

# EVEBRIEF

## Legal & Parliamentary

Volume 32(16) 22 November 2010

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### LOCALISM RETURNS TO RATES



Hilary Wescombe  
Partner

Rating in Scotland is not often in the headlines but at item 01 in the regional supplement we report on a Statutory Instrument that will allow an authority to retain some non-domestic rates. The very recent announcement by Finance Secretary John Swinney that the Scottish Government will help support the priorities set out in its budget through an increase in business rates on the largest retail properties, including supermarkets and out of town retail parks will be more likely to have caught the attention of ratepayers for premises north of the border.

However, both signal a change in attitude. The targeting of retail properties indicates an abandonment of the Executives' commitment to harmonise the Scottish Uniform Business Rate with that in England. While a return to locally retained rates revenue, if only in part, may herald the way to changes in England that relate to the localism agenda. Any such changes, together with the Local Government resource review in England in January could lead to further business worries about increased costs.

A handwritten signature in black ink, appearing to read 'Hilary Wescombe'.

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**PLANNING**


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01 Court of Appeal

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**Enforcement notice – infringement of Art 8 European Convention on Human Rights – whether judge had applied correct test in determining whether to grant injunction**


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\* BROADLAND CITY COUNCIL V BRIGHTWELL  
(2010) All ER (D) 294 (Oct) – Decision given 28.10.10

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**Facts:** Since 1988, B had occupied an area of land belonging to her mother. She had installed mobile homes on the land, the lawful use of which was for agriculture, and bred livestock on it. In 2006, BCC, the local planning authority, sought an injunction to restrain B for the repeated breaches of planning control since B had persistently failed to comply with their enforcement notices. In 2008, B's appeals against these notices were heard at a public inquiry where the inspector dismissed the appeals and upheld the enforcement notices. The inspector had regard to Article 8 of the European Convention on Human Rights and considered the effect that dismissal of the appeals would have on B's family life, but found that the public interest in the enforcement of planning controls was greater. If an injunction were granted, B would be made unintentionally homeless, and as there was no available housing in the same village, she and her family would have to be housed elsewhere which would affect B's health and the education requirements of B's child. Notwithstanding this evidence, BCC was granted an injunction in October 2009 requiring B to remove the mobile homes and scrap from the land within three months and to cease using the land for residential purposes.

**Point of dispute:** Whether B's appeal against the injunction would be allowed. B argued that she had the support of the community behind her and that the meat she produced was sold to a top supermarket.

**Held:** B's appeal was dismissed. On the evidence, the judge had had proper regard to the Convention, and had properly balanced the matters which adversely affected B's family against the planning control factors, but had properly found that the latter were of greater importance. B's attitude to those factors had rendered it almost inevitable that the injunction would be granted and the judge had not erred in his application of settled principles.

02 Court of Appeal

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**Development of waste composting site – whether environmental impact assessment required**


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\* R (ON THE APPLICATION OF BIRCH) V BARNESLEY METROPOLITAN BOROUGH COUNCIL  
(2010) All ER (D) 34 (Nov) – Decision given 06.10.10

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**Facts:** D, the interested party, applied for planning permission for a development of a waste composting site on his land. Garden compost would be brought to the site and piled up in 'windrows' where it would biodegrade into a fertiliser and then be used to spread on D's land. After it had carried out a 'screening opinion' the council concluded that an EIA was not required for the proposed development as it did not reach the applicable threshold criteria (0.5 hectares) in para 11(b) of Schedule 2 to the 1999 Town and Country Planning (Environmental Impact Assessment) Regulations ("the EIA Regulations"). Permission was granted for the development.

**Point of dispute:** Whether the council's appeal would be allowed against the decision of the judge in the court below to allow B's application for judicial review of the council's decision to grant permission for the development. In this appeal, the main issue was whether the council had been mistaken in concluding that an EIA had not been required.

**Held:** The council's appeal was dismissed. The proposal involved both composting and spreading – whether the spreading operation amounted to development was critically dependent on there being a means of ensuring that the quality of the composted material was such that it was no longer waste. The approach adopted in the screening opinion, which merely stated that the impacts "should be... controllable", had been inadequate and contrary to the underlying purpose of the EIA Regulations. An EIA had been required so that the proposed controls could be identified and their adequacy thoroughly tested through the EIA process.

## 03 CLG Consultation

**Procedures for revoking or making changes to development consent orders for nationally significant infrastructure projects  
Deadline for Responses: 24.12.10**

This consultation is concerned with the draft regulations setting out the procedures for revoking or making changes to a development consent order for a nationally significant infrastructure project which has been granted by the Infrastructure Planning Commission (IPC) or the Sec of State. Although the Government has announced that the IPC will be abolished, these regulations are still needed to enable such a development consent order to be changed or revoked. The Government has announced that it will replace the unelected IPC with an efficient and democratically accountable system, which will provide a fast-track process for major infrastructure projects, but in the interim, the IPC will continue to consider applications for nationally significant infrastructure projects, as defined in the Planning Act 2008.

