Legal Update

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Introduction

This paper looks at legal developments in the field of planning over the last year. The content is, by definition, dictated by the somewhat hit-and-miss way in which new cases and legislative reforms are thrown up. In an effort to impose some structure on this, the case-law and changes in the legislation are analysed in an order which (at least loosely) reflects the sequence of the planning system, i.e.:

- the formulation of and challenges to policy (both national and development plan);
- the determination of planning applications by LPAs;
- environmental issues—EIA, Habitats Directive etc;
- conditions and s.106 obligations;
- the interpretation of planning permission once granted;
- permitted development rights and the GPDO;
- lawfulness and enforcement, including the implementation of planning permissions in breach of condition and time limits for enforcement against breaches of planning control;
- compulsory purchase;
- the appeal process—making and validity of appeals, the role and powers of inspectors;
- rights of challenge in the courts.

Formulation of and challenges to Policy

Challenging ministerial policy

In the 1980s, it was road schemes, but in the "noughties" it seems to be airport expansion which is generating most challenges to the formation of national policy. The most recent example is *R. (on the application of Hillingdon LBC) v Secretary of State for Transport*[1] concerning the Secretary of State's January 2009 announcement in the House of Commons of continued support for a third runway at Heathrow. Given the Coalition Government's stated intentions, the result on the facts is now almost certainly academic, but the case has important things to say about the necessity and scope for judicial review, and the extent to which it is possible to mount challenges to national policy at public inquiry.

The claimants contended that the Secretary of State's decision was unlawful on three broad grounds.[2] However, before determining any of these, the court had to grapple with the effect of the Secretary of State's announcement. The claimants' case depended to a large extent on "the expectation that [the decision] would be treated by the Secretary of State as in effect closing the door to further principled opposition to the runway project."[3] Was this correct?

Carnwath L.J. concluded that it was not. The 2009 decisions were no more than policy statements without any direct substantive effect. Although the Secretary of State's initial position had been that the decision in principle to support the runway proposal had been taken as long ago as 2003, this was "untenable in law and common sense". The Government was entitled to maintain the 2003 position unless and until a change in circumstances demanded a change of view, but it could not be regarded as immutable. Common

[1] *R. (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626; [2010] J.P.L. 976.
[2] Natural justice, failure to take into account material considerations and inadequate reasoning.
[3] *R. (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626; [2010] J.P.L. 976 at [34].

sense demanded that a policy established in 2003, before the recent developments in climate change policy, should be reviewed in the light of those developments. The decision in *Bushell v Secretary of State for the Environment*[4] could not be read as laying down any general rule that government "policy" is automatically outside the scope of debate at a local planning inquiry.

Self-evidently, this conclusion took away much of the force of the claimants' concerns. While this did not rule out judicial review, it had important implications for its scope. In circumstances where, even if there was a flaw in the consultation process or a failure to take a material consideration into account, this could be put right at a later stage, the claimants would need to show not just that there was something "clearly and radically wrong", but also that this was such as to "require the intervention of the court at this stage".[5] Although Carnwath L.J. agreed that there were serious issues about the overall aviation growth assumptions underlying the Secretary of State's position, and that there had been defects in the Secretary of State's reasoning on the issue of surface ground access, he doubted that a quashing order was appropriate.

For parties interested in issues beyond the expansion of Heathrow, it is Carnwath L.J.'s comments about *Bushell* which are likely to be most important, since the claimants' fear that *Bushell* created a "no-go" area at planning inquiries is one which was widely held. *Hillingdon* makes it clear that this is not necessarily so. Significantly, although Carnwath L.J.'s reasoning relied in part on the provisions of the Planning Act 2008 concerning the preparation of National Policy Statements (which make it clear that "even those issues which have been subject to policy decisions … are still open to debate, inside and outside Parliament, before a final decision can be taken"[6]) he nevertheless considered that, even before the changes introduced by the 2008 Act:

> "it was not open to the Secretary of State simply to stand on the principle of the policy made in 2003, without regard to the important developments since then."

Carnwath L.J.'s reasoning is therefore potentially applicable in areas which will not necessarily be the subject of an NPS.

Development plan challenges

The Legal Update to the 2009 Conference reported the decisions in *Persimmon Homes (North East) Ltd v Blyth Valley BC*[7] (where Keene L.J. concluded that an informed economic viability assessment was a "central feature of the PPS3 policy on affordable housing", which was a "crucial requirement of the policy"); *R. (on the application of Stamford Chamber of Trade and Commerce) v Secretary of State for Communities and Local Government*[8] (where it was held that the LPA was under no duty to consult before deciding not to put an old local plan policy forward to the Secretary of State for saving); and *St Albans City and DC v Secretary of State for Communities and Local Government*[9] (where the East of England Plan was quashed in part because of failure to carry out a Strategic Environmental Assessment of the decision to vary the figures for housing growth). Although the past year might not be able to match the "shock-wave" effect of the *Hertfordshire* decision, it has also produced its share of challenges to development plans.

In *Barratt Developments Plc v Wakefield MDC*[10] arguments of the *Blyth Valley*-type arose again in the context of what the judge called:

[4] *Bushell v Secretary of State for the Environment* [1981] A.C. 75.
[5] *Bushell v Secretary of State for the Environment* [1981] A.C. 75 at [69].
[6] *Bushell v Secretary of State for the Environment* [1981] A.C. 75at [41].
[7] *Persimmon Homes (North East) Ltd v Blyth Valley BC* [2008] EWCA Civ 861.
[8] *R. (on the application of Stamford Chamber of Trade and Commerce) v Secretary of State for Communities and Local Government* [2009] EWHC 719.
[9] *St Albans City and DC v Secretary of State for Communities and Local Government* [2009] EWHC 1280.
[10] *Barratt Developments Plc v Wakefield MDC* [2009] EWHC 3208.

