EVEBRIEF

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HOUSING POLICIES – RELEVANT AND UP–TO–DATE?

In this edition of Evebrief we report on a number of decisions of various courts on planning matters. Of particular interest is the decision of the Court of Appeal in the 'Hopkins' case, which we report at Item 05. This is a judgment relating to two cases dealing with the same principle which is: if a local authority cannot demonstrate a five-year supply of land for housing, what policies of the Development Plan should be considered to be "out-of-date" and therefore have less weight in the decision making process?

Previously this question has resulted in a number of conflicting judgements. The judgment in Hopkins puts the question to bed with a clear and straightforward answer: the relevant policies for the supply of housing are all those which affect the supply – that is, those which restrict the supply of housing as well as those which provide positively for delivery in terms of a target for housing numbers and allocation of sites. The relevant 'restrictive' policies might include those defining and restricting development in the Green Belt, Green Gaps, "Countryside outside the built up area" and areas of outstanding natural beauty. Accordingly policies are likely to be considered "out-of-date" if all of the relevant policies taken together do not demonstrate the required five-year supply of housing.

This is by no means an invitation to build in sensitive areas, but it means that the balance of prohibition may, in appropriate circumstances, change.

Tony Chase
Editor

GERALDEVE

LANDLORD & TENANT

01 Administrative Court

Breach of covenant – plumber making holes in wall when installing a new boiler – whether in breach of covenant in lease – whether difficulty in contacting landlord to request consent relevant to existence of breach

*RAJA V AVIRAM
[2016] PLSCS 64 – Decision given 23.02.16

Facts: The appellant was the freehold owner of a semi-detached house which had been converted into two flats. The first floor flat belonged to the respondent on a long lease and was let out to shorthold tenants. The respondent's lease contained a covenant against cutting the walls or making structural alterations without the landlord's prior written consent. When the boiler in the first floor flat broke down the respondent engaged a plumber to install a new condensing boiler which required the insertion of a new exhaust pipe and waste pipe through the side wall of the house. The respondent did not obtain the appellant's consent before doing these works and while the boiler was being installed some water penetrated through the ceiling of the ground floor flat. The appellant applied to the first tier tribunal (FTT) under s168 of the Commonhold and Leasehold Reform Act 2002 for a determination that breaches of covenant had occurred.

Point of dispute: Whether to allow the appellant's appeal against the finding of the FTT that there had not been a breach of covenant. The FTT accepted the respondent's evidence that he had not known that the works required cutting any new holes into the walls since he had believed that the new pipes would use the same vents as before, and that making the holes was necessary because of the housing authority's requirement for a condensing boiler. Furthermore, in the past the respondent had had difficulty in finding or making contact with the appellant, so it was difficult to see how consent for the works could have been obtained.

Held: The appeal was allowed.

i. Although the alleged breach was not serious, the FTT was wrong to have ruled that there had been no breach of covenant at all.

ii. It was irrelevant that the respondent had been unaware that alterations to the wall would have to be made. He had instructed a contractor to install a new boiler and was responsible for the consequences of his instructions. The respondent's lack of knowledge did not justify the FTT's conclusion that there was no breach of covenant.

iii. Nor was that conclusion justified by the FTT's findings that the respondent had made reasonable efforts to find his landlord without success. There was no evidence that he had ever asked for consent to make holes in the walls of the building.

iv. Where a lease contains a covenant against alterations without the landlord's prior consent the burden of showing that consent has been unreasonably withheld falls on the tenant. If a landlord cannot be found, with the result that the consent cannot be requested, the tenant will be in breach of covenant if he carries out the alteration.

v. A failure by a landlord to provide a name and address where he can be contacted does not mean that a tenant can carry out alterations or take other prohibited steps without the need to obtain the landlord's consent.

vi. The respondent had committed a breach of covenant for making holes in the walls without the appellant's consent.

02 High Court

Assignment of lease – Landlord & Tenant (Covenants) Act 1995 – whether 1995 Act precluded guarantor of assignor from becoming assignor's assignee – whether assignment void

**EMI GROUP LTD V O & H Q1 LTD
[2016] PLSCS 8 – Decision given 16.03.16

Facts: In 1996 a lease of retail premises was entered into with the tenant's obligations being guaranteed by the claimant, EMI. The landlord's interest was later assigned to the defendant, O&H. The tenant went into administration and the lease was vested in EMI. On the same day EMI granted an underlease to a new company and EMI informed O&H that although the assignment of the lease and the grant of the underlease were valid, the tenant's covenants in the lease could not be enforced against EMI. EMI sought a declaration that as the lease had vested in EMI by assignment and by operation of law, the tenant covenants in it were void and could not be enforced against EMI.

Point of dispute: Whether to allow EMI's claim. The court had to determine:

i. whether the 1995 Act precluded the guarantor of the assignor from becoming the assignor's assignee; and

ii. if that arrangement was precluded by the Act, to what extent the agreements which purported to give effect to it were avoided by s25(1).

EMI contended that although the legal interest in the tenancy was now vested in it as the assignee of the lease, the tenant's covenants were void by reason of s24(2) and s25(1) of the 1995 Act. O&H argued that the assignment of the tenancy by the original tenant to its guarantor was rendered void under the Act.

Held: The claim was dismissed.

i. A tenant was precluded under the 1995 Act from assigning the tenancy to its guarantor and any agreement which sought to give effect to such an arrangement was void by reason of s25(1) as it frustrated the purpose of the Act.

ii. There was nothing in the 1995 Act which provided for there to be sequential steps in relation to the release of the guarantor from his liabilities under the tenant covenants and the re-assumption of those same liabilities on him as assignee. There was no moment in time when a person who was the guarantor, and then became the assignee, was released or otherwise freed from his liabilities in respect of the tenant covenants. Whether as guarantor or as assignee the liabilities in respect of tenant covenants continued unchanged.

iii. The consequence of s25(1)(a), in the circumstances of this case, was that the assignment was void. The assignment purported to make EMI, as the assignee, liable in respect of the same covenants from which it had just been released as guarantor. This had the effect of frustrating s24(2) and in order to safeguard the objectives of the Act the assignment itself had to be void. The assignment did not take effect to vest the lease in EMI and thus it remained vested in the original tenant. EMI remained bound as guarantor of the original tenant's obligations under the lease by virtue of the guarantee and had not been released from its obligations under the guarantee by the operation of the 1995 Act.

03 Upper Tribunal: Lands Chamber

Service charges – issue estoppel

*HEMMISE V TOWER HAMLETS LONDON BOROUGH COUNCIL
[2016] PLSCS 73 – Decision given 02.03.16

Facts: The appellant, H, was the long lessee of a flat in a block forming part of an estate owned by THLBC. In May 2006 H applied to the LVT under s27A of the Landlord & Tenant Act 1985 to challenge the reasonableness of the service charges for the years 2000-2005. The LVT disallowed certain items of service charge after finding that as a matter of construction of the lease, the costs of maintaining the estate, as opposed to H's building, were not recoverable through the service charge. This decision was not appealed, but THLBC continued to include items that were attributable to the estate in the service charge and H applied to the first tier tribunal (FTT) (as successor to the LVT) in respect of the service charges for 2006-2014. The FTT upheld the charges on the grounds that it was not bound to follow the LVT decision and that the definition in the lease was wide enough to include the estate items claimed.

Point of dispute: Whether to allow H's appeal against the FTT decision. The issue was whether the FTT was bound to follow the decision of a previous tribunal in circumstances where that decision had not been appealed and included a determination on the meaning or effect of the same lease in proceedings between the same parties.

Held: The appeal was dismissed.

i. A decision of law by a tribunal such as the LVT did not create a binding precedent. However in a case between the same parties and involving the same lease the question of whether the FTT could depart from a previous decision would depend on whether there was an estoppel between the parties.

ii. Issue estoppel would arise in the absence of special circumstances.

iii. On the facts of this case there were special circumstances to defeat the issue estoppel: (a) the LVT decision was plainly wrong; (b) from the terms of the decision it could be inferred that the question of whether the maintenance of the estate fell within the landlord's obligations was not argued before the LVT, which had dealt with reasonableness of charges; and (c) if an estoppel arose in a situation where there was a continuing relationship between the landlord and the lessee under a long lease it would result in the lessees underpaying the service charge for a long period of time.

iv. THLBC should have appealed the LVT decision rather than carrying on as if it had not been made, but THLBC were not estopped from arguing that they could recover an appropriate portion of the service charge in respect of maintenance of the estate.

