EVEBRIEF

Legal & Parliamentary

Volume 36(05) 14 July 2014

CONSERVATION COVENANTS: THE WAY TO CAPTURE CURRENTLY MISSED CONSERVATION OPPORTUNITIES

In this edition we report on the Law Commission's review and recommendations on conservation covenants. The recommendations include a draft Bill to introduce a scheme aimed at creating a versatile, simple and cost effective way of securing long term conservation proposals by landowners keen to protect heritage assets.

The Queen's Speech outlined a programme of 11 new bills that make up the coalition's plans for its final year in power before the election. Highlights include amendments to the process for making changes to Development Consent Orders for nationally significant infrastructure projects, establishing the Highways Agency as a Government–owned company and allowing certain types of planning conditions to be discharged upon application if a local planning authority has not notified the developer of their decision within a prescribed time period and measures to make it easier to gain access to shale oil and gas reserves, including fracking activities. The legislation will also allow for the creation of an "allowable solutions scheme" to enable all new homes to be built to a zero carbon standard.
So another busy parliamentary session ahead!

Peter Dines
Editor

GERALDEVE

LANDLORD & TENANT

01 Upper Tribunal: Lands Chamber

Landlord & Tenant Act 1985 – service charge – recovery of management fees

*WESTLEIGH PROPERTIES LTD V GRIMES
[2014] PLSCS 174 – Decision given 14.05.14

Facts: G was the leaseholder of one of three upper floor flats, all of which were let on long leases in similar terms, in a converted building in Paignton, Devon. The leases required the leaseholder "to contribute annually or more frequently as the Lessor shall require when called upon to do so by the Lessor" one quarter of the costs of the appellant landlord (WP) in insuring the property and discharging certain covenants under which WP was obliged to maintain, repair, and redecorate the building. The leaseholders disputed their liability to pay the management fees that WP had added to the service charges for the years after 2009. These included the fees of a managing agent, accountancy fees and an administration fee in respect of major works.

Point of dispute: Whether WP's appeal would be allowed against the LVT's ruling that it was not entitled to recover any management fees since no management activities had actually been undertaken during the relevant period. WP contended that a management fee and associated professional fees were an integral part of the costs that it had to incur in order to perform its obligations under the repairing covenants. It further argued that the cost of collecting service charge arrears should be regarded as coming within those covenants since it could not perform its functions unless it was able to collect monies due from the leaseholders.

Held: WP's appeal was dismissed. The terms of this lease relating to recovery of service charges were unusually limited and any liability of the leaseholders to contribute towards WP's costs in connection with the property had to be found within the lease. There was no express reference in the lease to a service charge; nor was there any reference to a managing agent or to the cost of engaging one and no function was described which was to be performed by any agent of the landlord. The agreement between the parties did not permit the recovery of a flat rate management fee and WP was only entitled to recover the fees of managing agents when it arranged for repairs or other works to be done. With regard to the years under consideration no part of the management fee that WP had paid to its managing agent amounted to costs expenses and outgoings mentioned in the covenants and accordingly it could not recover any of those fees from the leaseholders.

02 Upper Tribunal: Lands Chamber

Service charges – placement of steel beams supporting walkway used to access upper floor flats – whether cost of works recoverable through service charge – whether lessees' liability reduced on grounds of historic neglect

*DAEJAN PROPERTIES LTD V GRIFFIN
[2014] PLSCS 172 – Decision given 14.05.14

Facts: The appellant, DP was the freehold owner of a three-storey Victorian building with shops on the ground floor and flats on the upper floors. G were the long lessees of two of the flats under leases which contained a landlord's covenant to repair the structure of the building and a tenant's covenant to pay for such repairs through a service charge. Access to the upper floors was along an external concrete walkway on a parapet wall which was supported by steel beams. These had been corroding over many years and in 2008 one of them failed altogether requiring emergency repair work. At that point it was decided to replace the remainder of the steel beams and DP sought to recover £300,000 for the cost of these works from the lessees of the flats through the service charge. The LVT determined that the lessees' liability should be reduced by £44,665 on the basis that the beams should have been replaced 20-30 years earlier and that the repair costs were not reasonable to the extent that they were increased as a result of being carried out as an emergency response to the imminent collapse of the parapet.

Point of dispute: Whether DP's appeal against the LVT's ruling would be allowed. By the date of the application DP had carried out four out of five phases of the works. The lessees argued that the cost of the works would have been less had they all been tendered together as a single contract.

Held: The appeal was allowed. The LVT had erred in focusing on the condition of the beams in the 1960s since DP had not acquired its interest until 1973 and none of the present leases had existed in the 1960s. The present lessees were not entitled to damages referable to breaches of covenant committed by DP between 1973 and the date on which each individual lessee acquired his own lease. Historic neglect could only provide a defence to a claim for service charges if it could be shown that, but for the failure of a landlord to make good a defect at the time required by the covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided. The evidence established that by 1983, the earliest date when any current leaseholder acquired their interest, a decision to replace all the beams would have been inevitable had they been inspected. Substantially the same work would have been required at any time in the intervening 30 years before the works actually started in 2008. The first four phases of the works had properly been considered emergency works with no time for prior consultation with the lessees, but that would have been the case whenever the need for those phases became apparent. All the work that had been already carried out and that proposed in phase 5 would have been required if it was done as a single project and it was unlikely that doing it as a single project would have led to any significant savings. No award for compensation for disruption to the lessees during the course of the works should be made. The cost of the works claimed was appropriate and should be included in the service charge payable by the lessees.