> "the practical question 'what are the legitimate approaches which Councils and Planning Inspectors formulating local development plans may adopt when national policy for the provision of affordable housing is temporarily undermined by current economic conditions.'"

Wakefield's draft Core Strategy, which had been prepared when the market was still buoyant, had contained a requirement that at least 30 per cent of new dwellings on developments across the district which met the thresholds should be affordable, with an 80:20 split for social: intermediate units. However, by the time the policy came to be examined (December 2008) the market had slumped. Wakefield supported the policy with a recently completed[11] Strategic Housing Land Availability Assessment and Strategic Housing Market Assessment, and an economic viability assessment ("EVA") which had been completed by DTZ in October 2008.

Perhaps not surprisingly, the EVA concluded that, as at August 2008, there was little scope to deliver any development at all, let alone any affordable housing. However, DTZ concluded that conditions were likely to change over the life of the Core Strategy. An affordable housing rate of 30 per cent would be viable during more stable market conditions, given certain assumptions about construction costs and an internal rate of return of 18–20 per cent.

These assumptions were challenged by various representatives from the house-building industry at the subsequent examination. The Inspector nonetheless concluded that the SHLAA, the SHMA and the DTZ report provided robust and credible evidence. The Regional Spatial Strategy target for affordable housing was 30–40 per cent, but 30 per cent was the most that could be sustained in normal economic conditions. The Inspector therefore recommended a target of 30 per cent, but with no defined tenure split, and with flexibility to make the provision negotiable on each qualifying site.

In the High Court, Barratts contended that this conclusion was not supported by the EVA; that the EVA was in any event not "robust and credible evidence"; that the policy adopted by Wakefield was in fact inflexible; and that the policy was demonstrably ineffective because it could not be delivered, contrary to PPS12.

Pitchford J. accepted that *if* the policy had imposed a 30 per cent target across the district for the life of the plan, it would have failed to reflect the EVA and would not be founded on robust and credible evidence. In this respect, he accepted that:

> "While neither PPS3 nor PPS12 gives specific assistance on changing economic and market conditions, the fact that the strategy requires a robust evidence base to support it acknowledges that deliverability will depend upon those conditions."

However, he concluded that Wakefield's policy, while not "happily drawn", did not in fact impose a straitjacket. In so doing, he found that an apparent requirement to "make provision for sufficient affordable housing to meet identified needs" should be interpreted to mean "to *contribute towards* meeting identified needs".

The *Wakefield* challenge therefore makes it clear that the present economic conditions have to be taken into account when seeking to meet national and local targets for affordable housing, so as to ensure that policy targets or requirements are realistic. However, it also indicates that, as long as they are informed by a suitably robust evidence base, policies which are drawn so as to give developers and LPAs flexibility to respond to the ups and downs in the market are an appropriate way of addressing this.

R. (on the application of Persimmon Homes Ltd) v Vale of Glamorgan Council[12] involved a challenge to a Local Development Plan prepared under the Welsh legislation. The claimant had for some years been promoting a site at Llandow Newydd for a new settlement of 2750 dwellings. The local planning authority

[11] This work was in fact carried out after the Inspector had called an exploratory meeting in February 2008, at which she had expressed concern about the soundness of the Core Strategy given the absence of a completed SHLAA, SHMA or EVA.

[12] *R. (on the application of Persimmon Homes Ltd) v Vale of Glamorgan Council* [2010] EWHC 535 (Admin).

had commissioned an independent appraisal of the various options from Hyder Consulting, who had commented favourably on the Llandow Newydd proposal. However, the LPA's officers were critical of the way in which Hyder had assessed this, in particular with regard to Welsh Assembly Government policy, which stated that new settlements on greenfield sites were unlikely to be appropriate in Wales. When the matter was reported to committee, officers recommended an alternative option ("option 5"), commenting critically on Llandow Newydd, and making no mention of Hyder's conclusions.

The claimant challenged the resulting "Draft Preferred Strategy" on four main grounds:

(1) that the LPA was misled by the officers' report, which had omitted to make reference to or make available the only independent appraisal of the Llandow Newydd option;
(2) that officers who had prepared the report were illegitimately predisposed in favour of option 5 and against all other options;
(3) that one of the officers involved, Mrs Harvey, was married to an employee of Persimmon who had been working on the Llandow Newydd project, and should have recused herself from involvement in the process;
(4) that there was inadequate statutory consultation.

Of these, (2) and (3) are discussed in the later sections on bias and predetermination, below.

In relation to the complaint that members had been misled, Beatson J. observed that neither the Act, the Regulations nor Welsh Assembly guidance suggested that local authorities had to obtain an independent sustainability appraisal, or that if they did obtain one, they were bound by it. The statutory duty for appraising the sustainability of the plan lay with the authority. The officers' reasons for disagreeing with the Hyder analysis were matters of planning judgment, and did not "stray outside their legal entitlement" in concluding that Hyder's draft appraisal was defective.