04 Department for Energy and Climate Change guidance

Private Rented Sector Tenants' Energy Efficiency Improvements Provisions

This guidance relates to Part 2 of the Energy Efficiency (Private Rented Property) Regulations 2015 which established a new right for private rented sector tenants to request consent from their landlords to install energy efficiency improvements in the property which they rent and to which the landlord cannot unreasonably refuse consent. These new rights came into effect on 16.04.16 and are subject to the tenant obtaining suitable funding for the improvements. This guidance explains the steps that have to be taken by both parties.

https://www.gov.uk/government/publications/tenants-energy-efficiency-improvements-provisions-guidance-for-domestic-landlords-and-tenants

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

PLANNING

05 Court of Appeal

NPPF – Planning permission for residential development – proper application of requirement for sustainable development – correct approach to development plan policies where a five year land supply for housing is not demonstrated

***HOPKINS HOMES LIMITED V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT; CHESHIRE EAST BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2016] PLSCS 90 – Decision given 17.03.16

Facts: In the first appeal, the appellant lpa had refused a planning application by the respondent for a development of 26 houses. The respondent's appeal against that decision was dismissed by a planning inspector. In reaching his decision, the inspector found that a five-year housing supply could not be demonstrated but that relevant development plan policies, which set out a hierarchy of different types of location for the distribution of housing development and which militated against the proposed development, should nonetheless be regarded as up-to-date. In proceedings brought under s288 of the Town and Country Planning Act 1990, the respondent obtained an order quashing the inspector's decision after the Sec of State conceded that the inspector had misunderstood and misapplied para 49 when considering whether the applicable development plan policies were "up-to-date". In the second appeal, the appellant was a developer to which the inspector had granted planning permission for a development of 170 houses. The inspector found that there was not a five-year housing supply, that development plan policies relating to housing development in the open countryside and requiring the maintenance of "green gaps" were therefore to be regarded as out-of-date and should therefore be given reduced weight, and that the proposed housing development should be allowed since it would make an important contribution towards housing requirements. The inspector's decision was subsequently quashed in proceedings brought by the first respondents.

Point of dispute: The meaning and effect of government policy in para 49 of the NPPF for the supply of housing.

Held: The first appeal was dismissed; the second appeal was allowed.

i. Para 49 of the NPPF had to be read in its full context and not in isolation. Its general context was provided by the policies of the NPPF as a whole, in which the government's aim of providing a supply of housing to meet the needs of present and future generations were reflected in the policies for sustainable development, plan-making and decision-taking. Underlying the housing policies of the NPPF was the basic imperative of delivery. As set out in para 47, an authority was to ensure that their local plan met the "full, objectively assessed needs" for housing. The second requirement of para 47 was for local planning authorities to "identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements". In the absence of five years worth of housing, relevant policies of a development plan should not be considered up-to-date, or, in other words, would be "out-of-date".

ii. Construed objectively in their proper context, the words "relevant policies for the supply of housing" in para 49 referred to relevant policies that affected the supply of housing. Para 49 was therefore not limited in its application to policies in the development plan that provided positively for the delivery of new housing, in terms of numbers and distribution or the allocation of sites, but should be given wider interpretation, recognising that the concept extended to other plan policies which had the effect of influencing the supply of housing land by restricting the locations where new housing might be developed. Such policies might include those relating to the green belt; policies for the general protection of the countryside, for conserving the landscape of areas of outstanding natural beauty and national parks and for the conservation of wildlife or cultural heritage; and various policies with the purpose of protecting the local environment in one way or another by preventing or limiting development. A "relevant" policy was simply a policy which was relevant to the application for planning permission, either because it related specifically to the provision of new housing in the local planning authority's area or because it bore on the principle of the site in question being developed for housing. Accordingly, if a local planning authority were unable to demonstrate the requisite five-year supply of housing land, both the policies of their local plan that identified sites for housing development and policies that were restrictive of such development were liable to be regarded as not "up-to-date" under para 49 of the NPPF and "out-of-date" under para 14.

iii. The NPPF presented the decision-maker with a simple sequence of steps when dealing with a proposal for housing development. The first step was to consider whether relevant policies for the supply of housing in the development plan were out-of-date because the local planning authority could not demonstrate a five-year supply of deliverable housing sites. Whether a particular policy of the plan, properly understood, was a relevant policy "for the supply of housing" in the relevant sense was a question for the decision-maker, not the court; accordingly, provided that the decision-maker acted on the correct understanding of the policy in para 49 of the NPPF, and also on the correct understanding of the development plan policy in question, it was for him to decide, as a matter of planning judgment, whether the plan policy was a relevant policy for the supply of housing. If the decision-maker found that relevant policies of the plan were out-of-date, then he would apply the presumption in favour of sustainable development in the way mandated by para 14 of the NPPF, again exercising his planning judgment.

iv. If policies for the supply of housing were out-of-date under paras 14 and 49 of the NPPF, that did not make them irrelevant in the determination of a planning application or appeal, or require them to be given no or minimal weight. The policies in paras 14, 47 and 49 of the NPPF were not intended to punish a local planning authority when they failed to demonstrate the requisite five-year supply of housing land but were meant to be an incentive; the weight to be given to such policies was not dictated by government policy in the NPPF. It would vary according to the circumstances, including, for example, the extent to which relevant policies fell short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy. The amount of weight to be attached to such policies was a matter for the decision-maker.

v. In the first appeal, had the inspector not misconstrued the policy in para 49 of the NPPF he would not have concluded that the development plan policies to which he referred were up-to-date in the absence of a sufficient five-year housing supply. All those policies were properly to be regarded as relevant policies for the supply of housing since they were all policies by which a material degree of restraint was imposed on both the location and amount of new housing development. Given his conclusion on the five-year housing supply, he should have regarded each of those policies as out-of-date, then applied the presumption in favour of the development plan in accordance with the policy in para 14 of the NPPF, giving to the out-of-date policies such weight as he thought they should have in the particular circumstances. His failure to do so was an error of law that vitiated his decision. The inspector had misunderstood and misapplied national policy for the protection of heritage assets in para 135 of the NPPF. There were no grounds on which the court should exercise its discretion to withhold a quashing order.

vi. In the second appeal, the inspector had proceeded on a correct understanding of the policy in para 49 of the NPPF and of the relevant development plan policies. He had properly exercised his own judgment when resolving which of those policies were within the scope of para 49 and how much weight should be given to them when applying the statutory presumption in favour of the development plan and the policy presumption in favour of sustainable development in the NPPF. He had made no error of law. Both his approach and his conclusions were legally sound and his decision should not have been quashed.

06 Court of Appeal

Sale of stadium site for development as supermarket – sale conditional on respondent obtaining satisfactory planning permission free from onerous conditions – whether respondent lawfully terminating sale agreement – whether complying with obligation to use reasonable endeavours and act in good faith

*SAINSBURY'S SUPERMARKETS LTD V BRISTOL ROVERS (1883) LTD
[2016] PLSCS 89 – Decision given 17.03.16

Facts: In 2011 the appellant, BR, which was the owner of Bristol Rovers Football Club, entered into a conditional contract for the sale of the club's stadium to the respondent, SS, who proposed to demolish it and construct a mixed-use development with residential units and a superstore. Under the terms of the sale agreement SS was required to use all reasonable endeavours to obtain an acceptable planning permission for the development as soon as reasonably possible ("the store planning condition"); this meant that the permission could not contain onerous conditions meaning restrictions on delivery hours. If an unacceptable permission were granted SS would have to pursue an appeal, but only if planning counsel confirmed that such an appeal had a 60% or more chance of achieving an acceptable store planning permission before a contractual long stop date in December 2014. Permisssion for the new superstore was granted, but subject to a restriction on delivery times. BR accepted that this was a store onerous condition and SS agreed to make an application to vary the restriction, under s73 of the Town and Country Planning Act 1990, without seeking guidance from planning counsel. The application was refused in January 2014 and in October that year a jointly instructed planning counsel advised that the prospects of achieving an acceptable store planning permission were less than 60%. SS purported to terminate the sale agreement for non-satisfaction of the store planning condition.

Point of dispute: Whether the sale agreement had been validly terminated. BR argued that SS was in breach of contract because it had failed to use all reasonable endeavours to obtain an acceptable store planning condition.