If you require advice on landlord & tenant issues, contact Graham Foster on Tel. +44 (0)20 7653 6832 gfoster@geraldeve.com

PLANNING

03 Court of Appeal

Company seeking planning permission for exploratory drilling for oil and gas in the green belt – whether amounting to "mineral extraction" within para 90 of NPPF such that not automatically inappropriate development in green belt

*EUROPA OIL & GAS LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2014] PLSCS 181 – Decision given 19.06.14

Facts: In 2008 the respondent company, EOG, applied for planning permission for exploratory drilling for oil and gas on a site in the green belt near Leith Hill, Surrey. The appellant action group objected to the proposed development. Planning permission was refused first by the local planning authority and then by a planning inspector on appeal. The inspector found that the proposals would amount to inappropriate development in the green belt for which there were no special circumstances to justify. In coming to this conclusion he rejected EOG's contention that the development would qualify as "mineral extraction" which, under para 90 of the NPPF, was not automatically inappropriate development.

Point of dispute: Whether to allow the appellant's appeal against the finding of the judge in the court below who quashed the inspector's decision. He held that "mineral extraction" in para 90 of the NPPF and in the relevant minerals core strategy for Surrey included exploration, so that the proposed development did amount to mineral extraction and therefore was not necessarily inappropriate development.

Held: The appeal was dismissed. The phrase "mineral extraction" in the NPPF covered all three stages of on-shore oil and gas development – exploration, appraisal and production. Moreover, para 143 of the NPPF required local authorities, when preparing local plans, to identify and include policies for extraction which would include exploration. There was nothing in the Surrey minerals core strategy requiring "mineral extraction" to be given an different interpretation from that in the NPPF. The inspector had proceeded on the incorrect premise that exploration for hydrocarbons was necessarily inappropriate development and, but for that error, his decision might have been different which meant that his decision had properly been quashed.

04 Administrative Court

S106 agreement – claimant police commissioner seeking judicial review of grant of planning permission

*R (ON THE APPLICATION OF THE POLICE AND CRIME COMMISSIONER FOR LEICESTERSHIRE) V BLABY DISTRICT COUNCIL
[2014] PLSCS 162 – Decision given 27.05.14

Facts: The defendant, BDC, granted planning permission for a 394 hectare mixed-use development in Leicestershire. It was common ground that the development would place additional and increased burdens on local health, education and other services, including the police force. The claimant police commissioner did not challenge the principle of the proposed development nor the potential amount of funding for policing that was to be provided by the developer, but he had concerns about the timing of the fund provision during the course of the development and the lack of a clear commitment in the planning obligation agreement for the developer to provide any police premises to serve the new community.

Point of dispute: Whether the claimant's application for judicial review of the decision to grant planning permission for the development would be allowed. He contended: (i) that BDC should have included provisions in the s106 agreement to secure adequate and timely contributions towards policing so as properly to mitigate the adverse impact of the development; and (ii) the police had a legitimate expectation that BDC would consult with them over the timing and delivery of the contribution.

Held: The application was dismissed.

i. The claimant had not established that BDC had acted irrationally or unfairly in carrying out the necessary balancing exercise in the decision making process leading to the s106 agreement. A planning judgment had been reached that earlier trigger points for the financial contributions were not required to make the development acceptable.

ii. The court did not find that any representation had been made by BDC that could have led to an expectation that the claimant would be consulted on the level and timing of the delivery of the contribution. Although the negotiations leading to the finalising of the s106 agreement had been prolonged nothing had occurred during the various communications that could reasonably have led the claimant to believe that he would be consulted on the specific terms of the agreement.

05 Administrative Court

Change of use – permission for supermarket in city street – whether inspector erring in assessment of noise impact

*WESTMINSTER CITY COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2014] PLSCS 173 – Decision given 10.06.14

Facts: The property was a mixed-use building in the City of Westminster with residential flats on the upper floors and three retail units on the ground floor. One of these had permission for A1 retail use restricted to non-food activities. Permission was sought to operate the shop as a supermarket which would involve lifting the restriction on non-food retailing and building a service entrance for deliveries at the back of the property. WCC refused permission on the grounds that the delivery arrangements would conflict with the policy of promoting pedestrian movements in the area and would have an unacceptable impact on the residential amenity of those living in the flats.

Point of dispute: Whether to allow WCC's application to quash the decision of the inspector appointed by the Sec of State who allowed the appeals against refusal of planning permission for the development, following a public inquiry. WCC argued that: (i) in his approach to the assessment of the noise impact of the development the inspector had not dealt with the matter on the basis of the evidence and the arguments before him but had introduced a new process of assessment in breach of natural justice; (ii) the inspector's approach to the table of measures used to evaluate noise levels had been flawed; and (iii) the inspector had misunderstood the proposed delivery and service plan.

Held: The application was dismissed. An application to the court under s288 of the Town and Country Planning Act 1990 may only be brought on normal public law grounds and is not an opportunity for reconsideration of the planning merits of the inspector's decision. Read as a whole the decision in this case showed a properly balanced approach both to the evidence and to the arguments that had been before the inspector. On the basis of the evidence that had been before him concerning noise levels, and the effect that the proposed development would have on them, his judgment had been entirely proper. The inspector had remarked that any increase in noise levels was undesirable but he had had to make a judgment call as to whether it was unacceptable in what was an already noisy city street.

06 High Court

Application for judicial review of decision to fell tree causing damage to listed building in conservation area – whether local authority had a statutory duty to preserve the tree

*R (ON THE APPLICATION OF MCCLELLAN) V LAMBETH LONDON BOROUGH COUNCIL [2014] PLSCS 179 – Decision given 16.06.14

Facts: Following expert reports that a tree growing next to a Grade II listed library building in a conservation area in South East London was causing movement to the boundary wall LLBC decided to fell it. M, a local resident who objected to this decision, contended that LLBC were subject to a duty to protect the tree from risk under s72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the 1990 Act").