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

Impact Assessment:

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

## 04 CLG Publication

**Replacement Appendix D to Department of the Environment  
Circular 09/95: General Development Consolidation Order 1995**

This document replaces Appendix D of Circular 09/95: General Development Consolidation Order 1995 to reflect:

- changes to the Article 4 direction process, introduced on 06.04.10 by SI 2010/654; and
- changes to compensation arrangements, where certain permitted development rights are withdrawn, introduced on 01.10.10 by SI 2010/2135.

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

## 05 CLG – Letter to Chief Planning Officers

**Letter to Chief Planning Officers: Publication of Revised Circulars on Houses in Multiple Occupation (HMOs) and Article 4 Directions**

This letter confirms that a replacement for Circular 05/10, which relates to planning and Houses in Multiple Occupation, and a replacement Appendix D of Circular 09/95, relating to Article 4 directions, have been published.

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

## 06 CLG Circular

**Circular 08/10: Changes to Planning Regulations for Dwellinghouses and Houses in Multiple Occupation**

This circular contains guidance on changes of use for dwellinghouses and houses in multiple occupation following changes to the relevant legislation in April and October 2010. The effect of these changes is to allow changes of use between dwellinghouses and houses in multiple occupation to take place without the need for an application for planning permission, unless a local authority has specifically identified an area where planning applications for any such changes will be required. This Circular cancels and replaces Circular 05/10: Changes of Use of Buildings And Land – The Town and Country Planning (Use Classes) Order 1987 and paragraphs 66-77 of Circular 03/05: Changes of Use of Buildings And Land – The Town and Country Planning (Use Classes) Order 1987.

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

## 07 CLG – Letter to Chief Planning Officers

**Letter to Chief Planning Officers: Abolition of Regional Strategies**

This letter follows the recent case brought by Cala Homes in the High Court in which it was ruled that the powers contained in s79(6) of the Local Democracy, Economic Development and Construction Act 2009 could not be used to revoke all Regional Strategies in their entirety. The effect of this is to re-establish Regional Strategies as part of the development plan, but it is the Government's intention to abolish them as part of the Localism Bill, and local planning authorities are expected to have regard to this as a material consideration in planning decisions. The Localism Bill, which will return decision-making powers in housing and planning to local authorities, will commence its passage through Parliament before Christmas.

The letter also informs chief planning officers that the Government is going ahead with the New Homes Bonus, which will reward councils for building homes and working with local communities.

It is anticipated that this scheme will come into effect next April, but new homes delivered now will be rewarded under the scheme.

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

## 08 Planning Officers Society Paper

**Future of Planning Paper No 6: Neighbourhood Planning**

It is expected that the Decentralisation and Localisation Bill will pave the way for a modified development plan in the form of a Local Plan for each authority's area. This may include the equivalent of a core strategy, together with other elements such as a site allocations document and continuing provision for joint plans and subject plans eg minerals and waste. Neighbourhood Plans instigated by local communities would inform the preparation of the Local Plan. Local Development Frameworks would not be scrapped, but would evolve with the new regime. Preparation of the plans would necessitate the council, as local planning authority (LPA), and the neighbourhoods working together with the LPA, to resolve local differences and issues. The neighbourhood plan would be in the format most appropriate to the nature of the locality and its planning objectives. This paper, which outlines some of the issues that will need to be addressed in the new regime, covers the following:

- the new planning system;
- defining neighbourhoods;
- the role of the local planning authority:
  - > the 'Community Planning Charter';
  - > leadership;
  - > procuring the plan;
  - > evidence base and planning constraints; and
  - > accreditation; and
- effective participation.

<http://www.planningofficers.org.uk/downloads/pdf/Neighbourhood%20Planning%20-%2025oct10.pdf>

## RATING

09 Upper Tribunal (Lands Chamber)

### Ratepayer occupying office building and parts of an adjoining office building – whether to be entered as one hereditament or two in the rating list

\* TRUNKFIELD (VO) V LONDON BOROUGH OF CAMDEN RA/2/2008 – Decision given 29.09.10

**Property:** Two adjoining but unconnected properties, one wholly occupied by LB Camden and the other in the council's part occupation.

**Issue:** Whether the occupied premises constituted a single rateable hereditament as determined by the Valuation Tribunal or two separate hereditaments, as contended by the VO.

**Held:** Following the leading case of *Gilbert v Hitchinbottom*, the Upper Tribunal determined that there were two separate hereditaments. The premises occupied did not constitute an entity that could be ringed around on a map. Although they touched for small parts of their peripheries, they were structurally separate and did not intercommunicate. The Council had never considered making a connection between them and, in terms of access, they were separated by 48 metres of public highway.