Of itself, this may not seem an exceptional conclusion. However, the ultimate decision on the Local Development Plan was one for members, rather than officers. One of the other topics addressed later in this paper is the developing case-law on the circumstances in which "mistake of fact" can provide a ground of review. As discussed in that section, the "mistake of fact" can include a mistake as to the availability of evidence on a particular issue. Further, the section below on determination of applications includes examples of cases where a failure to accurately summarise the views of consultees has been held to be a ground of challenge. It is not difficult to envisage circumstances in which a positive decision by officers not to inform members of the recommendations of an independent consultant, commissioned by the LPA itself, could give rise to a complaint that members had been ignorant of the existence of (and so "mistaken" as to) a material fact when reaching their decision, or had failed to take a material consideration into account.

Persimmon's complaint about consultation contended that, since the Council had decided to appraise the Llandow Newydd proposal, it should have consulted on it. In particular, if members had decided to endorse Persimmon's proposal, they could not simply have amended the preferred strategy, because this strategic option (which was more than a minor amendment) was not included in the pre-deposit proposals documents. If selection of that option would have been vulnerable to challenge on the ground that there had been no consultation, it was irrational to argue that there was no requirement to consult because the option had not been chosen.

Beatson J. rejected this submission which would, he said, be a "recipe for perpetual consultation rather than effective policy making". The WAG's guidance only suggested an obligation to re-consult where a LPA decides to change its draft prepared strategy.

Designating conservation areas

Demolition of a listed building, and demolition of a building in a conservation area both require consent. In most other cases, demolition either is not to be taken as involving development, or is permitted. Nonetheless, there are many examples of buildings which are not nationally listed, but are regarded as local landmarks and which LPAs (and local residents) would prefer to retain. However, unless by happy coincidence those buildings lie within a conservation area, there is often little which LPAs can do to require their retention. Against this backdrop, the case of *Metro Construction Ltd v Barnet LBC*[13] concerned the not entirely unusual device of an LPA seeking to circumvent this difficulty by designating the building (in this case a former Carmelite monastery) as a conservation area, pursuant to s.69(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

Relying on the decision of Sullivan L.J. in *R. (on the application of Arndale Properties Ltd) v Worcester City Council*[14] the claimants challenged this, contending that the designation was no more than an attempt to achieve what English Heritage's refusal to list had frustrated. Collins J. agreed, commenting:

> "It is clear that the future of unlisted buildings may be a relevant consideration if they do provide a material contribution to an area which is worthy of designation and which would be harmed if they were to be demolished. But it is apparent that the desire to protect unlisted buildings and I think *a fortiori* a single unlisted building cannot justify a designation unless there is an area to which that building or those buildings make a real contribution. Thus if the motive for designation is to protect an unlisted building, that will suggest that the statutory powers are being used for a wrong purpose."

Accordingly, the designation was quashed.

The determination of applications by LPAs

Procedural issues

Neighbour notification

Although the GDPO sets out certain statutory requirements relating to consultation, s.18 of the Planning and Compulsory Purchase Act 2004 now requires LPAs to adopt a Statement of Community Involvement, which may include a more extensive commitment. What happens if a LPA fails to consult someone who need not have been consulted under the GDPO, but clearly should have been consulted pursuant to the SCI?

In *R. (on the application of Majed) v Camden LBC*[15] the LPA's SCI stated in terms that "where the Statement of Community Involvement is adopted by the Council, the Council is required to follow what it says". The appellant was a neighbour who, due to an administrative oversight, had not been notified of an application to extend an adjoining property, even though he was clearly within the class of people which the SCI said would be consulted. When he discovered that permission had been granted, he sought judicial review, claiming there was a breach of his legitimate expectation to be consulted.

In the Court of Appeal, Sullivan L.J agreed. Rejecting the LPA's argument that the only expectation was of consultation in accordance with the statutory (GDPO) requirements, he observed that the whole point about legitimate expectation was that it came into play "when there is a promise or practice to do more than that which is required by statute". In this case, it was difficult to imagine a more unequivocal statement as to who would, and who would not be notified. However, given the lack of any development

[13] *Metro Construction Ltd v Barnet LBC* [2009] EWHC 2956 (Admin).
[14] *R. (on the application of Arndale Properties Ltd) v Worcester City Council* [2008] EWHC 678 (Admin).
[15] *R. (on the application of Majed) v Camden LBC* [2009] EWCA Civ 1029.

plan objection, the lack of any real planning harm to the appellant and the very real prejudice that would be suffered by the interested party (who had completed the development) enforcement action was inconceivable. The court granted declaratory relief, but declined to quash the permission.

Consulting/notifying statutory consultees and reporting their views

Both Circular 01/01 and the Planning (Listed Buildings and Conservation Areas) Regulations 1990[16] require LPAs to notify English Heritage of applications which the authority considers would affect the setting of a listed building. The decision of Cranston J. in *R. (on the application of Friends of Hethel Ltd) v South Norfolk DC*[17] confirms that this is a subjective assessment for the LPA to make.

However, where statutory consultation does not depend on the exercise of any subjective judgment or discretion by the LPA, the consequences of failing to consult can be drastic. In *Health and Safety Executive v Wolverhampton City Council*[18] the LPA had consulted the HSE on an application for permission for four blocks of flats located within 100 metres of a liquid petroleum gas facility, but (contrary to the advice in para.A5 of DETR Circular 04/2000) when the HSE advised that permission should be refused, the LPA failed to give the HSE advance notice of its intention to grant permission.