Held: BR's appeal was dismissed against the decision of the judge in the court below who held that the sale agreement had been validly terminated.

i. The store planning condition was never satisfied because no acceptable store permission had been granted before the long stop date.

ii. The process of SS using all reasonable endeavours to obtain an acceptable store planning permission continued until there were no more reasonable steps that SS could take; the obligation did not end at the cut-off date, but continued until service of a termination notice.

iii. For the purposes of this agreement the s73 application was an appeal and SS was not required to lodge a further application.

iv. There was no obligation on SS to assist BR with an application for store planning permission which neither party was under an obligation to lodge.

v. SS had not been in breach of its contractual obligations and had been entitled to terminate the sale agreement when it did.

07 Administrative Court

Gypsy caravan site – appeal against refusal of permission – procedural unfairness – availability of alternative sites – whether inspector failing to distinguish between availability and suitability – claimants' human rights

*DURANT V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2016] PLSCS 62 – Decision given 19.02.16

Facts: In 2011 a planning inspector appointed by the Sec of State granted temporary planning permission for some land in the green belt near Doncaster to be used as a gypsy caravan site by two named families, subject to a requirement that the use would cease within three years of the grant of permission, or upon the families vacating the site if sooner. The first claimant continued to live on the site after the end of the three years, and, although the second family had left, their place had been taken by the second claimant. The lpa issued an enforcement notice and the inspector appointed by the Sec of State dismissed the claimants' appeal against the lpa's refusal to grant a fresh planning permission with new conditions.

Point of dispute: Whether to allow the claimants' application to quash the inspector's decision. The claimants contended that:

i. there had been procedural unfairness as the lpa had submitted late new evidence which changed the basis of its case on the availability of suitable acceptable alternative accommodation;

ii. proper analysis of the evidence put to the inspector indicated that there was one alternative site available;

iii. the inspector had failed to distinguish between availability and suitability;

iv. the inspector had not taken into account the claimants' rights under Article 8 of the ECHR; and

v. the inspector had failed to give adequate reasons for her decision.

Held: The application was dismissed.

i. The claimant's experienced consultant could have asked for more time to consider late evidence, had he required it. There had been no procedural unfairness.

ii. The inspector had concluded that a reasonable number of sites were, or were likely to become, available within the near future. In reaching that general conclusion she could give weight to potential vacancies.

iii. Taking account of the subjective needs of the family for Article 8 purposes did not require deferring to their subjective preferences as to where they wished to live. The inspector had to ask whether there were alternative sites which objectively met the families' requirements and this exercise had been properly carried out.

iv. The inspector had had proper regard to the Article 8 rights of the claimants and their families.

v. The inspector had properly explained her conclusions on both availability and suitability. The reasons she gave for reaching these were clear and adequate.

08 Administrative Court

Community Infrastructure Levy – claimant obtaining permission on two separate planning applications

**R (ON THE APPLICATION OF ORBITAL SHOPPING PARK SWINDON LTD) V SWINDON BOROUGH COUNCIL [2016] PLSCS 71 – Decision given 03.03.16

Facts: The claimant, OSPS, who was the freehold owner of a unit in the Orbital Park Shopping Centre, Swindon, submitted two planning applications in respect of the property to the defendant SBC. The first was for the installation of a mezzanine floor and the second was for external works, including new shop fronts, which created no extra floor space. SBC granted planning permission in respect of both applications and issued a CIL liability notice stating that OSPS would be liable for £170,900 of CIL in respect of the development on the grounds that the mezzanine installation was development liable to CIL because there was a direct link between the two applications.

Point of dispute: Whether to allow OSPS's application for judicial review challenging the lawfulness of the CIL notice. It argued that the mezzanine planning permission fell within the exemption under Regulation 6(1)(c) of the Community Infrastructure Levy Regulations 2010 and that the external planning permission created no floor space and so was not liable to CIL. Each planning permission was independent of the other. SBC contended that both planning permissions should be treated as one since in reality they were linked. The works were carried out together and affected the interior and exterior of the property and SBC argued that OSPS was pursuing a deliberate strategy to avoid CIL

Held: OSPS's application was granted.

i. On the plain and ordinary meaning of the works used in Regulation 6(1)(c) of the 2010 Regulations, it was clear that CIL was not chargeable on the mezzanine planning permission. Nothing on the face of that permission linked it to the permission for the external works. The statutory intent of the 2010 CIL Regulations was to give certainty to developers as to when and how CIL liability would arise. The explanatory memorandum to the 2011 CIL amendment regulations explained that its purpose was to ensure there was equal treatment of any development of the interior of buildings. Therefore Regulation 6(1)(c) put internal floor space for retail development on the same footing as other internal retail floor space which did not require planning permission.

ii. OSPS had not manipulated the system for any illegal motive. It had taken advantage of the legislative scheme which permitted it to submit two separate planning applications for each act of development that it wished to carry out. SBC had acted unlawfully in demanding the CIL by interpreting the two separate planning permissions as one.

09 Administrative Court

Section 106 agreement – developer applying to lpa to remove obligation to pay for affordable housing – lpa refusing modification – whether application to modify possible after housing element of development completed

**MEDWAY COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2016] PLSCS 97 – Decision given 23.03.26

Facts: A developer was granted planning permission for a substantial mixed use development at Chatham Keys, subject to entering into a s106 agreement with the claimant lpa, MC. By 2014 the construction works were largely completed, although the commercial units needed further works before they could be occupied. The developer applied to MC to modify the s106 agreement in order to remove the obligation to make an affordable housing contribution on the ground, verified by a firm of surveyors, that the scheme could not afford it. When MC did not determine the application within the prescribed time period the developer appealed to the defendant Sec of State. (After this appeal had been entered MC resolved that they would have refused the application.) The inspector appointed by the Sec of State determined the appeal in the developer's favour.

Point of dispute: Whether to allow MC's application for an order quashing the inspector's decision. MC contended that on the proper construction of s106BA-C of the TCPA 1990 affordable housing obligations could not be modified after the housing element of a development had been completed. The issues were: (i) the meaning of the word "development" in s106BA(13); (ii) whether an application could be made after the housing element had been completed; and (iii) whether the inspector had properly addressed the argument that the relevant completion related to housing development.

Held: The claim was dismissed.

i. The "development" in s106BA(13) was that authorised by the original planning permission and included the commercial units. The developer would have considered the whole scheme when determining what affordable housing contribution to accept, including financial contribution. MC's argument that one should look only at the housing element was not sustainable or realistic.

ii. The commercial development was incomplete – it was not in a state which could generate receipts or return. The developer had demonstrated that MC had failed in its challenge regarding the relevant completion and judgment was given to the defendant.

10 Planning Court

NPPF – outline planning permission for development near listed buildings – whether inspector applied wrong test for harm to heritage assets

**FOREST OF DEAN DISTRICT COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2016] PLSCS 75 – Decision given 04.03.16

Facts: A developer (the second defendant) was refused planning permission to build 85 dwellings on a site close to a complex of Grade II listed buildings near Newent. On appeal the inspector appointed by the Sec of State overturned that decision and granted permission for the development. That decision was challenged by the lpa, FDDC, who contended that the inspector had failed to consider the interaction between paras 134 and 14 of the NPPF and therefore applied the wrong test for harm to heritage assets. Paragraph 14 provided for the main presumption in favour of sustainable development, unless: (i) Limb 1 – any adverse impacts would significantly and demonstrably outweigh the benefits, when assessed against the policies in the framework taken as a whole; or (ii) Limb 2 – specific policies in the framework indicated development should be restricted. Paragraph 134 stated that, where a development proposal would lead to less than substantial harm to the significance of a designated heritage asset, that harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.

Point of dispute: Whether the inspector's decision to grant permission for the development should be quashed. The Sec of State agreed with the view of the FDDC and participated with it in the appeal.

Held: The application to quash the inspector's decision was granted.

i. Limb 2 of para 14 of the NPPF disapplied the presumption in favour of granting planning permission where there was a specific policy indicating that development should be restricted, such as para 134 in the case of designated heritage assets. Properly interpreting the NPPF meant that a para 134/limb 2 exercise needed to be undertaken where there was less than substantial harm to the significance of a heritage asset. There was no need to import the weighted test from limb 1 into para 134.

ii. When a development would harm a listed building or its setting the decision-maker had to give that harm considerable importance and weight. That harm alone gave rise to a strong presumption against the grant of planning permission. Having only carried out the weighted limb 1 test and not the limb 2 test the inspector had erred in law in reaching his decision.

iii. The court could not be satisfied that the inspector would have reached the same conclusion had he applied the correct test, particularly where, as in this case, the test in limb 1 was firmly weighted in favour of the benefits of development, while the ordinary test in para 134 was not. It was impossible to be sure that, as part of the ordinary balancing exercise, the harm identified by the inspector would not outweigh the benefits and as a result the decision should be quashed.