Point of dispute: Whether to allow M's application for judicial review of LLBC's decision to fell the tree. M argued that LLBC had failed to give special attention to whether the preservation of the tree would be desirable in the interests of preserving or enhancing the character or appearance of the area; alternatively it had failed to take into account the material consideration that the tree was situated in a conservation area.

Held: M's application was granted.

i. Section 72 of the 1990 Act did not apply to trees owned by local authorities.

ii. The final decision to fell the tree had been taken by LLBC's Cabinet, not its planning committee. It could not be assumed that Cabinet members had the same depth of local knowledge of planning and conservation issues as would a planning committee. The court was satisfied that LLBC, through their Cabinet, had failed to take into account a material consideration, namely that the tree was situated in a conservation area.

iii. Since the decision to fell the tree had been such a finely balanced one, and because the Cabinet had failed to weigh the impact that the loss of the tree would have on the character of the conservation area as a whole the appropriate remedy was to quash the decision to remove the tree. The court was not required to be satisfied that there was certainty that consideration of the conservation issue would have made a difference to the decision, rather that there was a real possibility that it would, as was the case in this instance.

07 High Court

Change of use

*PEMBERTON INTERNATIONAL LTD V LAMBETH LONDON BOROUGH COUNCIL
[2014] PLSCS 183 – Decision given 18.06.14

Facts: LLBC granted planning permission for a material change of use of business premises in Old Town, Clapham, London SW4 to use as a restaurant and café. A new condition attached to the permission permitted outdoor seating within a specified area limited to 30 covers and operating only between 9am and 8pm.

Point of dispute: Whether to allow the claimant's application for judicial review of the grant of permanent planning permission subject to the condition. The claimant contended that: (i) the decision was ultra vires as it had been taken in breach of the LLBC's scheme of delegation; (ii) there had been a failure to have regard to a material consideration i.e. a previous in principle objection to outdoor seating; and (iii) there had been a failure to have regard to complaints about breaches of conditions made during the period of an earlier, temporary planning permission for the change of use.

Held: The application was granted.

i. The scheme of delegation did not violate the provisions of s101 of the Local Government Act 1972.

ii. A individual might apply for planning permission without complying with conditions attached to a previous planning permission and under s73 of the Town and Country Planning Act 1990 the local authority had power to grant such an application.

iii. However, in considering the application for permanent planning permission LLBC's decision-making process had been flawed as the officer concerned failed to have regard to a material planning consideration, namely complaints about breaches of the condition relating to external seating made during the currency of the temporary permission which formed part of the planning history of the site.

08 Queens Speech

Changes to planning

The Queen's Speech setting out the legislative programme for the final session of the current Coalition administration promised an Infrastructure Bill which will include changes to the planning regime and the way zero carbon homes policy will be implemented.

The Bill will:

- amend the process for making changes to Development Consent Orders for nationally significant infrastructure projects;
- establish the Highways Agency as a Government-owned company;
- allow certain types of planning conditions to be discharged upon application if a local planning authority has not notified the developer of their decision within a prescribed time period;
- permit land to be transferred directly from arms-length bodies to the Homes and Communities Agenc; and
- contain measures to make it easier to gain access to shale oil and gas reserves, including fracking activities.

The legislation will also allow for the creation of an "allowable solutions scheme" to enable all new homes to be built to a zero carbon standard

Also promised was the introduction of the secondary legislation to allow for a locally supported garden city to be built in Ebbsfleet, backed by an Urban Development Corporation.

In addition, the speech signalled measures to speed up the time taken for sites granted planning permission to be built, including reforming unwieldy procedures and conditions attached to existing planning permissions whilst protecting environmental safeguards.

Secondary legislation will be amended "to further reform change of use rules to make it easier for empty and redundant buildings to be converted into productive use, supporting brownfield regeneration and increase the supply of new homes".

09 Statutory Instrument

SI 2014/1531 The Growth and Infrastructure Act 2013 (Commencement No.6) Order 2014

This Order brings into force on 01.10.14 s1 of, and Schedule 1 to, the Act in so far as they are not already in force. S1 of the Act inserts new provisions sections 62A and 62B into the Town and Country Planning Act 1990. Those sections provide for the designation of local planning authorities in accordance with criteria set by the Sec of State. Where a local planning authority is designated a person wishing to apply for planning permission in the area of that authority may choose to apply to the authority as usual or instead apply to the Sec of State.

http://www.legislation.gov.uk/uksi/2014/1531/contents/made

10 Statutory Instrument

SI 2014/1532 The Town and Country Planning (Development Management Procedure and S62A Applications) (England) (Amendment) Order 2014

i. This Order amends the Town and Country Planning (Development Management Procedure) (England) Order 2010 to insert a new text into the notice sent to applicants who have been refused planning permission for minor commercial development, or who have been granted permission subject to conditions.

ii. The Order also applies, with modifications, provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990 and certain other provisions to enable the Sec of State to determine applications for listed buildings consent made to the Sec of State under s62A(3) of the Town and Country Planning Act 1990 ("the 1990 Act").

http://www.legislation.gov.uk/uksi/2014/1532/contents/made

11 Local Government Association Report

Planning and growth: the facts

This paper considers the relationship between planning policy and delivery of new housing since WW2. It argues that successive reforms of the planning system have had little effect on housebuilding and that numbers of new homes built are a function of the state of the economy, house prices and the accessibility of finance to homebuyers and house builders. Local councils need to build more housing – last year they only built 1,360 houses – and this can only be done if the Housing Revenue Account borrowing cap is removed and councils are allowed to run housing as a business.

http://www.local.gov.uk/documents/10180/5854661/L14-61+Planning+and+growth-the+facts_26.pdf/def17fe1-6b80-4308-a1fd-69044bdb9493