## REAL PROPERTY

10 High Court

### Right of way – whether right to use private road had been acquired by prescription or under doctrine of lost modern grant

\* LONDON TARA HOTEL LTD V KENSINGTON CLOSE HOTEL LTD (2010) PLSCS 281 – Decision given 01.11.10

**Facts:** The London Tara Hotel ("the claimant") and the Kensington Close Hotel ("the defendant") owned adjacent hotels. A private service road, belonging to the claimant, had been used by the defendant and its predecessors for access to its building for many years. In 1973, the then owner of the site of the claimant's hotel had granted a licence to use the road to the then owner of the defendant's hotel. This licence expired in 1980, when the ownership of the defendant's hotel changed hands, but the road continued to be used for deliveries and by coaches taking visitors to the defendant's hotel. In 2007, the claimant asserted that the defendant had no rights over the access road and that its use of it constituted a trespass which should cease immediately.

**Point of dispute:** Whether the claimant's application for an injunction, restraining the defendant from using the access road, and for damages should be allowed. The defendant argued that it had acquired an easement by prescription, or under the doctrine of lost modern grant based on 20 years continuous use since 1980.

**Held:** The claimant's application was dismissed. The character of the acts of user or enjoyment relied on by the party asserting the right had to be determined. If the user amounted to an assertion of a continuous right that continued for the requisite period and the acts of user were actually or presumptively known about by the servient owner (in this case the claimant) who did nothing to prevent them, that would be sufficient. The defendant's case that it had acquired a prescriptive right of way depended how much it had used the access road after it had acquired the freehold of the hotel in 1980. The claimant, not being aware of the change of ownership, believed that the defendant's use of the road was pursuant to the 1973 licence, but it could have taken legal advice and discovered the true position. The fact that the change in the corporate ownership of the defendant's land was not obvious, did not preclude the inference that the claimant had acquiesced in the defendant using the road such that the latter had acquired a prescriptive right. The defendant had acquired by a lost modern grant, on the basis of 20 years use since 1980, a right of way over the road, but the right of way that had been acquired by prescription was for the use of coaches and delivery vehicles only.

## CONTRACT

11 Court of Appeal

### Option to purchase land – defendant obliged to build new bypass – whether road open for purposes of sale agreement

\*\* BOVIS HOMES LTD V PERSIMMON HOMES LTD (2010) All ER (D) 50 (Nov) – Decision given 04.11.10

**Facts:** In December 2007 the parties, who were both developers, entered into a contract for the claimant to purchase land from the defendant for the purposes of a residential development. Under the terms of the agreement, the defendant was required to construct a new bypass (defined by reference to the s106 agreement) and the claimant was granted a put option under which the defendant was required to re-purchase the land in the event that this bypass was not open to the public by 31.10.09. Under the terms of the outline planning permission, no premises could be occupied until the bypass was open to vehicular traffic. The defendant constructed the bypass and an opening ceremony was held on 30.10.09. From 11pm on that day the bypass could be used by the public, but one lane in each direction was coned off and the whole bypass was subject to traffic management measures. The claimant considered that the bypass had not been opened to the public in accordance with the contract and exercised the option. In the defendant's view this notice was invalid and it refused to repurchase the land.

**Point of dispute:** Whether the defendant's appeal would be allowed against the ruling of the judge in the court below that on its proper construction the condition in the sale agreement relating to the opening of the bypass had not been satisfied. The issues were whether the bypass as specified in the sale agreement existed on the day that the claimant served notice exercising the option and, if it did exist, whether it was open to the public on that day within the meaning of the sale agreement.

**Held:** The defendant's appeal was dismissed. The correct issue to be determined was not whether the bypass was sufficiently completed and the outstanding work sufficiently minor that the council was satisfied, but whether the bypass, as defined in the s106 agreement and authorised by the planning permission, had been constructed and was opened to the public. On the evidence, the bypass had not been constructed on the date when the claimant served notice exercising the option, and nor was it opened to the public because the dual carriageway was partly coned off. The situation would have been different if both carriageways had been opened before the date of the notice and one lane was subsequently coned off.

## HOUSING

12 Homes & Communities Agency (HCA) Housing Market Bulletin

### Monthly Housing Market Bulletin, October 2010

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

- House prices have fallen, with the Halifax recording a 3.6% fall in house prices in September, although other indices do not record such a significant fall.
- Lending for house purchase continues gradually to improve on a year-on-year basis, though it remains significantly below its historical levels.
- UK GDP increased by 0.8% in the Q3 2010, although this rate of growth may be difficult to sustain due to the Spending Review cutbacks to public expenditure, as well as ongoing low levels of credit for businesses and households.
- In the Spending Review, the Government announced a programme to deliver 150,000 new affordable homes over the Review period, and a New Homes Bonus scheme is to be launched with the aim of incentivising local authorities to build new housing.
- The Government has announced that planning is to be reformed with a new presumption in favour of sustainable development.