11 Statutory Instrument

SI 2016/331 The Town and Country Planning (Compensation) (England) (Amendment) Regulations 2016

W.e.f 06.04.16 these Regulations amend the 2015 Regulations to add a new class of development to the list of permitted development rights for which compensation on withdrawal of the right is limited in various ways provided in the 2015 Regulations. The new right – Class PA – permits change of use from premises in light industrial use to dwellinghouses, and has been inserted into Part 3 of Schedule 2 to the 2015 GPDO ("the 2015 Order") by the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016 (see item 12 below). The practical effect of the 2015 Regulations is that if a local planning authority withdraws the new permitted development rights by issuing a direction under Article 4 of the 2015 Order, compensation is only payable in respect of planning applications made within 12 months beginning on the date the direction took effect. The Regulations also allow local planning authorities to avoid compensation liability on withdrawal of the new permitted development rights by publicising their intention to make an Article 4 direction at least one year, and not more than two years, ahead of the Article 4 direction taking effect.

http://www.legislation.gov.uk/uksi/2016/331/contents/made

12 Statutory Instrument

SI 2016/332 The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016

This Order came into force on 06.04.16 and makes various amendments to the Town and Country Planning (General Permitted Development) (England) Order. These amendments relate to:

- Review;
- Change of use of buildings to residential use;
- Amendment in relation to minerals permitted development; and
- Various other amendments.

http://www.legislation.gov.uk/uksi/2016/332/contents/made

13 Communities and Local Government Committee Report

Department for Communities and Local Government's consultation on national planning policy

The Department for Communities and Local Government (DCLG) launched a consultation in December 2015 which proposed the first changes to the NPPF since it was published in March 2012 (See Evebrief Volume 37(09) i12). The Committee considers that to date there has not been sufficient robust, objective and evidence-based monitoring, evaluation or review of the NPPF and that a comprehensive review of its operation should be carried out before the end of the current Parliament. Although the Committee welcomes many of the consultation proposals, such as the development of brownfield sites and the introduction of a housing delivery test, it considers that some proposals need to be reconsidered and revised in the light of evidence:

- the reduced discount period for affordable housing, including Starter Homes;
- the consequences for housing under-delivery; and
- the definition of a commuter hub.

Many of the Committee's recommendations need local authorities to have the flexibility to make decisions which are suitable for their communities. It argues, however, that communities will not benefit fully from the NPPF unless local authorities properly fulfil their responsibilities to publish and adopt Local Plans, The Committee has called on the DCLG to set out how it intends to intervene in local authorities which do not have Local Plans in place by early 2017 and how many authorities it expects will require such intervention.

http://www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/news-parliament-2015/national-planning-policy-report-published-15-16/?utm_source=update&utm_campaign=6301adea51-BPF+Update+-+7+April&utm_medium=email&utm_term=0_0134d0d4b0-6301adea51-246675113&mc_cid=6301adea51&mc_eid=01069531d7

14 Historic England Advice Note 2

Making Changes to Heritage Assets

This advice note illustrates the application of the policies in the NPPF to determination of planning applications and listed building consents for heritage assets, as well as other non-planning heritage consents, including scheduled monument consent. General advice relating to repair, restoration, addition and alteration of heritage assets is given as well as works being carried out for research purposes.

https://historicengland.org.uk/images-books/publications/making-changes-heritage-assets-advice-note-2/

15 Historic England publication

The Assessment and Management of Marine Archaeology in Port and Harbour Development

This document sets out advice for organisations or individuals involved in the planning and development of port and harbour facilities, particularly those involving marine environmental assessment. In particular it provides practical advice on the following:

- assessing the impact of harbour development in England upon the intertidal and marine historic environment; this is of relevance to port and harbour owners and operators, developers, contractors, regulatory authorities, curators and archaeological consultants and contractors;
- environmental assessment where port and harbour developments may impact on heritage assets; and
- environmental assessments required for new development projects, including applications for new Harbour Revision or Empowerment Orders.

The document does not cover heritage assets located above high water or the effect that routine port operations or activities, covered under existing Harbour Orders, may have upon heritage assets.

https://historicengland.org.uk/images-books/publications/assessment-management-marine-archaeology-port-and-harbour-development/

16 CLG Statistics

Planning applications in England: October to December 2015

This release presents National Statistics on planning applications including decisions on applications for residential developments and enforcement activities.

Between October and December 2015 district level planning authorities in England:

- received 111,000 applications for planning permission, much the same as during the same period in 2014;
- granted 92,400 decisions, 4% more than in the same quarter in 2014, an approval rate of 87%;
- decided 81% of major applications within 13 weeks; and
- granted 12,000 residential applications, 6% more than during the same period in 2014.

In the year ending December 2015 district level planning authorities:

- granted 369,700 decisions, 4% more than in 2014; and
- granted 46,800 permissions for residential developments, 6,000 of which were for major developments.

https://www.gov.uk/government/statistics/planning-applications-in-england-october-to-december-2015

17 HM Treasury and Infrastructure and Projects Authority Plan

National Infrastructure Delivery Plan 2016 to 2021

This Plan sets out the government's plans for the support of large-scale housing and regeneration projects, new transport projects, the rollout of improved broadband and mobile networks and investment in new local schools, hospitals and prisons. It also incorporates the latest version of the National Infrastructure Pipeline.

https://www.gov.uk/government/news/new-national-infrastructure-delivery-plan-gets-britain-building?utm_source=update&utm_campaign=3ea3893f99-BPF+Update+-+24+March&utm_medium=email&utm_term=0_0134d0d4b0-3ea3893f99-246675113&mc_cid=3ea3893f99&mc_eid=01069531d7

18 TCPA Guide

Garden City Standards for the 21st Century – Practical Guides for Creating Successful New Communities

These guides – which are on location, finance and delivery, masterplanning and design, planning for energy and climate change, homes for all and planning for arts and culture – are designed to assist councils who want to create high-quality, large-scale new developments. They highlight key points for consideration in planning for growth.

http://www.tcpa.org.uk/pages/gcguides.html

19 RTPI Research document

Location of Development – Mapping planning permissions for housing in twelve city- regions

While evidence is available about the number of planning permissions being granted for new housing there is less analysis about the location and scale of these developments. This makes it difficult to analyse whether settlement patterns are changing and the impact that this might have on infrastructure provision. For example, there is no way of telling whether much of the new housing in England is:

- located in places which are far from employment and services and only accessible by car; and/or
- spread across many small sites which are harder to provide with infrastructure.

RTPI commissioned Bilfinger GVA to conduct this study into the location and scale of recent planning permissions in 12 city-regions with the aim of helping planners to understand spatial patterns of housing growth across cities, towns and rural areas and to widen the debate about how best to monitor the effectiveness of the planning system.

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

http://www.rtpi.org.uk/briefing-room/news-releases/2016/march/we-need-to-build-new-homes-in-the-right-places-urges-study/

RATING

20 HM Treasury Publication

Business Rates Review: Summary of Responses

The Business Rates Review was launched at March Budget 2015. In summary:

- most respondents were in favour of retaining a property based tax, with some large retailers and small businesses suggesting alternative tax bases;
- there was wide support for continuing relief for small businesses and taking properties with a rateable value of below £12,000 out of business rates altogether;
- the majority of businesses would like more frequent revaluations; and
- local authorities were in favour of greater rates retention and devolution of rate setting and relief setting powers.

Most of these proposals have subsequently been implemented in Budget 2016. (See item 22 below)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510497/PU1925_Business_rates_review.pdf.