At first instance, Collins J. rejected the LPA's argument that the advice in para.A5 was merely directory. In Collins J.'s view, this was clearly a mandatory requirement which enabled the HSE to seek further information about a development or (more importantly) to ask the Secretary of State to call-in the application. Although, because of delay by the HSE in bringing the proceedings, the judge went on to decide that he would not quash the permission but would only grant declaratory relief,[19] it is almost certain that, but for delay, he would have quashed the permission.[20]

If consultation is important, it is equally necessary to ensure that the consultees views are accurately reported. Although an officer's report is necessarily a summary of the material which has been placed before the LPA, where no-one expects the officer to record the views and representations of others verbatim, the decision in *R. (on the application of Corus UK Ltd) v Newport City Council*[21] underlines the need to ensure that the summary is not misleading.

The application before the LPA had been for the change of use of an employment site to temporary use as a gypsy traveller site. The consultation response from the LPA's Economic Development Manager had expressly stated that he was "opposed to this proposal in principle", but when this was carried over into the officer's report, members were simply advised that "the Economic Development Manager has expressed concern regarding the long term residential use of the land due to the loss of future employment land and the impact on neighbouring businesses." Wyn Willams J. concluded that this was not a fair or accurate summary of the Economic Development Manager's true views. It followed that the Committee had taken its decision without having regard to those views. Moreover, there was a similar difficulty with the views of the Environment Agency, which had unequivocally recommended that permission be refused. Taken with other inaccuracies in the report, the grounds for quashing the permission were made out.[22]

[16] Planning (Listed Buildings and Conservation Areas) Regulations 1990 (SI 1990/1519).
[17] *R. (on the application of Friends of Hethel Ltd) v South Norfolk DC* [2009] EWHC 2856 (Admin); [2010] JPL 594.
[18] *Health and Safety Executive v Wolverhampton City Council* [2009] EWHC 2688 (Admin).
[19] See discussion on delay below.
[20] Collins J.'s decision to reject the HSE's associated challenge to Wolverhampton's refusal to revoke the permission was the subject of appeal to the Court of Appeal, but there was no appeal from his conclusions on the challenge to the underlying permission.
[21] *R. (on the application of Corus UK Ltd) v Newport City Council* [2010] EWHC 1596.
[22] Though the court ultimately declined to do this, having regard to the facts that (as was common ground) the travellers would not be required to vacate the site until their application was redetermined, and their permission was only a temporary one for two years.

Delegated powers

Although significant or controversial applications are usually determined by elected members, the majority of planning applications are dealt with by officers under delegated powers. The precise wording of the schemes of delegation under which this happens varies from one authority to the next, but most authorities require applications to be referred to the planning committee where they are in conflict with the development plan. Who decides whether this test is satisfied, and what happens in cases of doubt?

The two leading authorities on the question are *R. (on the application of Carlton-Conway) v Harrow*[23] and *R. (on the application of Springhall) v Richmond upon Thames LBC*.[24] In the former, the Court of Appeal concluded that the application should have been referred to committee because (per Pill L.J.)

> "public policy requires that the planning officer should be circumspect in exercising powers delegated in the terms they were in this case. When there are real issues as to the meaning of planning policies, as to their application to the facts of the case, reference to the appropriate committee is required."

Carlton Conway was however distinguished in *Springhall*, on the grounds that the policies in play were clear and the officer had genuinely and carefully considered whether the decision was delegable and had accompanied his decision with a reasoned report setting out his reasons.

The tension between *Carlton Conway* and *Springhall* was explored in *R. (on the application of Technoprint Plc) v Leeds City Council*,[25] where the LPA had a scheme of delegation which allowed officers to determine planning applications, inter alia as long as the application was not a significant departure from the development plan. Concluding that there was no conflict in principle between the two Court of Appeal decisions, Wyn Williams J. identified the following strands as emerging from the two decisions:

> "First, when the issue of whether or not the power to grant planning permission has been delegated to a planning officer arises under a scheme of delegation and the resolution of that issue is dependant upon the exercise of planning judgment a decision by the officer to exercise the delegated power and grant planning permission may be impugned upon the ground that his decision is irrational or unreasonable. Second, in assessing whether such a decision is irrational or unreasonable the court will approach its task in exactly the same way as if it was simply being asked to quash the planning permission on the ground that the decision to grant permission was irrational or unreasonable. Third, in most cases where the issue about whether the power to grant planning permission has been delegated depends upon the exercise of planning judgment there will be no need for a planning officer to adopt a formalised two-stage approach when determining whether he is authorised to grant permission and, if so, whether permission should be granted. That is because the factors relevant to both issues will normally be closely interrelated if not identical. However, fourth, there may be occasions when an officer could properly form the view that planning permission for a proposal should be granted but yet act irrationally or unreasonably if he also concludes that he is authorised to grant the permission. *Carlton-Conway* is one such case. Consequently, officers should remain alive to this possibility."

On the facts of *Technoprint*, the judge found that the officer had acted unreasonably. Although the officer had produced a report which "at first blush" reads as a balanced and properly considered planning appraisal which was "replete with planning judgments", there were two issues where there had been no proper appraisal of whether the applicable policies would be satisfied. The first was open space, where a condition had been imposed requiring improvements to open space "on or off site" with no consideration about how

[23] *R. (on the application of Carlton-Conway) v Harrow LBC* [2002] EWCA Civ 927.
[24] *R. (on the application of Springhall) v Richmond upon Thames LBC* [2006] EWCA Civ 19.
[25] *R. (on the application of Technoprint Plc) v Leeds City Council* [2010] EWHC 581 (Admin).

this would be fulfilled (and without any s.106 agreement if it had to be off-site). The second was contamination, where the LPA's own technical officer had recommended obtaining a Phase II site investigation report *before* granting permission. The permission was therefore quashed.