12 CLG Report

S106 planning obligations in England, 2011 to 2012: report of study

This research looks at the extent and value of planning obligations entered into in England in 2011-12 and examines how these have changed since the last study which was undertaken in 2007-08. When s106 planning obligations were first introduced in 2003-04 it is estimated that they raised £1.9 billion; this study estimates that the total value of planning obligations agreed during 2011-12 was £3.7 billion. A recurring theme of the findings is the reduction in the level of development activity undertaken since the last study.

https://www.gov.uk/government/publications/section-106-planning-obligations-in-england-2011-to-2012-report-of-study

13 CLG Guidance

Improving planning performance: criteria for designation

This document sets out the criteria which the government intends to use to designate local planning authorities if their performance in handling planning applications falls below a satisfactory level, under the powers contained in s62B of the Town and Country Planning Act 1990. The criteria have been updated following consultation.

https://www.gov.uk/government/publications/improving-planning-performance-criteria-for-designation

14 CLG Government Response to Consultation

Planning performance – Government response to consultation

This document sets out the government's response to the consultation on the criteria for identifying under-performing planning authorities. A separate summary of responses will be published for those aspects of the consultation relating to planning contributions.

https://www.gov.uk/government/consultations/planning-performance-and-planning-contributions

15 CLG Statistics

Planning applications in England: January to March 2014

This publication contains national statistics about the number of planning applications made and permissions granted in England. The following are of note:

- Compared to the March quarter in 2013 5% more residential decisions were made; and
- Compared to the previous year 8% more residential decisions were made, and the number of major residential decisions made was 31% higher than in the year ending March 2013.

https://www.gov.uk/government/publications/planning-applications-in-england-january-to-march-2014

16 CLG Statistics

Live tables on planning application statistics

This is a set of live tables of statistics on planning applications at national and local planning authority level.

https://www.gov.uk/government/statistical-data-sets/live-tables-on-planning-application-statistics

If you require advice on planning & development issues, contact Hugh Bullock on Tel. +44 (0)20 7333 6302 hbullock@geraldeve.com

LEASEHOLD REFORM

17 Upper Tribunal (Lands Chamber)

Leasehold Enfranchisement – deferment rate – use of Upper Tribunal decisions as evidence of facts found – evidence required to justify departure from Sportelli deferment rate outside prime central London – whether reliance on Zuckerman permissible – risk of long term growth rate not being achieved – risk of deterioration of low value property of conventional design – management issues in maisonettes –

*IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LVT FOR THE MIDLAND RENT ASSESSMENT PANEL BY SINCLAIR GARDENS INVESTMENTS (KENSINGTON) LIMITED [2014] UKUT 0079 (LC) – Decision given 23.04.14

Facts: 7 Grange Crescent, Halesowen, West Midlands B63 3ED. This concerned the lease extension claim for a flat with 48.29 years unexpired as at the date of valuation on 09.12.11, with an agreed FHVP value of £96,600. The LVT considered the deferment rate and existing lease value. The appeal was only concerned with the deferment rate, which the LVT determined to be 5.75%. This was arrived at by taking the Sportelli rate for flats at 5%, adding 0.5% for poorer long term growth and a further 0.25% for obsolescence.

Point of dispute: Whether the LVT was entitled simply to adopt the deferment rate used by the Tribunal in Zuckerman, and to treat the facts established in that case and the conclusions drawn from them as applicable to the valuation of 7 Grange Crescent without the need for those facts to be independently established by evidence presented to it.

Held: The appeal allowed in part. As mentioned in Arrowdell, the decisions of first–tier Tribunals can constitute no useful evidence in subsequent proceedings. However the same does not apply to the Upper Tribunal, whose role in promoting and facilitating outcomes by providing guidance which parties can assume will be followed is therefore one of its most important functions. The Upper Tribunal was satisfied the LVT was entitled to rely upon the Tribunal's decision in Zuckerman as a sufficient basis for the additional 0.5% to reflect poorer long term growth. The additional 0.25% for obsolescence was determined to be not applicable as this was already reflected in the vacant possession value of the property, which is relevant in only the most exceptional cases. Something more than age and poor condition is required to justify any additional allowance. The appellant also sought to use the generic deferment rate for houses (4.75%) rather than flats (5%) as the starting point due to the characteristics of the subject property, but this was rejected. The deferment rate was determined to be 5.5%, resulting in a premium payable of £10,800.

18 Upper Tribunal (Lands Chamber)

Leasehold Enfranchisement – flats and houses in prime central London – development potential – comparables – adjustments – valuation – development hope value – development value on reversion – appeals allowed in part – s.9(1C) Leasehold Reform Act 1967 and s.32 and Sch.6 Leasehold Reform Housing and Urban Development Act 1993

*TRUSTEES OF JOHN LYON'S CHARITY V KAVEH ALAMOUTI
[2014] UKUT 0087 (LC) – Decision given 28.04.14

Facts: Nos.70, 110 and 106 Hamilton Terrace, London NW8. Three houses, each with separate enfranchisement claims. Two claims under s.9(1C) of 1967 Act and the other a collective enfranchisement claim under 1993 Act. Three separate LVT hearings determined No.70 at a premium of £2,582,783 (37.91 years and an FHVP value of £9,700,000), No.110 at a premium of £9,200,000 (with circa six months remaining the enfranchisement price was agreed to be the FHVP value) and No.106 at a premium of £2,262,528 (36.94 years and an FHVP value of £9,000,000). It was agreed that there has been a trend in this locality to restore properties to houses in single occupation and extend them significantly, thus increasing their value.

Points of dispute:

i. The principle issue was the value of the freehold interest in each property;

ii. Adjustment to comparables; and

iii. Development hope value/development value on reversion.