21 CLG Consultation

Business Rates: delivering more frequent revaluations
Deadline for Comments: 08.07.16

This paper sets out the challenges in delivering more frequent revaluations under the current valuation system and explores possible alternatives that could enable a move to more frequent revaluation. The chapters of this 'discussion paper' cover:

- more frequent revaluations under the current system;
- a self-assessment option; and
- a formula option to preparing valuations.

https://www.gov.uk/government/consultations/business-rates-delivering-more-frequent-revaluations

22 CLG guidance

Business Rates Information Letter 2/2016: Budget 2016 – business rates

This letter provides information on Budget 2016 announcements on business rates including:

- compensation to be paid to local authorities for their loss of income as a result of the changes;
- small business rate relief, which is to double from 50% to 100% from 2017-18 – businesses with rateable values below £12,000 that meet the eligibility criteria will receive 100% relief and for those with rateable values of between £12,000 and £15,000 the relief will be tapered;
- discounts for office space occupied by local newspapers;
- support for publicly owned toilets;
- from April 2020 bills will be indexed to the main measure of inflation, CPI;
- more frequent revaluations; and
- better billing procedures.

https://www.gov.uk/government/publications/22016-budget-2016-business-rates

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

HOUSING

23 Statutory Instrument

SI 2016/420 The Houses in Multiple Occupation (Specified Educational Establishments) (England) Regulations 2016

Under Schedule 14 to the Housing Act 2004 specified educational establishments are not houses in multiple occupation. W.e.f. 13.04.16 these Regulations revoke the 2013 Regulations and provide a replacement list of specified educational establishments.

http://www.legislation.gov.uk/uksi/2016/420/contents/made

24 CLG Consultation

Starter homes regulations: technical consultation
Deadline for Comments: 18.05.16

This technical consultation seeks views on the details for the regulations to support the starter homes clauses in the Housing and Planning Bill.

https://www.gov.uk/government/consultations/starter-homes-regulations-technical-consultation

25 Homes & Communities Agency (HCA) Bulletin

Housing Market Bulletin, February 2016

This bulletin provides up to date information on the housing market, the economy and the housebuilding industry.

- Although there has been a seasonal price dip, the trend is for average house prices to continue to rise steadily.
- Estimated gross mortgage lending for 2015 was 8.2% higher than in 2014 and the highest annual total since 2008.
- The seasonally adjusted number of residential sales has generally been increasing steadily for over a year.
- More new homes were built in 2015 than in 2014 and urban residential development land values have increased.

https://www.gov.uk/government/publications/housing-market-bulletin

26 Institute of Economic Affairs Briefing

The housing crisis: a briefing

This paper provides an independent analysis of the current housing crisis in terms of:

- the current situation;
- why the housing crisis has arisen;
- solutions provided so far by the government and the effect these have had; and
- suggested solutions.

http://www.iea.org.uk/in-the-media/press-release/political-leadership-needed-to-solve-housing-crisis

27 CPRE Report

Brownfield comes first

Following on from CPRE research carried out in late 2014 which found that there are enough suitable brownfield sites to create at least one million new homes in England, this report concludes that brownfield sites are being developed at a rate that is six months faster than greenfield sites. It therefore argues that prioritising investment in brownfield sites is a highly effective way of building new homes, undermining claims that brownfield is either too slow or inconvenient to develop in comparison to greenfield.

http://www.cpre.org.uk/media-centre/latest-news-releases/item/4257-brownfield-sites-developed-six-months-faster-than-greenfield-sites

28 Housing Finance Institute Report

How To Build More Homes, Faster

This report aims to identify the issues which are holding back housebuilding across the country and to make recommendations to help unlock greater efficiency in housing delivery.

http://www.thehfi.com/how_to_build_more_homes_faster

29 Homes & Communities Agency Bulletin

Housing Market Bulletin – March 2016

The housing market bulletin provides up to date information on the housing market, the economy and the housebuilding industry.

- House prices continue to grow steadily. All regions in England are now seeing growth, although growth is slowest in the North and strongest in the South East, the East and London.
- The numbers of residential planning approvals have increased following a drop in early 2015. New orders for construction are up on a year ago.

https://www.gov.uk/government/publications/housing-market-bulletin

COMPULSORY PURCHASE

32 Court of Appeal

CPO for mixed use development on site of Shepherd's Bush market – planning inspector recommended non-confirmation of CPO on grounds that safeguards for existing traders were insufficient – Sec of State overturning inspector's decision – whether reasons given were adequate

*HORADA (ON BEHALF OF SHEPHERD'S BUSH TENANTS' ASSOCIATION) V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2016] PLSCS 93 – Decision given 18.03.16

Facts: H, the appellant, acted on behalf of an organisation which represented stallholders at Shepherd's Bush market, a market located in railway arches and comprising over 130 stalls run by independent traders selling fashion, food and household goods. The local council, recognising the importance of the market to the local community, promoted the regeneration and upgrading of the site in a way which would encourage independent traders. In 2012 it granted outline permission for a mixed use development on the site, including some residential units, subject to various conditions which were intended to protect the existing traders. The developer entered into a s106 agreement requiring it to adopt a lettings policy, charge affordable rents for small local businesses, and retain the unique character of the market. The CPO was made in 2013. Following a public inquiry the inspector appointed by the Sec of State recommended that the CPO should not be confirmed since no compelling case in the public interest had been made out for it. She considered that the developer's proposals lacked sufficient mechanisms to ensure that the number, mix and diversity of traders was retained and concluded that the development would not achieve social, environmental and economic wellbeing. The Sec of State who took the opposite view sought to confirm the CPO, indicating in his letter that "existing market traders and shopkeepers or new operators with similarly qualitative and diverse offerings" would be protected.

Point of dispute: Whether to allow H's application to quash the CPO on the ground that the respondent Sec of State had not given proper reasons for confirming it.

Held: H's appeal against the decision of the court below which had dismissed his claim was allowed for the following reasons:

i. In a situation such as this where the Sec of State was disagreeing with his inspector's recommendation he had to explain his reasons.

ii. The Sec of State's decision letter did not give adequate reasons for his decision to confirm the CPO. It did not make it clear whether the safeguards would enable the existing traders to return in a sufficient number to preserve the unique character of the market, or that their situation did not matter because new operators with "similarly qualitative and diverse offerings" would be protected.

iii. The decision letter made no mention of the inspector's main concern – affordability – although this was a much disputed issue. Nor was there any mention of the arches which the inspector clearly considered were important to the market.

iv. Although the Sec of State had clearly disagreed with the inspector's conclusion that the safeguards and guarantees were inadequate, he had not explained why he had come to that conclusion.

v. Decision-makers must give reasons for their decisions so that affected parties can decide whether there is a legal case for challenging them. While the respondent might have had good reasons for concluding that the guarantees and safeguards were adequate, his decision did not disclose what those reasons were; this meant that the traders were substantially prejudiced by a failure to comply with a relevant requirement.

33 CLG Consultation

Further reform of the compulsory purchase system
Deadline for Comments: 15.05.16

If you require advice on compensation & compulsory purchase issues, contact Tony Chase on Tel. +44 (0)20 7333 6282 tchase@geraldeve.com

This consultation seeks views on a further range of proposals aimed at making the compulsory purchase regime clearer, fairer and faster.

https://www.gov.uk/government/consultations/further-reform-of-the-compulsory-purchase-system

COMPENSATION

34 Upper Tribunal: Lands Chamber

Section 10 Compulsory Purchase Act 1965 – construction of outer harbour – claimant alleging that works changed tidal flows so as to cause collapse of cliff including part of its land – whether claim under s10 available

*BOURNE LEISURE (HOPTON) LTD V GREAT YARMOUTH PORT AUTHORITY
[2016] PLSCS 63 – Decision given 22.02.16

Facts: The claimant, BL, owned a caravan park at Hopton-on-Sea, Norfolk close to a beach. Between 2007 and 2008 the respondent, GYPA, constructed an outer harbour at Great Yarmouth, about 3.5km away pursuant to powers conferred by the Great Yarmouth Outer Harbour Act 1986 ("the 1986 Act"). In 2013 some of the wooden sea defences at the beach failed causing part of the cliff to collapse and the loss of some of BL's land. BL carried out works to make good the damage and to repair and improve the sea defences. It brought a claim against GYPA for compensation under s10 of the Compulsory Purchase Act 1965 alleging that the damage had been caused by the construction of the outer harbour which had changed tidal flows, thus increasing erosion in such a way as to lead to the failure of the sea defences at Hopton Beach resulting in the loss of the beach, damage to the cliff and the loss of part of its land.

Point of dispute: Whether s10 of the 1965 Act applied to the claim at all and, if so, whether compensation under that section could extend to the losses BL claimed – costs of carrying out the works, losses associated with maintenance and monitoring of the works, operational losses and diminution in the value of its land as a result of the loss of the beach – or whether compensation was limited to the diminution in the open market value of its land. A further issue concerned whether BL's cause of action arose for the purposes of s9 of the Limitation Act 1980.

