- The Investment Property Forum; and
- The Royal Institution of Chartered Surveyors.

The paper sets out some key facts about the commercial property sector of the UK eg value, proportion of owner/occupied to rented, length of lease, rental values, details of investors in the sector, performance and investment value.

http://www.bco.org.uk/uploaded/BPF_PIA_Property_Data_web.pdf

19 British Council for Offices survey

Occupier Satisfaction Survey 2010

This year's survey marks a departure from the three previous editions with an updated and more detailed approach based on the Code for Leasing Business Premises in England & Wales, 2007. Overall occupier satisfaction is rated at 4.9 out of 10, while office occupiers scored better with 5.2 out of 10. There appears to be a marked difference between small and large occupiers while sustainability remains a key concern.

<http://www.bco.org.uk/research/researchreports/detail.cfm?rid=160&cid=0>

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

Abbreviations

The following abbreviations are used in evebrief:

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

The star system

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

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

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EVEBRIEF

Legal & Parliamentary

Volume 32(13) 27 September 2010

- 01 Wales – Rating
- 03 Northern Ireland – Planning

WALES

RATING

- 01 Statutory Instrument
-

WSI 2010/2222 The Non-Domestic Rating (Collection and Enforcement) (Local Lists) (Amendment) (Wales) Regulations 2010

These Regulations, which come into force on 01.10.10, make provision for the amendment of the 1989 Regulations following changes to the level of Small Business Rate Relief between 01.10.10 and 30.09.11 for certain ratepayers who meet the relevant conditions. The 1989 Regulations are amended to allow for different arrangements for the financial years 2010 to 2011 and 2011 to 2012, so that the increased level of relief is apportioned to the correct parts of the financial years.

http://www.legislation.gov.uk/wsi/2010/2222/pdfs/wsi_20102222_mi.pdf

- 02 Statutory Instrument
-

WSI 2010/2223 The Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) (No 2) Order 2010

This Order comes into force on 01.10.10 and amends the 2008 Order by making provision for an increase in the level of small business rate relief between 01.10.10 and 30.9.11. The increase only applies to the categories of ratepayer covered by the 2008 Order.

http://www.legislation.gov.uk/wsi/2010/2223/pdfs/wsi_20102223_mi.pdf

NORTHERN IRELAND

PLANNING

03 Statutory Instrument

NSI 2010/294 The Planning (Fees) (Amendment) Regulations (Northern Ireland) 2010

These Regulations, which come into force on 04.10.10, amend the 2005 Regulations which prescribe the fees payable to the Department of the Environment in respect of applications made under the Planning (Northern Ireland) Order 1991. The Regulations increase planning fees by approximately 2.9% overall.

http://www.legislation.gov.uk/nisr/2010/294/pdfs/nisr_20100294_en.pdf