

# local authority newsbites

Welcome to our July edition of *Newsbites*, our monthly email bulletin updating you on local government issues. In this edition we look at several important developments arising out of the new Government's localism agenda and the proposed "reboot" of the planning system. In addition to these developments we also look at the proposals under the health white paper *Liberating the NHS* as well as interesting news in the fields of housing, procurement and data protection.

We are very interested to hear from you about other topics we could or should be covering in this update. If you have any comments or suggestions then please contact [Benjamin Smith](#) or email [LALaw@mills-reeve.com](mailto:LALaw@mills-reeve.com).

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## Community Right to Build

Among many announcements from the Coalition Government about its agenda for localism comes one about establishing local housing trusts (LHTs). First trailed by the Housing Minister, Grant Shapps speaking at a recent conference of Community Land Trusts, these have now been announced under the initiative called Community Right to Build.

It's tempting to ask "Why, yet another delivery vehicle?" In common with other recent announcements, we await detail - promised in the forthcoming White Paper on sub-national economic growth, and draft legislation in the form of the Decentralisation and Localism Bill. Emphasising the "Big Society", Mr Shapps is keen that local communities should have the freedom to decide on the type and quantity of housing, without external restrictions imposed by a centralised planning system.



For further information please contact [Christine de Ferrars Green](#)

The aim of LHTs will be to allow small-scale development in towns and villages. They will be community-led initiatives. They will require strong and experienced leadership, supported by expert advice, as they will have to achieve high levels of approval from the local community, through a referendum which must show no more than minimal (10 per cent or perhaps 20 per cent) opposition for a scheme to go forward. This will take some organising and not inconsiderable resources to ensure that the time, money and effort expended in promoting a scheme will achieve the positive referendum result.

The suggestion is that LHTs will be looking at land which is not otherwise designated for housing development in existing development plans. The unique selling point of LHTs will be the ability to side step the usual planning processes. Details of the development will have to be submitted to the local planning authority for checking that basic criteria related to sustainability and environmental issues are satisfied. If the legislation follows the Conservative's policy paper, provided those criteria are met then planning permission will automatically be granted, on the basis of the mandatory presumption in favour of development. If not, then the planning decision will revert to the local planning authority to be treated as any other planning application. It's interesting to note that Mr Shapp's department acknowledges that "where a community's proposed development fits with a local authority's local development plan and other planning requirements, then the easiest route may well be to file a planning application".

What is not clear is whether the Community Right to Build will really be anything more than another way of bringing forward rural "exception sites". Might local communities promote sites that are actually allocated, or at least are within the built up area of the local community? That would present clear issues in terms of the price to be paid for the land, and the cost of land acquisition will be fundamental to the viability of any scheme. The proposals make no commitment on the availability of public funds - hardly surprising in the current economic climate - and must await the autumn's comprehensive spending review.

Local housing trusts will be "not for profit" organisations, with a commitment to the long-term view. Surpluses arising and income derived from any development will be re-invested in a virtuous circle of recycling funds. This is consistent with the recent trend in making public money work harder for longer, moving away from one-off grant in aid, to investment with a long-term return.

LHTs seem set to will follow the existing model of community land trusts (CLTs), which for the most part, have charitable status and the legal framework of a company limited by guarantee, or an industrial and provident society. While not being side-tracked in a debate about legal structures, it is wise to be mindful that in the absence of clarity on such matters, it can be difficult to get schemes off the ground and there can be difficulties for funding.

Mr Shapps suggests that Community Right to Build need not be limited to building affordable housing, but may have a wider brief to construct housing for sale, sheltered housing for the elderly or even set aside plots for local people to build their own homes. Indeed, its activities may not be limited to housing, but could extend to providing other local community facilities.

The success of LHTs will be dependent on local communities identifying developable land within their locality and having strong local leadership and resources (both financial and skills-based) to promote it successfully - not only to the community itself, but to the local planning authority. The prize will be a big one - much needed small-scale development that otherwise would not be permitted for the want of a formal planning designation, within the existing fabric of the local community.

## Localism again - the demise of regional planning

As Christine de Ferrars Green has noted, our new Government is keeping itself busy putting into action its plans for a "radical reboot" of the planning system. The recent revocation of regional strategies, and the anticipated abolition of the legal basis for further such strategies means that regional housing targets are no more - it is now down to local communities to decide how much development is appropriate.

It seems that the abolition of regional targets is being seen by many as good news, but it does risk threatening many housing projects which can no longer rely on the need to meet targets imposed at regional level. And what happens to more strategic development such as waste management sites or windfarms? The lack of a strategic level of planning is likely to be felt more here: drumming up local support for housing is one thing, but doing so for waste management plants is arguably quite another. This is perhaps an unintended consequence of removing housing figures.