Held: These preliminary issues were determined in favour of BL.

i. On the proper construction of the 1986 Act s10 of the 1965 Act applied in principle to the construction of the outer harbour. It provided a substantive right to compensation and did not depend on the land said to be injuriously affected having been compulsorily acquired.

ii. To allow a claim in compensation would not be inconsistent with the provisions of the 1986 Act which did not impose a statutory duty to prevent increased coastal erosion and provided only a partial remedy when that did occur.

iii. A claim for compensation under the 1965 Act could only arise if BL would have had a claim in nuisance but for the statutory authority for the construction of the outer harbour. In this case there would have been an actionable nuisance in the absence of statutory authority.

v. The compensation that could be claimed under s10 of the 1965 Act might not always be the same as the measure of damages for nuisance. However, if it was reasonably foreseeable that the effects of the outer harbour would continue to cause damage to BL's land in the future, and that the sea defence works were reasonably necessary to protect against such future loss, then there was no reason in principle why the cost of those works was not recoverable as compensation, subject to BL being able to demonstrate that it acted reasonably to mitigate such future loss.

If you require advice on compensation & compulsory purchase issues, contact Tony Chase on Tel. +44 (0)20 7333 6282 tchase@geraldeve.com

v. No claim could be brought under s10 until loss had actually been suffered. The claim must have arisen in nuisance and, for limitation purposes, the cause of action did not accrue until there was actual physical damage to the reference land or substantial interference with an easement.

REAL PROPERTY

35 Law Commission consultation

Updating the Land Registration Act 2002
Deadline for comments: 30.06.16

It is estimated that 86% of land in England and Wales is now registered with over 24 million registered titles. Land registration is governed by the Land Registration Act 2002 which effected a major reform of the Land Registration Act 1925 and modernised the system. The aim of this project is to update the 2002 Act in the light of experience of its operation; it is not proposed to comprehensively reformulate the Act, but to improve the operation of specific aspects of the legislation within the existing legal framework. The paper raises a range of issues – many of these are technical, but others consider fundamental questions about the role of land registration. The government is also currently consulting on moving Land Registry operations to the private sector (see item 54 below).

If you require advice on real property issues, contact Annette Lanaghan on Tel. +44 (0)20 7333 6419 alanaghan@geraldeve.com

http://www.lawcom.gov.uk/project/updating-the-land-registration-act-2002/

TORT

36 Court of Appeal

Nuisance – whether licensor of property liable for noise nuisance by licensee

*COCKING V EACOTT
[2016] PLSCS 78 – Decision given 09.03.16

Facts: The appellant, E, owned a Victorian terraced property which she allowed her daughter to live in. The respondents, C, who lived next door, brought a claim in nuisance against her on account of noise caused by the daughter's shouting and her dog barking. E served a 28-day notice to quit on her daughter, but did not enforce it. At first instance the judge held that E was not liable for her daughter's shouting because she was not aware of it during the relevant period, but that she was liable for the dog's barking on the ground that she knew about it but had done nothing to stop it despite having complete control of the property. The judge found that the daughter occupied under a bare licence from E, who received no rent and paid all the bills for the property.

Point of dispute: Whether to allow E's appeal against the judge's ruling. E contended that the judge had been wrong in law to find her liable for the dog barking where she was the licensor of the property and did not reside there and that her position was the same as that of a landlord who would not ordinarily be liable for nuisance caused by a tenant.

Held: E's appeal was dismissed. In a normal landlord/tenant situation a landlord would not normally be liable for a nuisance caused by his tenant because he had no control over the property and did not occupy it. An occupier of a property would normally be held responsible for a nuisance even if he did not directly cause it, because he was in control and possession of the property. On the facts of this case E should be treated as an "occupier"; her daughter had never had more than a bare licence and had no right to exclude E from the house and E had taken steps to terminate the licence. Throughout the period of her daughter's residence E was in both possession and control of the property and was liable since she could easily have abated the nuisance by removing the dog or her daughter, or both, but she had chosen to do nothing.

37 Court of Appeal

Solicitor's negligence – solicitor failing to advise client of existence of planning restriction on residential property he was purchasing – assessment of damages

*BACCIOTTINI V GOTELEE & GOLDSMITH (A FIRM)
[2016] PLSCS 94 – Decision given 18.03.16

Facts: The appellant, B, retained the respondent firm of solicitors, G&G, to act for him in connection with the purchase of a residential property. The purchase was completed in May 2007, but in 2008 it was discovered that there was a planning condition affecting the property which restricted its residential use. In late 2009 the lpa removed the restriction. G&G admitted that it had been negligent in failing to advise B of the existence of the planning restriction.

Point of dispute: The amount of damages to be paid to B. B sought to recover £100,000 being the difference between the value of the property in May 2007 with the planning restriction and its value at that date without the restriction. At first instance the judge rejected that claim and awarded £250 being the cost of the successful application to remove the restriction. B argued that his action in applying to remove the planning restriction was a collateral and independent act and did not have sufficient causal connection with GG's original breach of duty. GG argued that B's application should be taken into account as mitigation of their loss.

Held: B's appeal was dismissed. Damages should be awarded in the sum that would put the injured party into the same position as if he had not suffered the wrong and this did not have to be assessed as at the date of purchase. Removing the restriction meant that B had suffered no loss and there was nothing in respect of which he required to be compensated. Because of GG's negligent action B had proceeded to purchase the property, but he was under a duty to mitigate his loss which he had done by taking steps to remove the restriction. B's action in applying successfully to lift the restriction could not be regarded as a collateral transaction independent of the original breach. The measure of B's loss was the cost to him of removing the defect, which was £250.

38 High Court

Noise from helicopter training at aerodrome– whether unreasonable and excessive – whether defendant had a right to carry on training exercises by prescription

**PEIRES V BICKERTON'S AERODROMES LTD
[2016] PLSCS 92 – Decision given 17.03.16

Facts: The claimant, P, owned a substantial property next door to Denham Aerodrome which had a CAA licence and from which a number of flying activities were carried on, including helicopter training close to her property. P had been complaining about the noise since 2006 and when the defendant, BAL, failed to take any steps to reduce it she commenced proceedings in nuisance. P contended that the nature and frequency of the noise was such as to be unreasonable and excessive and was an undue interference with the comfortable and convenient enjoyment of her land.

Point of dispute: Whether to allow P's claim in nuisance. BAL disagreed and submitted that it had acquired a right to carry on training exercises by prescription.

Held: P's claim was allowed.

i. It was well accepted that parties had to put up with intermittent and relatively slight disturbance. There had to be give and take between two parties' rights to use their respective properties unless the use complained of was excessive. P's evidence on the nature of the noise and its frequency was compelling, whereas BAL's evidence on frequency was not convincing. BAL's case that the helicopter noise was neither unreasonable nor excessive was rejected.

ii. In certain circumstances a right to make a noise nuisance could be established by prescription, but it was difficult to do this because: (i) the 20 year use only began when the noise amounted to a nuisance; (ii) there were difficulties in identifying the extent of the easement obtained by prescription, even if (i) could be established; and (iii) it would be difficult to work out how much, if any, more noise could be emitted pursuant to the claimed right than had been emitted during those 20 years. Also, if objections were made and the activity continued the easement could not be established because it was being established by force.

iii. BAL's claim that it had established a right in the nature of an easement to carry on the noise interference failed. The appropriate remedy was an injunction that would sanction the activity but limit it to a reasonable level.

39 High Court

Defective Premises Act 1972 – appellant injured when hole opened up in her garden – whether landlord liable for damages under s4 of the 1972 Act

*LAFFERTY V NEWARK AND SHERWOOD DISTRICT COUNCIL
[2016] PLSCS 84 – Decision given 19.02.16

Facts: In 2010 the defendant, L, sustained injuries when she fell into a hole which opened up in her garden. She claimed damages against her landlord, NSDC, under s4 of the Defective Premises Act. The judge found that the ground had eroded over time where it had been saturated by water leaking from a fractured underground pipe leading to a soakaway. This was part of the drainage of the premises which NSDC were under an obligation to maintain and repair under s11 of the Landlord and Tenant Act 1985, but as the defect could not have been discovered on a reasonable inspection of the garden he held that NSDC were not liable since there was no evidence that they ought in all the circumstances to have known of the relevant defect.