Held: The appeal was allowed in part. The Upper Tribunal determined No.70 at a premium of £2,862,260 (FHVP £10,750,000), No.110 at £7,750,000 (being both the premium and FHVP) and No.106 at a premium of £480,882 (FHVP £6,750,000). "Bottom up" and "top down" comparable sales were analysed, being unmodernised houses ripe for redevelopment and those that had sold having been redeveloped. With regard to No.106, development hope value was rejected. Development value on reversion was determined to be the correct approach.

19 Upper Tribunal: Lands Chamber

Collective enfranchisement – extent of premises to be enfranchised – whether roadway, car parking spaces and gardens to be included under s1(3)(b) of Leasehold Reform, Housing and Urban Development Act 1993 ("1993 Act") – whether rights in lieu could be granted by freeholder

*CUTTER V PRY LTD
[2014] PLSCS 175 – Decision given 20.05.14

Facts: The appellants, C, served notice under s13 of the 1993 Act to acquire the freehold of a block of flats by collective enfranchisement. P also sought to acquire other parts of the site including a roadway, car parking spaces and gardens which P, the freeholder disputed. Instead it offered to grant leases of six car parking spaces for £10,000 each, a right of way over the roadway subject to payment of "a fair proportion of the costs and expenses" of its maintenance, but no rights over the gardens on the grounds that the lessees were prohibited from entering them although they were liable to contribute to the cost of their maintenance.

Point of dispute: Whether to allow C's appeal against the LVT's ruling that they were not entitled to acquire any additional land and that rights should be granted to them in the terms proposed by P. With regard to the car parking spaces C could not acquire them under the 1993 Act since under the leases each tenant was entitled to use one particular space and therefore they were not property that a tenant was "entitled under the terms of the lease of his flat to use in common with the occupiers of other premises" (Section 1(3)(b) of the 1993 Act).

Held: C's appeal was dismissed.

i. The car parking spaces did not fall within s1(3)(b) of the 1993 Act since each allocated space was not used in common with occupiers of other premises.

ii. Nor could C acquire the gardens as they were not property that it, as nominee purchaser, was entitled to use in common with occupiers of other premises under the terms of their leases. There was a specific restriction on entering the gardens which were purely ornamental in nature which meant that C was not entitled to "use" the gardens within the meaning of s1(3)(b) of the 1993 Act.

iii. It was permissible for P to offer rights under s1(4)(a) of the 1993 Act in lieu of C acquiring the roadway.

If you require advice on leasehold reform issues, contact Julian Clark on Tel. +44 (0)20 7333 6361 jclark@geraldeve.com

HOUSING

20 KPMG + Shelter Report

Building the homes we need – a programme for the 2015 Government

This document is a blueprint for the next government to address the current serious housing shortage. The report identifies four areas in need of reform – the land market, house building market, affordable housing investment and strategic local leadership – a vision statement for each of them and policy recommendations.

http://www.shelter.org.uk/__data/assets/pdf_file/0019/802270/Building_the_homes_we_need_-_a_programme_for_the_2015_government.pdf

https://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Pages/building-the-homes-we-need%E2%80%93programme-2015.aspx

21 Homes and Communities Agency Bulletin

Housing Market Bulletin, May 2014

The HCA monthly bulletin provides the latest information on trends in the housing market, the economy and the housebuilding industry. Recent trends indicate that:

- Average house prices have continued to rise, led by London and the South East. The lowest percentage increase over the past year was issued by the Land Registry (5.6%) but the Nationwide (whose figure is the highest) puts the increase at 10.9%;
- The number of housing transactions increased throughout 2012 and 2013, but they still remain below their 2007 peak; and

http://www.homesandcommunities.co.uk/ourwork/market-context

22 CLG Statistical Release

Affordable housing starts and completions: April 2013 to March 2014

The latest statistics on affordable housing starts and completions managed by the Homes and Communities Agency (HCA) and the Greater London Authority (GLA) were released on 12 June 2014. The figures show the supply of homes delivered under a number of government programmes. The main points were as follows:

- in 2013 to 2014, there were 41,654 affordable housing starts on site delivered in England through programmes managed by the HCA and the GLA; this represents an increase of 15% compared to the 36,090 started in 2012 to 2013; and
- in 2013 to 2014, there were 36,352 affordable housing completions delivered through programmes managed by the HCA and the GLA; this represents a decrease of 1% compared to the 36,733 completed in 2012 to 2013.

https://www.gov.uk/government/statistical-data-sets/affordable-housing-starts-and-completions-april-2013-to-march-2014

23 Prospectus

Estate Regeneration Programme

In his Budget speech earlier this year the Chancellor set aside £150 million for investment in regeneration and new homes on large, deprived housing estates. This fund is to be used to help kick-start and accelerate the regeneration of large estates through fully recoverable loans. Funding will be available for the years 2015/16 through to 2018/19. A new prospectus, inviting expressions of interest, will be published for each of these years, this document being the 2015/16 prospectus. Funding bids are invited for schemes which are:

- necessary;
- locally supported;
- clear on their funding requirements; and
- commercially viable.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320196/140613_Estate_Regeneration_Prospectus.pdf

REAL PROPERTY

24 High Court

Proprietary estoppel – whether claimant acting in reliance on promise to his detriment

*SEWARD V SEWARD
[2014] PLSCS 186 – Decision given 20.06.14

Facts: The claimant, S, and his brother were brothers whose parents, the defendants, owned and operated a farm in Devon. The farm was later split between S and his brother with the defendants retaining partial ownership. When the farm was sold for £830,000 S sought a declaration that the defendants held the sale proceeds upon trust for him absolutely. This was based on a promise, allegedly made to S by the defendants, that if he transferred to his brother his half share in another property that he and his brother jointly owned, he would receive the whole of the farm after the first defendant's death.

S had made the transfer to his brother and was seeking to enforce the promise. The defendants denied making the promise, but contended that, even if they had, it had been satisfied by gifts of land and the provision of financial support to S.