Proposals for business rate and council tax incentives may give developers some comfort that the localism agenda does not necessarily equal a "NIMBY" culture, but there is no doubt that public support will be even more important in the new system than it is now.

It will also be interesting to see how this "localism" squares with the Government's climate change agenda. Assuming some acceptance of the need for more housing, local communities are almost certain to want to protect their green belts but a large percentage of "sustainable" sites will be on the edges of towns and cities and so are likely to be within the green belt.



For more information please contact [Caroline Bywater](#)

## Information Commissioner offers guidance on school photos

The Information Commissioner has recently issued guidance, specifically aimed at Local Education Authorities and those working within the education sector, addressing the confusion surrounding the taking of photographs and videos in educational institutions.

Up until now some schools have been wary of allowing parents to take photographs or videos of their children for fear of breaching the requirements of the Data Protection Act 1998 (the "Act"). One can imagine however that, when a child is performing in a school play or competing at a sports day event, the provisions of this Act are not at the forefront of a parent's thoughts. And neither should they be according to the Information Commissioner, who adopts a common sense approach to this whole issue. It is quite apparent following the release of this guidance that photos/videos taken for personal use shall not be covered by the Act.

In contrast, there is a distinction between such personal photos/videos, and photographs/videos taken by the school/college for official reasons. In such a situation the Information Commissioner has confirmed the Act will apply. However, once again a common sense approach has been adopted to this issue - and so long as the photographer obtains permission to take the picture, this should ensure compliance with the provisions of the Act.

This is not the first time the Information Commissioner has tried to settle this uncertainty for all involved - similar guidance was published in 2005. But the message remains the same for all involved in the education sector - just use your common sense!



For more information please get in touch with [Toby Smith](#)

## Government has no plans to legislate on private lettings

The Housing Minister, Grant Shapps, announced last month that the Coalition Government has no plans to introduce new legislation to regulate private landlords. In response to the Rugg Review of the private rented sector, the last government announced plans to regulate managing agents, to require written tenancy documents and to introduce a national register of landlords. The coalition thinks this would introduce too much additional red tape. In addition, it believes current legislation strikes a balance between the interests of landlords and tenants. Councils have existing powers such as a power to require a landlord to remove or alter any hazardous features of their properties. In addition, a local authority has a discretionary licensing power to tackle situations where poorly managed privately rented housing stock blights an area. Mr Shapps said "I am putting councils on alert to use the range of powers already at their disposal to make sure tenants are properly protected".



## New rules on lenders repossessing dwelling houses

Shortly before dissolution the last parliament passed the Mortgage Repossessions (Protection of Tenants etc) Act 2010. It deals with the situation where a landlord has mortgaged their property and grants a tenancy without obtaining the lender's consent. The landlord later defaults on the mortgage and the lender begins proceedings to sell the property. The Act intervenes where a lender has obtained a possession order and now wishes to take possession of the dwelling. It obliges the lender to serve a notice on the tenant advising them of their rights under the Act. A tenant can request the lender to delay enforcing the possession order so they can find alternative accommodation and avoid homelessness. If the lender refuses, the tenant can apply to court to ask it to order a delay. The tenant can be required to pay a rent for the period of any delay. The government has published the form of notice which a lender must serve on the tenant. The lender cannot enforce the possession order until fourteen days has passed since it gave the notice. The change comes into effect on 1 October 2010.



The regulations can be read [here](#): The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010

## Secure tenant required to give up possession of flat

*Wilson v London Borough of Harrow* is a decision of the High Court concerning the right of a tenant to remain in council property which she had occupied for some seventeen years. The tenant had a secure tenancy of a two bedroom flat. She later married and the council agreed to her husband becoming a joint tenant. The wife suffered from mental illness and the marriage later foundered. The husband left the flat. After discussions with the local authority housing department, he served a notice to quit on the council in respect of the tenancy. This had the effect of terminating the tenancy, thereby making the wife a trespasser. She asked to become a sole tenant of the flat but the council refused. It had a waiting list for two bedroom flats whereas the applicant needed only a one bedroom property. She appealed against the council's possession order on the grounds that it was a contravention of her rights under article 8 of the European Convention on Human Rights. The court rejected the appeal. It held the law was clear as to the rule whereby one of two joint tenants can serve a notice to quit without the consent of the other tenant. Even though this brings the tenancy to an end, the rule does not breach article 8.



To read the full decision in the case of *Wilson v London Borough of Harrow* please click [here](#)

## The Court of Appeal provides guidance on the rules on equitable set-off; *Geldof Metaalconstructie NV v Simon Carves Ltd* (2010)

Set-off effectively allows one person to deduct from sums he owes to another, amounts that the other person owes to him. It comes in two forms, legal or equitable, each with its own different rules. It is equitable set off which is the subject of this article and it is a far from simple concept.