Point of dispute: Whether to allow L's appeal against the judge's decision. In reaching his conclusion the judge had rejected L's argument that s4(4) of the 1972 Act, which treated the landlord's repair and maintenance obligations under the tenancy as extending to matters in respect of which it had a right of entry, had the effect of extending the landlord's liability in the absence of fault. He found that the effect of s4(4) did not involve imputing knowledge of a defect to a landlord where none existed.

Held: The appeal was dismissed.

i. The purpose of s4(4) was not to create a strict liability, but to extend the application of s4(1), and thus the whole section, to relevant defects which, not being the subject of a repairing or maintenance obligation under the tenancy, would otherwise fall outside its scope.

ii. Section 4(4) was a deeming provision which treated the landlord as being under a s4(1) obligation in circumstances where the lease and statute did not confer such an obligation. It was not a stand alone obligation.

iii. In establishing the extent of the landlord's duty the question had to be asked whether the landlord "ought in all the circumstances to have known of the relevant defect" (s4(2)).

iv. NSDC's system for inspecting the property should have been scrutinised in order to establish whether even an entirely reasonable system would have discovered the existence of the defect. The judge had found on the facts that no careful inspection could have revealed the defect.

CONSTRUCTION

40 Statutory Instrument

SI 2016/284 The Energy Performance of Buildings (England and Wales) (Amendment) Regulations 2016

W.e.f. 06.04.16 these Regulations make a number of changes to the detail of the 2012 Regulations.

http://www.legislation.gov.uk/uksi/2016/284/contents/made

41 Statutory Instrument

SI 2016 285 The Building Regulations &c. (Amendment) Regulations 2016

W.e.f. 06.04.16 these Regulations make changes to the 2010 Building Regulations (as subsequently amended) to revoke requirements relating to the provision of energy performance certificates for new and certain converted buildings, and to make various amendments relating to methodology for calculating the energy performance of buildings.

http://www.legislation.gov.uk/uksi/2016/285/contents/made

42 Statutory guidance

Sanitation, hot water safety and water efficiency: Approved Document G

This amended approved document came into force on 01.03.16, but it does not apply to work started before that date, or work subject to a building notice, full plans application or initial notice submitted before that date provided the work started on site before 01.03.16. The current edition covers the standards required for cold water supply, water efficiency, hot water supply and systems, sanitary conveniences and washing facilities, bathrooms and kitchens and food preparation areas. A correction document which lists the 2016 changes to the previous 2015 version of this document has also been published.

https://www.gov.uk/government/publications/sanitation-hot-water-safety-and-water-efficiency-approved-document-g

43 CLG Circular

Circular 01/2016 Building Regulations 2010: Amended Approved Documents G and M

This circular draws attention to the publication of amendments to Approved Document G and Approved Document M, volume 1 (see item 42 above)

https://www.gov.uk/government/publications/building-regulations-2010-amended-approved-documents-g-and-m-circular-012016

44 CLG Circular

Circular 03/2016 Building Regulations and (Amendment) Regulations 2016

This circular:

- draws attention to the publication of the Building Regulations &c (Amendment) Regulations 2016 (SI 2016/285) (see item 41 above) and explains the changes they make to the Building Regulations 2010 and the Building (Approved Inspectors etc) Regulations 2010;
- announces the revocation of authorisation of one competent person scheme; and
- announces the amendment of Approved Documents L1A, L1B, L2A and L2B.

https://www.gov.uk/government/publications/building-regulations-and-amendment-regulations-2016-circular-032016

If you require advice on construction issues, contact Richard Fiddes on Tel. +44 (0)20 7333 6294 rfiddes@geraldeve.com

LONDON

45 London Assembly Government Report

Tax Trial: Land Value Tax for London?

This report examines the arguments for and against introducing a Land Value Tax in London. This taxation provides incentives for bringing land into more productive use and discourages keeping land empty or derelict which could have potential for bringing more land forward for development including for housing. The report concludes that the next Mayor should fund an economic feasibility study and, if its conclusions are positive, request the powers from the Government to trial a Land Value Tax in part of the city.

https://www.london.gov.uk/what-we-do/planning/planning-publications/tax-trial-land-value-tax-london

46 London Housing Commission Report

Building a New Deal for London

This is the final report of the London Housing Commission. Another report addressing the issue of London's housing crisis, this proposes a new deal with central government to secure essential powers and resources for the London Mayor and boroughs giving them control over their own planning, borrowing and taxes and a programme of immediate actions to start to redress the crisis.

http://www.ippr.org/publications/building-a-new-deal-for-london

http://www.ippr.org/news-and-media/press-releases/give-mayor-boroughs-much-more-power-in-london-to-deliver-a-major-boost-in-housebuilding

47 Historic England Conservation Bulletin

London and the London Plan

This bulletin considers the issues that are thrown up by the rapid rate of growth of London – their effect on the historic environment and how the planning system (and specifically the London Plan) can address them.

https://historicengland.org.uk/images-books/publications/conservation-bulletin-75/

48 London Assembly Government Report

Growing, growing, gone: Long-term sustainable growth for London

With the size of London's population increasing by approximately 100,000 every year there is concern that without good planning the city could suffer unreliable energy supplies and excessive carbon emissions, a shortage of drinkable water, contaminated flooding caused by sewage overflow, and habitat destruction resulting in fewer green spaces for Londoners in the future. This report identifies the key challenges to accommodating London's growth and makes a number of recommendations as to how those pressures could be managed, including:

- putting long-term sustainability at the heart of all Mayoral strategies;
- integrating water strategy across the areas of supply, demand, drainage and flood risk;
- working towards achieving standardised domestic waste collections across London; and
- protecting green spaces and waterways so as to ensure that London receives more environmental benefit from its green and blue infrastructure through multifunctional usage e.g. enhancing drainage and biodiversity.

https://www.london.gov.uk/about-us/london-assembly/growing-growing-gone-long-term-sustainable-growth-london

49 London Assembly Report

At Home with Renting – Improving security for London's private renters

London's private rented sector has grown significantly in the last ten years with over 26% of London's homes now being rented privately. This report, which was prepared by the London Assembly Housing Committee, recommends that the next Mayor should seek delegated powers from Westminster in order to introduce a new default rental contract of three years, with initial rents set by the market, and increases limited to the level of consumer price inflation. It also recommends that the new Mayor should:

- stimulate the build to let sector with government help for landlords competing to develop land;
- set up a London-wide register of landlords to help boroughs enforce existing housing legislations and better protect tenants; and
- support London's low income renters by lobbying government to review the freeze imposed on Local Housing Allowance levels in London until 2020.

https://www.london.gov.uk/what-we-do/housing-and-land/housing-and-land-publications/stabilising-private-rented-sector

50 London Assembly Report

Business Improvement Districts: The role of BIDs in London's regeneration

The London Assembly Regeneration Committee has examined the question of how successful Business Improvement Districts (BIDs) have been. Its key findings are:

- BIDs have the potential to deliver significant local improvements and to help shape high streets, although regeneration is not their core remit;
- a major benefit of BIDs is their ability to respond quickly to local priorities with the mandate of local businesses; and
- although they have demonstrated value in making improvements to high streets, there are concerns about how accountable they should be to local communities.

The report makes a number of recommendations.

https://www.london.gov.uk/about-us/london-assembly/london-assembly-publications/business-improvement-districts

51 Centre for London publication

Going Large – Making the Most of London's Big Sites

This report argues that the development of London's large brownfield sites has been held back by commercial development models, which are often focused on short term and gradual delivery rather than long-term investment and delivery at scale. It sets out new models of partnership and financing which would help transform the long-term potential of London's Opportunity Areas. The report identifies the most effective types of delivery structure – as well as discussing new ways and approaches to meet the challenges of developing these areas.

http://centreforlondon.org/publication/largebrownfieldsites/

GENERAL

52 Historic England Advice Note

Conservation Area Designation, Appraisal and Management

This revised guidance sets out ways to manage change in a way that conserves and enhances historic areas through conservation area designation, appraisal and management.

https://www.historicengland.org.uk/images-books/publications/conservation-area-designation-appraisal-management-advice-note-1/

53 Department for Culture, Media and Sport White Paper

Culture White Paper (s2.3 on Built Environment)