Delegation arose again in a slightly different context in *R. (on the application of Friends of Hethel Ltd) v South Norfolk DC*.[26] Planning committee decisions against officer recommendation are neither unlawful, nor necessarily wrong. However, the guidance in the costs circular is clear: authorities who reject their officers' advice will be at risk of costs if they cannot provide evidence to substantiate the decisions they have taken. It was presumably to guard against this sort of risk that South Norfolk DC had adopted a scheme of delegation which provided that its area committees could not take a decision against officer advice without a 2/3 majority.

In *Hethel* that scheme was challenged after the area committee resolved by five votes to three to refuse permission for a wind farm, only to have their decision reversed when, in accordance with the scheme of delegation, the application was referred to the full planning committee because the area committee resolution was contrary to officer advice, and had not secured the requisite two thirds majority. The residents group argued that the scheme of delegation was contrary to the Local Government Act 1972, which provided that decisions should be taken by a majority of the members present. Cranston J. rejected the challenge, holding that it was a valid exercise of the Council's power of sub-delegation.

Bias and predetermination

As noted above, *R. (on the application of Persimmon Homes Ltd) v Vale of Glamorgan Council*[27] involved complaints of both predetermination and bias. Although the case was concerned with the development plan process, the analysis is equally applicable to the determination of planning permissions.

In relation to predetermination, the claimant pointed to a long history in which the Council's officers had favoured "option 5" over any other strategy for the LDP. Conduct said to provide evidence of predetermination included the fact that the LPA had dismissed its own independent consultants, Hyder, when they indicated they were professionally unable to produce a report downplaying the claimant's proposal for a new settlement at Llandow Newydd. Beatson J. disagreed that this indicated predetermination. The differences between the Council's officers and Hyder related to matters on which planning professionals could come to different conclusions. While the background showed a clear policy preference against a new settlement such as that proposed by the claimant, the evidence showed that officers' minds were not closed. The test of predetermination (which was "extremely difficult" to satisfy) was not made out.

The complaint of bias was based on the fact that one of the planning officers working on the LDP strategy was married to a Persimmon employee who was involved in the Llandow Newydd project. Beatson J. accepted that the officer concerned (Mrs Harvey) may well have breached the Council's Officer Code of Conduct, and possibly the rules of the RTPI. However, absent a "disqualifying bias", he did not consider that these matters meant that the Council's decision was tainted. It could not be said that spouses were automatically barred from participating: the decision in *R. v Gough (Robert)*[28] established that the only case of automatic disqualification is where there is a pecuniary interest. There was no suggestion of any dispute or difficulty between Mrs Harvey and her husband so that she might be antagonistic to him or his employer. A reasonable member of the public, knowing how she had conducted herself in relation to the Welsh Assembly Government's policy and other matters in a way which was adverse to the interests of her husband's employer, would not have concluded that a real possibility of bias existed. The position would, however, have been "quite different" if she had taken this line in relation to a competitor of her husband's employer in circumstances in which her husband's employer might benefit.

[26] *R. (on the application of Friends of Hethel Ltd) v South Norfolk DC* [2009] EWHC 2856 (Admin).
[27] *R. (on the application of Persimmon Homes Ltd) v Vale of Glamorgan Council* [2010] EWHC 535 (Admin).
[28] *R. v Gough (Robert)* [1993] A.C. 646.

The moral of the story therefore appears to be that it is legitimate for officers to be involved if they reach a conclusion which is adverse to the interests of their spouse or his/her employer, but not if their involvement is likely to benefit them. The difficulty, of course, is that if officers approach the project with an open mind, they will not know what their decision will be until the end of the process. The outcome of this challenge should not, therefore, disguise the fact that the situation was one in which there was clear potential for a conflict of interest.

On a different note, in *R. (on the application of Usk Valley Conservation Group) v Brecon Beacons National Park Authority*[29] Ouseley J. rejected an argument that embarrassment or fear of criticism arising out of the earlier involvement of two members in the grant of planning permission with inadequate information and to which inadequate (and arguably defective) conditions were attached gave rise to an appearance of bias in subsequent determinations on whether and in what form enforcement action should be taken:

> "I do not accept … that if members desire to protect themselves from further criticism and to avoid it being said that they caused both the problem in the first place and the cost of putting it right, they have an interest which means that they appear to be biased. … This is to ignore the broad political basis for local authority decision-making."

In *R. (on the application of Siraj) v Kirklees Council*[30] a member of the planning committee determining an application for permission for an agricultural machinery workshop, which was acknowledged to be inappropriate development in the Green Belt, had said:

> "I can't think of a better use for the Green Belt than mending tractors … far better use of the Green Belt than solicitors sat in posh houses…"

HH Judge Langan QC described this "robust … mode of expression" as an "unfortunate" remark, but concluded that it was a view which might fairly be held of the relative merits of differing types of development in the Green Belt. There was no suggestion that any other member of the Committee shared the same view. There was no basis for believing the decision was arrived at on a "closed minds" basis.

Extensions to time-limits and non-material amendments

With effect from October 1, 2009, the Town and Country Planning (General Development Procedure) (Amendment No.3) Order 2009[31] has allowed planning permissions which are about to lapse to be kept alive by a simplified application procedure. The changes apply to permissions which are extant both on October 1, and at the date of the application, but have not yet commenced.

From the same date, it has also been possible to make non-material amendments to existing planning permissions under s.96A TCPA 1990 (as introduced by s.190 of the Planning Act 2008).

[29] *R. (on the application of Usk Valley Conservation Group) v Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin).
[30] *R. (on the application of Siraj) v Kirklees Council* [2010] EWHC 444(Admin).
[31] Town and Country Planning (General Development Procedure) (Amendment No.3) Order 2009 (SI 2009/2261).