Point of dispute: Whether to allow S's claim.

i. Did the principle of promissory estoppel or proprietary estoppel apply?

ii. Was the claim barred by s2 of the Law of Property (Miscellaneous Provisions) Act 1989, since the alleged agreement was not in writing?

iii. Whether the recognition of a proprietary estoppel would contradict the operation and purpose of s2.

iv. Whether the defendants should be estopped from going back on their promise.

Held: S's claim was allowed.

i. Proprietary estoppel was the appropriate doctrine where a claimant sought to enforce a permanent right over property as the result of a representation. In this case a constructive trust arose by virtue of the proprietary estoppel.

ii. Section 2(5) contained an express saving provision for constructive trusts.

iii. The court had to look at all circumstances in order to decide on the appropriate remedy. Proportionality lies at the heart of the doctrine of promissory estoppel.

iv. S had suffered detriment by giving up half the jointly–owned property in reliance on the promise that he would receive in the future a property that was worth much more. It would be inequitable and unjust to allow the defendants to go back on their promise. S should be awarded the entire beneficial interest in the property. The defendants were ordered to execute a declaration of trust of the property in S's favour, subject to their right to live there so long as they, or the survivor of the two of them, wished to. If the property had to be sold S's interest would then be in any alternative accommodation that might be purchased and in the balance of any sale proceeds.

25 Law Commission Report

Conservation Covenants

Following extensive public consultation, which commenced with the publication of a Consultation Paper in March 2013, this report recommends the introduction of a new statutory scheme of conservation covenants in England and Wales.

- A conservation covenant is a voluntary agreement entered into between a landowner and a conservation body.
- The landowner promises to do something, or agrees not to do something, on his land in order to achieve a specified conservation objective, e.g. preserving a historic building, cultivating a particular plant, protecting a habitat or farming in a certain way.
- A conservation covenant is a long–term arrangement.
- The report includes a draft Conservation Covenants Bill, which would introduce the conservation covenant scheme into the law of England and Wales. This will enable landowners to protect their land in such a way as to conserve and restore the natural and built environment.
- The proposed scheme would give individual landowners the opportunity to contribute to conservation efforts being made across the country and to preserve important features of their property for the public and for future generations.

http://lawcommission.justice.gov.uk/publications/conservation-covenants.htm

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TORT

26 Technology and Construction Court

Damage to train caused by tree falling onto railway from first defendant's garden – whether landowner under duty to regularly inspect trees – whether second defendant tree surgeon owed duty to third party

*STAGECOACH SOUTH WESTERN TRAINS LTD V HIND
[2014] PLSCS 176 – Decision given 11.06.14

Facts: H, the first defendant, owned a house with a large garden adjacent to the railway in Staines. A train owned by the claimant, SSWT, was damaged when it collided with an ash tree which fell onto the railway line from H's property. SSWT sought to recover the cost of repairing the train. It also brought a claim against the tree surgeon who carried out work on the trees in H's garden.

Point of dispute: Regarding H's potential liability the issues were:

i. whether an ordinary landowner was obliged as a matter of course to instruct an expert arboriculturalist to carry out regular inspections of trees on his or her land;

ii. whether H was obliged to carry out preliminary/informal inspections;

iii. whether H had sufficient knowledge and experience to carry out such inspections; and

iv. whether she had in fact carried out such inspections.

With regard to the arboriculturalist he would only be liable if he owed a duty of care both to the SSWT and to H which went beyond the terms of his agreement with H and extended to advising on general safety issues in connection with the tree.

Held: SSWT's claim was dismissed.

i. The owner of a tree owed a duty to act as a reasonable and prudent landowner but not so that the burden upon him was unreasonable. He should act when there was an apparent danger he could see with his own eyes. A reasonable and prudent landowner was not obliged as a matter of course, and without any trigger or warning sign, to pay for an arboriculturalist to carry out periodic inspections of the trees on his land.

ii. An ordinary landowner, who was required to act reasonably and prudently, was obliged to carry out regular informal inspections of trees which bordered a highway, railway or someone else's property. On the evidence H had carried out these inspections properly and there had been nothing to trigger any suspicion that there was a potential problem requiring further inspection of the tree in question.

iii. The second defendant was a contractor who carried out specific works in H's garden, including tree work. Although he was obliged to carry out these works properly so as not to create a danger he owed no general obligation to either H or to SSWT to inspect or advise generally about the tree. His duties were circumscribed by his contractual obligations to H which absolved him from any liability in respect of the claim against him.

TRANSPORT

27 Centre for Cities Research

Making cities' transport work

Centre for Cities is a research and policy institute, dedicated to improving the economic success of UK cities. It is a charity that works with cities, business and the government to develop and implement policy that supports the performance of urban economies through impartial research and knowledge exchange.

This report identifies the challenges that need to be overcome if the transport systems in UK cities are to improve: uncertainty and short timescale of funding, limited freedom to make transport improvements, lack of transport integration, economic development and housing strategies. Arguing that London has managed to overcome most of these challenges by having more control over its transport system through one controlling body, Transport for London (TfL) the report recommends that all cities should be given similar TfL style powers.

http://www.centreforcities.org/research/2014/04/30/delivering-change-transport/

28 TfL Consultation

Crossrail 2
Deadline for Comments: 25.07.14

The original Crossrail route, which has been under development since the 1970's, will connect Wimbledon with Epping via Central London using the existing Tube network and new tunnels. In 2009 TfL decided that there was also a need for a new north east–south west rail line across London which led to a large number of options being assessed. Two of these were selected for further development, the Regional and Metro options, which were consulted on during the summer of 2013. There was greater support for the Regional option and this consultation considers and invites comments on various specific route alignments for Crossrail 2. These are as follows:

- Two route alignment options north of Angel serving Hackney or Dalston Junction;
- An alternative option for a possible new station in Chelsea; and
- A short extension of the route from Alexandra Palace to New Southgate

https://consultations.tfl.gov.uk/crossrail/june-2014

CONSTRUCTION

29 CLG Statistical Release

Code for Sustainable Homes: March 2014

This release contains cumulative and quarterly data on post construction and design stage certificates and ratings for England, Wales and Northern Ireland up to the end of March 2014.

https://www.gov.uk/government/publications/code-for-sustainable-homes-march-2014

30 CLG Guidance

Code for sustainable homes technical guide: Code addendum (2014) England

This addendum brings the Code into line with regulatory or national guidance changes that have occurred recently, in particular to Part L of the building regulations. It should be read in conjunction with the Code technical guide, November 2010.

https://www.gov.uk/government/publications/code-for-sustainable-homes-technical-guide-code-addendum-2014-england

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ENERGY

31 CLG Publication

Method for calculating the energy performance of buildings: notice of approval

This publication documents the approved methodologies and software programmes that can be used to produce Energy Performance Certificates, Display Energy Certificates and Air Conditioning Inspection Reports. It replaces the October 2008 notice of approval.

https://www.gov.uk/government/publications/method-for-calculating-the-energy-performance-of-buildings-notice-of-approval

GENERAL

32 Supreme Court

Registration of town or village green – Commons Act 2006 – use as of right – field provided and maintained by local authority as recreation ground under s80(1) of the Housing Act 1936 – whether use by local inhabitants "by right" not "as of right" so as to preclude registration

** R (ON THE APPLICATION OF BARKAS) V NORTH YORKSHIRE COUNTY COUNCIL [2014] PLSCS 158 – Decision given 21.05.14

Facts: The appellant, B, applied to the respondent local council, NYCC, under s15 of the Commons Act 2006 to register a playing field in Whitby as a town or village green on the ground that it had been used as of right for sports and pastime for the requisite period of 20 years. The land belonged to the local borough council whose predecessor had acquired it in 1951 under the provisions of the Housing Act 1936 and had laid it out and maintained it as a recreation ground under s80(1) which permitted local authorities to provide and maintain recreation grounds in connection with the provision of housing under that Act. The relevant provisions of the 1936 Act had been consolidated into s12(1) of the Housing Act 1985. The application was refused by NYCC on the basis that where land was laid out and maintained as a recreation ground open to the public pursuant to statutory powers then the public had legal right to use that land for recreation "by right", not "as of right". B's claim for judicial review of that decision was dismissed both at first instance and by the Court of Appeal.

Point of dispute: Whether to allow B's appeal against the Court of Appeal's decision. One of the issues which arose was the soundness of the House of Lords' reasoning in R (on the application of Beresford) v Sunderland City Council [2004] 1 AC 889 in which it was held that land acquired under the New Towns Act 1965, and used for recreation pending development plans, was not used "by right".

Held: The appeal was dismissed.

i. The expression “as of right” was the antithesis of “by right” and referred to a situation where the use of land was not done with the landowner’s permission but was carried on nonetheless. Where land was provided by a local authority for recreational purposes under the Housing Act 1985 members of the public used it “by right”. They were entitled to go onto the land and use it for the purposes stipulated by s12(1). In a situation where a public authority has lawfully allocated land for public use it could not be inferred that members of the public had been using that land “as of right” simply because the relevant authority had not objected to their use.

ii. The creation of a village green depended on the relevant period of use as of right being established. Land which was acquired under the New Towns Act 1965 could be made available for public recreation pending any further development proposals. In that case the public’s recreational use of the land was authorised and could not be described as merely “tolerated”, thus lending weight to the inference that the authority implicitly approved the public use under statutory powers rather than the inference of the creation of a modern village green. The decision and reasoning of the House of Lords in Beresford should no longer be relied upon.

33 Future High Streets Forum Report

Good Leadership: Great High Streets

The Future High Streets Forum advises government on the challenges facing high streets and helps to develop practical policies which will enable town centres to adapt and change. This report reviewed existing leadership models in Portas Pilot towns. It sets out a model for good leadership and recommends appropriate steps for establishing strong partnerships with a focus on local delivery.

https://www.atcm.org/policy_practice/future_high_streets_forum/future_high_streets_forum2014

34 Centre for Cities Research

City Views

Since the economic downturn in 2008 London’s economy has continued to accelerate at a much faster rate than other UK cities despite attempts by politicians to advocate a more balanced economy. This report, which examined how the capital is perceived by people and businesses in other cities, brings together the findings of a survey which questioned people living in 16 cities outside London, a national survey and a series of discussions with local government and business leaders.

http://www.centreforcities.org/research/2014/05/12/city-views/

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

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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 36(05) 14 July 2014

SCOTLAND

PLANNING

01 Statutory Instrument

SSI 2014/139 The Town and Country Planning (Control of Advertisements) (Scotland) Amendment Regulations 2014

These Regulations, which came into force on 30.06.14, amend the 1984 Regulations. Powers have been introduced to serve stop notices in respect of enforcement action taken where there is a breach of the 1984 Regulations and it is now an offence to fail to comply with an enforcement notice or stop notice.

http://www.legislation.gov.uk/ssi/2014/139/contents/made

02 Statutory Instrument

SSI 2014/142 The Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2014

This Order, which came into force on 30.06.14, makes changes to the currently permitted classes of development and introduces some new classes. The changes include the following:

- Extending or altering a shop or financial or professional services establishment is now permitted development;
- Permitted development rights are granted for the extension or alteration of schools, colleges, universities or hospitals subject to certain restrictions;
- Permitted development rights are given to the extension or alteration of an office building;
- Permitted development rights are given for electric vehicle charging points in off—street public car parks;
- Permitted development rights are given for the installation of ramps outside the external door of a non–domestic building;
- Erecting, altering or extending forestry or agricultural buildings are not permitted development if they are on land within a historic battlefield;

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- New restrictions and conditions are introduced to permitted industrial and warehouse development on land that is within a site of archaeological interest, a national scenic area, a historic garden or designed landscape, a historic battlefield, a conservation area, a National Park , or a World Heritage Site; and
- The definition of "industrial Building" is amended to include buildings used for research and development.

http://www.legislation.gov.uk/ssi/2014/142/contents/made

03 Scottish Assembly Government Policy Document

Scottish Planning Policy (SPP)

The SOPP sets out national planning policies reflecting Scottish Ministers' priorities for operation of the planning system and for the development and use of land. It relates directly to:

- the preparation of development plans;
- the design of development; and
- the determination of planning applications and appeals.