<http://www.homesandcommunities.co.uk/public/documents/Housing-Bulletin-Oct2010.pdf>

## CONSTRUCTION

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13 College of Estate Management (CEM) Occasional Paper Series

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### **Inclusive Access, Sustainability and the Built Environment**

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Inclusive access is an important component of the drive to achieve sustainability as it helps to prevent the need for expensive structural changes to a building during the course of its life, thus contributing to economic viability and long-term usability. In 2009-10 CEM, together with some other organisations, arranged a series of workshops on 'Inclusive access for higher performing buildings' which highlighted that successful delivery of inclusive access involves:

- collaborative working within built environment project teams;
- appreciation of all aspects of disability/diversity in order to understand why something needs to be done, and to envisage a building through someone else's needs;
- awareness that legislation and regulation will not deliver inclusive access, and may act as a brake on creative thinking;
- the need to keep abreast of developments in accessible and assistive technology, ICT and assistance/support services, which facilitate improved use of built environments by disabled people; and
- the need to identify and disseminate best practice.

<http://www.cem.ac.uk/ourresearch/reportsandpublications/inclusiveaccesssustainabilityandthebuiltenvironment.aspx>

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### Useful web links

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[www.odpm.gov.uk](http://www.odpm.gov.uk)  
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[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(16) 22 November 2010

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- 02 Scotland – Construction
- 03 Northern Ireland – Planning

### SCOTLAND

#### RATING

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#### 01 Statutory Instrument

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SSI 2010/391 The Non-Domestic Rating Contributions (Scotland) Amendment Regulations 2010

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These Regulations which come into force on 31.12.10, amend from the financial year 2011/12 onwards, the rules for the calculation of payments contained in the 1996 Regulations. The amendments to the rules are in consequence of the introduction by the Scottish Ministers of a Tax Incremental Financing Administration Pilot Scheme. Where a project is approved under this scheme, an authority can retain an agreed amount of growth in non-domestic rates for an area and use that income stream to fund investment in the area concerned.

[http://www.legislation.gov.uk/ssi/2010/391/pdfs/ssi\\_20100391\\_en.pdf](http://www.legislation.gov.uk/ssi/2010/391/pdfs/ssi_20100391_en.pdf)

**CONSTRUCTION**

02 Scottish Government Consultation – Building Standards Division

**Consultation on Sustainability Labelling Within Building Standards**

Deadline for Responses: 24.12.10

The Building (Scotland) Act 2003 allows Scottish Ministers to regulate for the purpose of achieving more sustainable development. In Scotland, sustainability is embedded into the building regulations for all new buildings rather than attempting to make new buildings achieve the required levels within a voluntary system. While it is recognised that the standards in ss1 to 6 of the 2010 Technical Handbook achieve a good level of sustainability, the Government considers that there is scope for further improvement. Scottish Ministers consider that it is not practicable at this time to require every building to incorporate higher performance standards or further sustainability measures, but developers may wish to gain recognition for building to higher standards, or they may be required to do this if either a planning authority, or funding body, make constructing to a higher level, a condition of approval or funding. It is proposed to introduce s7 in order to:

- recognise the level of sustainability already achieved by the building regulations; the 2010 standards being set as the benchmark level and credit being given to those designing to the standards within ss1-6 of the Building (Scotland) Regulations;
- encourage more demanding sustainability standards; and
- encourage consistency between planning authorities that use supplementary guidance to promote higher measures of sustainable construction in their areas.

The new higher standards to measure sustainability relate to:

- climate change, energy and water resources; and
- quality of life, material use and waste.

<http://www.scotland.gov.uk/Topics/Built-Environment/Building/Building-standards/publications/pubconsult>

**NORTHERN IRELAND****PLANNING**

03 Department of the Environment Consultation

**Planning Fees in Northern Ireland: Proposals for Change**

Deadline for Comments: 04.01.11

This consultation paper seeks views on a package of proposed changes to the planning fees charged under the Planning (Fees) Regulations (Northern Ireland) 2005 (as amended). The existing fee structure contains a number of anomalies and imbalances with the result that the income from smaller, uncomplicated developments is subsidising the cost of processing applications for larger, more complex developments. The economic downturn has also severely affected the income of the Planning Service. In order to address these problems this paper sets out a number of proposals relating to the current fee structure of the planning system.

[http://www.planningni.gov.uk/index/news/news\\_consultation/planning\\_fees\\_consultation\\_paper\\_2010.pdf](http://www.planningni.gov.uk/index/news/news_consultation/planning_fees_consultation_paper_2010.pdf)