Substantive issues

The development plan

The words of s.38(6) should be engraved on the hearts of everyone involved in planning, but in a world where policy is continually evolving, the decisions in *R. (on the application of Dacorum BC) v Secretary of State for Communities and Local Government*[32] and *Tesco Stores Ltd v Secretary of State for Communities and Local Government*[33] are a timely reminder of their importance.

Dacorum concerned the interaction of development plan policy and national guidance. Specifically, para.3.6 of PPG2 provides that the extension or alteration of a dwelling need not be inappropriate in the Green Belt, provided it does not "result in disproportionate additions over and above the size of the original building". Dacorum's Local Plan, like that of many LPAs, had a policy which broadly reflected the advice in PPG2, but used subtly different words. The case turned on whether the Local Plan policy should be interpreted to mean the same thing as the PPG. The Inspector concluded that it should, but Cranston J., whose decision[34] was upheld by the Court of Appeal, concluded that a reference in the Dacorum Local Plan to "the original dwelling" did not necessarily have the same meaning as para.3.6 of PPG2. Whatever PPG2 meant, the Local Plan was intended to refer to the first dwelling on the site, and not to any subsequent replacement.[35]

In so far as it turns on the particular wording of the Dacorum Local Plan, the decision is of limited importance. However, in the Court of Appeal Keene L.J. made the following observation, which is of wider relevance:

> "As for the proposition that, as a matter of law, plain words in an adopted Local Plan are to be overridden or set aside by wording in a planning policy guidance note, I have to say that I regard that as not only misconceived but quite astonishing. Unlike a PPG, a Local Plan will have gone through the necessary statutory processes, including public consultation and normally a public inquiry and a report by an independent inspector, before being formally and ultimately adopted. It has statutory force, being explicitly referred to in the legislation …
>
> PPG2, by contrast, is not a document which has any statutory force, albeit that it will be a material consideration. Such guidance notes do not expressly feature in the relevant Acts, will not have been through a public inquiry process, and simply cannot take precedence over clear language in the statutory development plan. They may, of course, assist if the statutory development plan uses words which are not precisely defined … [but that] is not the situation here"

These comments have a particular force in the context of PPG2, which specifically advises that:

> "development plans should make clear the approach Local Planning Authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

However, even where national guidance does not explicitly authorise local development plan documents to set their own agenda, Local Plan or Local Development Framework policies are (subject to testing at Local Plan inquiry or LDF examination) not *obliged* to accord. Keene L.J.'s observations are therefore potentially applicable to the full range of PPGs and PPSs.

[32] *R. (on the application of Dacorum BC) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1494.
[33] *Tesco Stores Ltd v Secretary of State for Communities and Local Government* [2010] EWHC 1581 (Admin).
[34] *R. (on the application of Dacorum BC) v Secretary of State for Communities and Local Government* [2009] EWHC 304; [2009] JPL 1317.
[35] The Inspector had concluded that the "original building" in para.3.6 of PPG2 referred to an *existing* building, as first built. Hence, if a pre-1948 dwelling had been replaced in 1960, it was the 1960 dwelling which was the relevant comparator. The Inspector concluded that the Local Plan should be construed similarly.

In the *Tesco* case, the issue was not the status of the development plan vis-à-vis national policy, but its relationship with *emerging* policy. The Liverpool Unitary Development Plan identified Great Homer Street as a Local Centre in retail terms. The emerging draft policy (which all parties agreed was necessary) was that it should be "upgraded" to become a "District Centre". The Inspector refused permission on the grounds that Tesco's proposal would have an unacceptable effect on the existing Local Centre, and was therefore contrary to the development plan. He also found that the Tesco proposal, as a stand-alone scheme, would not turn Great Homer Street into a District Centre, and that if Tesco was granted planning permission there was considerable uncertainty whether other regeneration development would follow in a timely fashion or at all.

Tesco argued that it was unlawful for the Inspector to find against its proposal on the grounds of extant retail policy when everyone agreed that the policy needed to change. Nicol J rejected that challenge, observing that s.38(6) obliged the Inspector to measure the proposal against the existing policy.

Nicol J.'s decision was undoubtedly made easier by the Inspector's conclusion that the Tesco proposal also failed when measured against the emerging policy. However, as a matter of law, the judge's reasoning must be right: emerging policy may be an "other material consideration", but it is always necessary to start with the development plan.

Finally, the decision in *Bexley LBC v Secretary of State for Communities and Local Government*[36] reinforces previous case-law[37] on the extent to which "other material considerations" can include matters which would fall to be considered when assessing compliance with the development plan. The Inspector had agreed with the LPA that an application for permission for the change of use of a retail unit to use as a hot food takeaway was contrary to the UDP policy designed to protect "non-core shopping frontages", but had nevertheless granted permission on the grounds that it would not adversely affect the neighbourhood centre's character or vitality and viability. In the High Court, the LPA argued that these were matters which formed part of the policy test, and that it was not open to the Inspector to treat matters relevant to compliance with the development plan as being considerations which might justify departure from it. John Howell QC, sitting as a Deputy High Court Judge, disagreed. The Council's case was contrary to authority and "unsustainable" in any event.

Green belt

Given the age of PPG2, the proper application of Green Belt policy continues to be the source of a surprising number of challenges. The order in which these are discussed below follows the paragraph numbering of the PPG.