The SPP is a non–statutory statement of Scottish Government policy on how nationally important land use planning matters are to be addressed across the country. In determining planning applications the SPP is a material consideration which carries significant weight.

http://www.scotland.gov.uk/Publications/2014/06/5823

04 Scottish Assembly Government Policy Document

National Planning Framework 3: Ambition – Opportunity – Place

Scotland's third National Planning Framework, the spatial expression of Government Economic Strategy, sets out a long term vision for development and investment across Scotland over the next 20-30 years. The framework focuses on supporting sustainable economic growth and the transition to a low carbon economy. NPF3 must be taken into account in all strategic and local development plans in Scotland.

http://www.scotland.gov.uk/Publications/2014/06/3539

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GENERAL

05 Guidance

High Hedges (Scotland) Act 2013 – Guidance to Local Authorities

This document contains advice on the processes relating to notices under the provisions of the High Hedges (Scotland) Act 2013, including advice on the application process, on making a decision as to whether a high hedge notice should be issued, compliance and how to handle the appeals process.

http://www.scotland.gov.uk/Publications/2014/06/1160

WALES

PLANNING

06 Welsh Assembly Government Guidance

Practice guidance on planning and the Welsh language

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This guidance, which supports the advice contained in the revised Technical Advice Note 20: Planning and the Welsh language, offers planning authorities advice on how Welsh language considerations can be incorporated into the preparation and review of Local Development Plans (LDPs).

http://wales.gov.uk/topics/planning/policy/guidanceandleaflets/8855237/?lang=en

RATING

07 Statutory Instrument

WSI 2014/1370 The Rating Lists (Postponement of Compilation) (Wales) Order 2014

If you require advice on rating issues, contact Jerry Schurder on Tel. +44 (0)20 7333 6324 jschurder@geraldeve.com

This Order, which came into force on 06.06.14, specifies 01.04.17 as the date on which the next new non-domestic rating list will be compiled in Wales.

http://www.legislation.gov.uk/wsi/2014/1370/contents/made

NORTHERN IRELAND

PLANNING

08 DOE Consultation

Draft Planning Policy Statement 22 (PPS22) 'Affordable Housing'
Deadline for Comments: 26.08.14

This draft Planning Policy Statement puts in place a mechanism for securing developer contributions for the delivery of affordable housing. This draft policy document should be considered alongside the Department for Social Development's draft Developer Contributions for Affordable Housing consultation (see item 11) which sets out the housing policy governing the introduction of developer contributions for affordable housing.

http://www.planningni.gov.uk/index/policy/policy_publications/planning_statements/planning_policy_statement_22__draft___affordable_housing.htm

09 DOE Consultation

Planning Reform and Transfer to Local Government: Proposals for Subordinate Legislation (NI)
Deadline for Comments: 20.08.14

This consultation paper sets out proposals for subordinate legislation to introduce reforms to Northern Ireland's planning system and transfer responsibility for the majority of planning functions to the new district councils in April 2015.

http://www.planningni.gov.uk/index/news/news_consultation/common_news_phase_1_consultation_planning_reform_subordinate_legislation_may_2014.htm

10 DOE Guidance

Information Leaflet 16: Pre–Application Community Consultation Guidance

Section 27 of the Planning Act (Northern Ireland) 2011 places a statutory duty upon prospective applicants for planning permission to consult the community in advance of submitting an application, where the development falls within the major category. This legislation is not due to come into force until April 2015 and the purpose of this information leaflet is to provide guidance on how pre-application consultation could be undertaken by prospective applicants for major applications on a voluntary basis prior to that date.

http://www.planningni.gov.uk/index/news/news_policy/smt-news-29.htm

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HOUSING

11 Department for Social Development Consultation

Developer Contributions for Affordable Housing (NI)
Deadline for Comments: 26.08.14

This consultation seeks views on a proposed system of Developer Contributions for Affordable Housing in Northern Ireland. The proposals would require planning authorities in Northern Ireland to seek contributions from developers for affordable housing, as a proportion of all newly proposed housing developments above a threshold number of dwellings.

http://www.dsdni.gov.uk/index/consultations/consultations-developer-contributions-for-affordable-housing.htm

http://www.planningni.gov.uk/index/news/news_releases/consultation_affordable_housing.htm

GENERAL

12 Statutory Instrument

NISR 2014/143 The Business Improvement Districts (General) Regulations (Northern Ireland) 2014

Business improvement districts are provided for in the Business Improvement Districts Act (Northern Ireland) 2013 as areas within which projects specified in the BID arrangements are to be carried out for the benefit of that district or for those who live, work or carry on any activity in the district. Those projects are to be financed by a BID levy imposed on eligible non–domestic ratepayers, or a class of such ratepayers, in the district. A business improvement district may only be established where those entitled to vote approve the BID proposals which on approval become BID arrangements. W.e.f. 01.07.14 these Regulations, make detailed provision in relation to the administration of these districts.

http://www.legislation.gov.uk/nisr/2014/143/contents/made