Equitable set-off unlike legal set-off can be used in any situation and can be used when the amounts are not yet quantified. However, for equitable set off to apply, the claims must arise from closely connected transactions. As with all equitable solutions, the party looking to set off must conduct himself in a fair way and deal in good faith.

The latest judicial decision on the subject clarifies the modern day test for using equitable set-off: *Geldof Metaalconstructie NV* (G) tendered for and won two contracts with *Simon Carves Ltd* (SC).

Under the first contract (under which SC did not pay G's invoice) G was to supply pressure vessels. Under the second contract (under which G refused to work until SC had paid the invoices under the first) G was to supply and install storage tanks. G claimed against SC for the invoice price under the first contract. SC alleged that G had breached the second contract by not carrying out the work.

G commenced proceedings to claim the price of the equipment SC under the first (supply) contract. SC then counterclaimed for damages for repudiation of the installation contract. SC submitted that the counterclaim was connected with the dealings and transactions which gave rise to G's claim and so should be subject to the principle of equitable set off, even though the two claims were under different contracts.

On the basis that there was a close connection between the contracts which give rise to the conflicting claims, it would be unjust to enforce G's claim without taking into account SC's cross claim, the Court of Appeal decided the case in favour of SC.

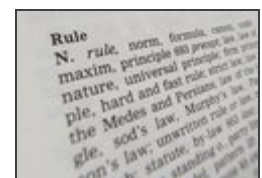
G had used SC's non payment under the first contract as a reason not to continue with works under the second contract and so the court found that there was a close connection between the two contracts.



For further information please contact [Katherine Souter](#)

## Update: development agreements and procurement law

The Office of Government Commerce (OGC) has issued an update to its guidance on development agreements and procurement law following the recent judgment of the European Court of Justice in Case C-451/08 *Helmut Müller*. The OGC sets out the circumstances in which the public procurement rules are less likely to apply. Essentially this will depend on whether the development agreement constitutes a public works or public works concession contract, the characteristics of which are discussed in light of case law and Commission decisions. The update also deals with section 106 agreements and covers the *Helmut Müller* judgment in detail.



The full judgement can be read [here](#). The OGC stresses the guidance is not definitive and may be subject to review in light of future Commission decisions. The OGC update is available [here](#)

## Getting the big picture right

In response to recent government announcements, design and architecture watchdog CABE has launched a new guide for planners. *Getting the big picture right* advises a new approach to large scale urban design and outlines a framework for implementing the three-stage process. CABE spent nearly two years trialling its flexible framework which aims to progress the idea of Local Enterprise Partnerships and to encourage working across local authority boundaries.



*Getting the big picture right* is available [here](#)

## Liberating the NHS

As part of the government's localism agenda the Health Secretary has announced that primary care trusts will be abolished in 2013 with their public health improvement functions being transferred to local authorities.

According to the *White Paper*, this will mean local authorities will have responsibility for "promoting integration and partnership working between the NHS, social care, public health and other local services and strategies", "leading joint strategic needs assessments, and promoting collaboration on joint commissioning plans", and "building partnership for service changes and priorities".

The *White Paper* gives little detail on the funding of these changes but indicates that the health budget will be ring-fenced. *White Paper* also recognises the need to simplify and extend the use of powers that enable joint working between the NHS and councils. The impact of the changes will be wide-ranging, with implications for procurement, employment, pensions and property.



For further information please contact [Benjamin Smith](#)

## ECJ clears up confusion between data protection principles and the right of access to public documents

The recent case of the *European Commission v Bavarian Lager* has provided useful guidance for public bodies faced with a request to disclose public documents (eg under the Freedom of Information Act), but concerned disclosing personal data (such as names) included in the documents. It appears that without express consent from the individual data subject, or failing that, an express and legitimate justification (such as an overriding public interest) or convincing argument to disclose, public bodies will not be compelled to disclose personal data contained in documents to which there is a public right of access.

The case concerned a request by Bavarian Lager (under the EC's regulations regarding public access to European Parliament, Council and Commission documents) for access to minutes of a meeting of the Commission. The Commission provided the minutes, but blanked out certain names of attendees to the meeting. The question for the courts was to determine which prevailed - the right of public access to the information, or the requirement to protect personal data?

Under this Regulation, the public have a general right of access to documents of EU institutions. However, this access can be refused if it would undermine the private life of an individual. This brought the EU Data Protection Regulations into consideration.



There are some circumstances where, despite the Data Protection Regulations, personal data can be disclosed. These include where the applicant for disclosure of the data establishes compelling legitimate grounds (relating to their situation) for the personal data to be disclosed; and also where the data subject consents to it being disclosed.

In the case, the Commission tried but failed to obtain the consents of the relevant individuals to disclose their personal data. Furthermore, the ECJ determined that Bavarian Lager had not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for the personal data to be disclosed. Absent any consent or compelling reason to disclose, the Commission had acted correctly in disclosing the minutes with the personal data blanked out.

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