R. (on the application of River Club) v Secretary of State for Communities and Local Government[38] concerned the meaning of the advice which lies at the heart of Green Belt policy, namely para.3.2:

> "Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

The particular question in *River Club* was whether the words "any other harm" were restricted to harm to the Green Belt, or whether they could include harm to any other acknowledged interest of pubic importance. The Inspector's decision clearly assumed the latter, because his analysis of harm included

[36] *Bexley LBC v Secretary of State for Communities and Local Government* [2009] EWHC 2325 (Admin).
[37] *Council for National Parks Ltd v Pembrokeshire Coast National Park Authority* [2004] EWHC 2907 (Admin); [2005] EWCA Civ 888.
[38] *R. (on the application of River Club) v Secretary of State for Communities and Local Government* [2009] EWHC 2674; [2010] J.P.L. 584.

the harm caused by reliance on less sustainable means of transport. Frances Patterson QC, sitting as a Deputy High Court Judge, agreed that "any other harm" in para.3.2 could refer to harm in the green belt context,[39] but was not necessarily limited to this.[40]

This conclusion seems sensible, not only because it gives the words "any other harm" their plain and ordinary meaning, but also because the benefits relied upon by developers seeking to demonstrate "very special circumstances" often have little or nothing to do with the impact of their proposal on the Green Belt. It would seem odd to restrict the items placed on the "negative" side of the scales to factors relating only to the Green Belt in circumstances when there is no similar restriction on what is placed on the "positive" side.

Two further cases concerned the definition of "inappropriate development", and in particular the advice in para.3.4 of PPG2 that appropriate development includes:

> "other uses of land which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in it."

First, in *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Communities and Local Government*[41] the court was asked to consider whether a 416 sq.m. stable block for an equestrian centre which was concerned with the foaling, rearing and sale of thoroughbred horses was "inappropriate" in the Green Belt. For some ten years, the LPA, the landowners' agents and SSOBT (as local landowner and objector) had all proceeded on the basis that it was, but the Inspector determining an enforcement appeal against the building concluded otherwise. Although it was common ground that equestrian use was not agriculture, the Inspector concluded that the equestrian use of the wider planning unit preserved the openness of the green belt and did not conflict with the purposes of including land within it, and that since the stable building was genuinely required for the equestrian use, it was therefore "appropriate".

That decision was quashed (by consent) on procedural grounds,[42] but Robert Kay QC rejected SSOBT's further argument that there was only one answer the Inspector could come to on the question of (in)appropriateness. While the Inspector was wrong to have considered the impact of the building on openness by reference to the relative proportion of built land to the area as whole (he should simply have asked whether this building, having regard to its size, location etc. preserved the openness of the green belt), it was not for the court to say what answer the Inspector should have come to if he had approached the matter correctly.

A similar issue arose in *West Lancashire BC v Secretary of State for Communities and Local Government*[43] in the context of the use of land for recreational motor vehicle activities (including bikes and cycles) and for motor racing. The Inspector concluded that a number of the attributes of the use (bunting, hay bales and the track) did not have any effect on openness, and that while the storage containers which had been brought onto the site were permanent and akin to buildings, their number, location and colour could be controlled by condition, such that the overall use did not harm the openness of the Green Belt or conflict with any of the purposes of including land in it. It was therefore not "inappropriate".

That decision was quashed by Parker L.J., who observed that:

[39] See also *R. (on the application of Langley Park School for Girls Governing Body) v Bromley LBC* [2009] EWCA Civ 734 per Sullivan L.J. at [6].

[40] The decision was however quashed because the Inspector made the elementary mistake of failing to make it clear that he had considered whether the package of circumstances relied upon by the appellant, taken together, amounted to very special circumstances.

[41] *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Communities and Local Government* [2009] EWHC 3238. This is the latest chapter in an extraordinary saga in which SSOBT have successfully sought judicial review of purported grants of planning permission for the stable block on no fewer than 5 separate occasions, and in a 6th claim successfully challenged the decision of the LPA not to take enforcement action against the development.

[42] See below.

[43] *West Lancashire BC v Secretary of State for Communities and Local Government* [2009] EWHC 3631 (Admin).

> "the policy in PPG2 simply does not accord any latitude to the Inspector to decide that a material change of use does affect the openness of the Green Belt but that the extent of such effect does not, in the Inspector's opinion, matter sufficiently to raise significant planning concerns."

The Inspector had concluded that the containers would affect openness. Consistently with the express terms of PPG2, the inevitable conclusion was that the material change of use would detrimentally affect, not maintain, openness and would therefore be inappropriate.

This conclusion is not a million miles from that which SSOBT had urged on the court in the previous case. Quite how it fits with the advice in para.3.4 of PPG2 relating to the provision of essential facilities for appropriate uses is less clear: even appropriate uses such as sport and recreation can require facilities such as changing rooms which have some effect on openness, yet para.3.4 specifically allows this. This point was, however, specifically made in the course of argument,[44] and rejected by the judge.

Yet another pair of cases were concerned with the guidance in paras 3.4 and 3.6, relating to the extension of buildings and dwellings. Coincidentally, both deal with the way in which that advice interacts with development plan policies.

As noted above, the decision in *R. (on the application of Dacorum BC) v Secretary of State for Communities and Local Government*[45] underlines the need to read development plan policies on Green Belt carefully, and not always to assume that they say the same thing as PPG2. In cases where there is a conflict, the development plan policy should prevail.