This is the first white paper for culture that has been published for 50 years and the second ever published. It represents the Government's latest contribution to public support for art and culture. The National Lottery, which was launched in 1994, has funded thousands of arts and heritage initiatives and paid for new and refurbished museums galleries and historic buildings across the whole of the UK. Section 2.3 of this paper addresses the historic built environment. Local communities need to be supported to enable local historic buildings to be preserved for use as entertainment venues, including theatres, rehearsal and performance spaces, artistic studios and exhibition spaces, while also ensuring that churches remain at the centre of community life, and to prevent these buildings from being adversely affected by new development.

https://www.gov.uk/government/publications/culture-white-paper

54 Department for Business, Innovation & Skills

Land Registry: moving operations to the private sector
Deadline for Comments: 26.05.16

This document sets out options for moving Land Registry operations into the private sector from 2017, a possible move which was first announced in the Autumn Statement 2015 as part of the Government's aim of raising up to £5 billion in corporate and financial asset sales by March 2020. The purpose of the consultation is to:

- set out the government's reasons for proposing change;
- propose how a private sector Land Registry would work;
- consider possible models for the future of the Land Registry; and
- to seek views on the proposals.

https://www.gov.uk/government/consultations/land-registry-moving-operations-to-the-private-sector?utm_source=update&utm_campaign=32b638bbbe-BPF+Update+-+31+March&utm_medium=email&utm_term=0_0134d0d4b0-32b638bbbe-246675113&mc_cid=32b638bbbe&mc_eid=01069531d7

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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 38(03) 25 April 2016

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SCOTLAND

RATING

01 Statutory Instrument

SSI 2016/113 The Non-Domestic Rate (Scotland) Order 2016

This Order prescribes a rate of 48.4 pence in the pound as the non-domestic rate to be levied in Scotland in respect of the financial year 2016/17.

http://www.legislation.gov.uk/ssi/2016/113/contents/made

02 Statutory Instrument

SSI 2016/114 The Non-Domestic Rates (Levying) (Scotland) Regulations 2016

These Regulations, which came into force on 01.04.16, make provision for the amount payable in certain circumstances as non-domestic rates in Scotland.

- Regulation 3 provides for the general reduction in rates for a ratepayer with an RV of £18,000 or less on a sliding scale of between 25% and 100%. This Regulation applies to the financial year 2016-2017.
- Regulation 3(4) provides for a reduction in rate relief (calculated in accordance with Regulation 3(3)) if the enactments listed in Regulation 3(4)(a) or (b) already provide for a reduction or determination.
- Regulation 3(5) provides that no rate relief may be granted in respect of lands and heritages used for payday lending.
- Regulation 4 provides a formula for the additional amount payable as rates for lands and heritages with RV exceeding £35,000 in respect of the financial year 2016-2017.

http://www.legislation.gov.uk/ssi/2016/114/contents/made

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03 Statutory Instrument

SSI 2016/119 The Non-Domestic Rates (Enterprise Areas) (Scotland) Regulations 2016

W.e.f. 01.04.16 these regulations provide relief from business rates in specified enterprise areas.

- Regulations 3 and 4 provide that business rates relief is available in those areas for new businesses carrying out an activity listed in the relevant part of the Schedule. It is also available for businesses set up in vacant premises if they carry out one of these listed activities.
- Regulation 5 sets out a sliding scale of the amount of relief available.
- Regulation 6 deals with applications for business rates relief.

http://www.legislation.gov.uk/ssi/2016/119/contents/made

04 Statutory Instrument

SSI 2016/120 The Non-Domestic Rates (Steel Sites) (Scotland) Regulations 2016

W.e.f. 01.04.16 these regulations provide 100% relief from business rates in respect of lands and heritages at the addresses specified in Regulation 3(2) if they are used for the sole or main purpose of carrying on the manufacture of basic iron and steel and of ferro-alloys.

Regulation 4 sets out how the applications to obtain the relief are to be made.

http://www.legislation.gov.uk/ssi/2016/120/contents/made

05 Statutory Instrument

SSI 2016/121 The Non-Domestic Rates (Renewable Energy Generation Relief) (Scotland) Amendment Regulations 2016

W.e.f. 01.04.16 these Regulations amend the 2010 Regulations, Regulation 3 of which specifies that lands and heritages used solely for the generation of renewable heat or power (or both) attract relief from non-domestic rates. Relief is now limited to cases where the lands and heritages are being used for a project where a community organisation is, in return for investment in the project, entitled to payments at a specified level.

In addition, a new Regulation 3B is inserted in the 2010 Regulations which grants certain relief in respect of lands and heritages used solely for the generation of renewable heat or power (or both) where those lands and heritages are first entered in the valuation roll on or after 01.04.16.

http://www.legislation.gov.uk/ssi/2016/121/contents/made

06 Statutory Instrument

SSI 2016/122 The Non-Domestic Rates (Telecommunication Installations) (Scotland) Regulations 2016

W.e.f. 01.04.16 these Regulations provide 100% relief from business rates in respect of lands and heritages in a Mobile Masts Pilot Area if they are occupied by a tower or mast used for the monitoring, processing or transmission of communications or other signals for the provision of electronic communications services and a new entry is made in the valuation roll on or after 01.04.16. Regulation 4 sets out the applications procedure.

http://www.legislation.gov.uk/ssi/2016/122/contents/made

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WALES

PLANNING

07 Historic Environment (Wales) Act 2016

This Act came into force on 21.03.16. (See item 03 of Evebrief – Regional Supplement Volume 38(02) where we reported the Bill).

http://www.legislation.gov.uk/anaw/2016/4/contents/enacted

08 Statutory Instrument

WSI 2016/60 The Town and Country Planning (Validation Appeals Procedure) (Wales) Regulations 2016

W.e.f. 16.03.16 these Regulations set out the procedure for the determination of validation appeals made to the Welsh Ministers under s62ZB of the Town and Country Planning Act 1990. These validation appeals are considered on the basis of written representations.

http://www.legislation.gov.uk/wsi/2016/60/contents/made

09 Statutory Instrument

WSI 2016/61 The Town and Country Planning (Pre-Application Services) (Wales) Regulations 2016

W.e.f. 16.03.16 these Regulations make provision under ss 61Z1 and 61Z2 of the Town and Country Planning Act 1990 for the provision of services by local planning authorities before a qualifying application is made (pre-application services).

http://www.legislation.gov.uk/wsi/2016/61/contents/made

10 Statutory Instrument

WSI 2016/358 The Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) (Amendment) Regulations 2016

W.e.f. 03.03.16 these Regulations amend the 2016 Regulations and change the criteria for the construction, extension or alteration of an onshore wind farm to be a development of national significance.

http://www.legislation.gov.uk/wsi/2016/358/contents/made

11 Welsh Government Consultation

Proposed changes to Planning Policy Wales Chapter 6: The Historic Environment
Deadline for comments: 13.06.16

Changes to the current Chapter 6 of PPW are proposed to ensure that:

- Welsh national planning policy fully meets the Welsh Government's objectives for a well-protected and accessible historic environment; and
- the policy takes into account recent legislation and guidance that has been or is in the process of being prepared for the protection and sustainable management of the Welsh historic environment.

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

http://gov.wales/consultations/planning/proposed-changes-to-planning-policy-wales-chapter-6-the-historic-environment/?lang=en

CONSTRUCTION

12 Statutory Instrument

WSI 2015/361 The Building (Amendment) (Wales) Regulations 2016

W.e.f. 08.04.16 these Regulations amend the 2010 Regulations by inserting a new Part 9A which provides for compliance with a new Part R (physical infrastructure for high speed electronic communications networks) of Schedule 1 to those Regulations. All new buildings and those subject to major renovation must be equipped with physical infrastructure up to a point where connection can be made to high speed electronic communications networks. Multi-dwelling buildings must also be equipped with an access point to that network.

http://www.legislation.gov.uk/wsi/2016/361/contents/made

13 Welsh Government Consultation

Building Regulations Sustainability Review (Wales)
Deadline for Comments: 24.05.16

In July 2014 the Sustainable Buildings national planning policy and related TAN22 guidance was withdrawn. The Welsh government stated that it intended to look into incorporating the key non-energy elements of the Code for Sustainable Homes/BREEAM into the Building Regulations. The subsequent review identified a number of components as having potential for incorporation into Building Regulations.

This consultation contains proposals for:

- changes to Part G – Sanitation, Hot Water Safety and Water Efficiency;
- the introduction of Part Q – Residential Security Part Q – unauthorised access;
- non mandatory guidance on the content and presentation of information to householders for new dwellings; and
- changes to the Approved Documents.

http://gov.wales/consultations/planning/building-regulations-sustainability-review/?lang=en

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