In *Dacorum*, the development plan policies favoured a more restrictive approach. However, in *Guildford BC v Secretary of State for Communities and Local Government*[46] the decision went the other way. A Planning Inspector had allowed an appeal against Guildford's refusal of permission for an extension to an already twice-extended house in the Green Belt. Guildford challenged this in the High Court, arguing that the Inspector had wrongly treated the guidance in para.3.6 of PPG2 as if it were concerned with visual impact, rather than simply the proportionate increase on the original dwelling. Following the unreported decision of the Court of Appeal in *Surrey Homes Ltd v SoSE*,[47] Cranston J. accepted that the emphasis in para.3.6 of PPG2 was on relative size, not visual impact, but found that the Inspector had been entitled to take these wider considerations into account because the Local Plan policy expressly disavowed any categorical statement about the maximum size allowed in favour of an assessment of the impact of the proposal against the openness and visual amenities of the Green Belt. Moreover, since public law principles demanded consistency in the application of policies, it was also relevant that the LPA had itself allowed significant extensions to adjoining properties.

In *R. (on the application of Siraj) v Kirklees Council*[48] HH Judge Langan QC rejected a complaint that, when giving reasons for granting permission for inappropriate development in the Green Belt, the LPA had simply listed the factors said to amount to very special circumstances, without assessing the quality of them. The factors were all capable in law of being a very special circumstance.

[44] *West Lancashire BC v Secretary of State for Communities and Local Government* [2009] EWHC 3631 (Admin) at [21].
[45] *R. (on the application of Dacorum BC) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1494.
[46] *Guildford BC v Secretary of State for Communities and Local Government* [2009] EWHC 3531 (Admin).
[47] *Surrey Homes Ltd v SoSE*.
[48] *R. (on the application of Siraj) v Kirklees Council* [2010] EWHC 444 (Admin).

Duplication of controls: relationship between integrated pollution prevention and control and planning

As is well known, PPS23 advises that the controls under the planning and IPPC regimes should complement rather than duplicate one another, and that planning authorities should "work on the assumption that the relevant pollution control regime will be properly applied and enforced". However, as the decision in *Harrison v Secretary of State for Communities and Local Government*[49] demonstrates, this does not mean LPAs or Inspectors have to ignore the issue.

Harrison concerned an enforcement notice alleging the unauthorised change of use of land from agriculture to a mixed use of agriculture and processing animal by-products. The landowner appealed, and by the time of the Inquiry had obtained an IPPC permit. It was common ground at the inquiry that "it must be assumed that the conditions [of the permit] will be implemented … and enforced … to meet BAT and IPPC guidance standards" and that "there would be an expectation that the odour impact standards will be achieved". However, in dismissing the appeal against that notice, the Planning Inspector refused permission under ground (a) inter alia because the odour arising from the industrial processing caused very significant harm and could not be resolved by condition. Having regard to the history and local geography, there were significant doubts that the pollution control regime could be relied upon to prevent undue amenity harm.

In the High Court, the claimant contended that this conclusion was contrary to the guidance in PPS23. Rejecting that argument, HH Judge McKenna said it could not be right that para.10 of PPS23 meant the planning system must assume that no pollution issues would arise. The Inspector had correctly directed himself to the advice in PPS23, but had been entitled to conclude that the close proximity of the site to residential developments would continue to cause problems.

Drainage

Although concerns about the capacity of the local sewerage system are frequently expressed, it is not unusual for developers to respond that if permission is given the relevant sewerage undertaker will be under a statutory duty to make provision. The decision in *Barratt Homes Ltd v Dwr Cymru Cyfyngedig (Welsh Water)*[50] suggests that LPAs may need to go beyond this simple assumption.

Barratts had obtained planning permission for 98 houses and a primary school. They constructed a private sewer to receive the sewage from this development, and claimed a statutory right to connect their private sewer to the public sewer at a point of their own choosing, in the close vicinity of their development. Welsh Water refused because of concerns that it would overload the sewer upstream. They offered an alternative which would be significantly more expensive for Barratts. A majority of the Supreme Court concluded that the ability of the undertaker, under s.106 of the Water Industry Act 1991, to impose restrictions on the "mode of construction" of the private sewer related to construction and not the point of connection. In the latter respect, the s.106 right to connect is absolute.

Lord Phillips (who gave the majority judgment) recognised that this could cause problems, especially since the right exists without any requirement to give more than 21 days' notice. To the extent that his judgment indicates a solution, it lies in his endorsement of the Court of Appeal's suggestion:

> "that the practical answer to this problem lies in the fact that the building of a development requires planning permission under the Town and Country Planning Act 1990. The planning authority can make planning permission conditional upon there being in place adequate sewerage facilities to cater for the requirements of the development without ecological damage. If the developer indicates that

[49] *Harrison v Secretary of State for Communities and Local Government* [2009] EWHC 3382 (Admin); [2010] J.P.L. 885.
[50] *Barratt Homes Ltd v Dwr Cymru Cyfyngedig (Welsh Water)* [2009] UKSC 13; [2010] J.P.L. 721.

> he intends to deal with the problem of sewerage by connecting to a public sewer, the planning authority can make planning permission conditional upon the sewerage authority first taking any steps necessary to ensure that the public sewer will be able to cope with the increased load… Thus the planning authority has the power, which the sewerage undertaker lacks, of preventing a developer from overloading a sewerage system before the undertaker has taken steps to upgrade the system to cope with the additional load."

Self-evidently, this will only be possible if LPAs are aware of the problem. As Lord Phillips went on to observe:

> "If conditions of planning permission are to provide the answer to the problem of the connection of private sewers to public sewers which are not adequate to bear the additional load, it would seem essential that there should be input to planning decisions from both the relevant sewerage undertaker and OFWAT."

If LPAs consult more widely, they will then need to consider whether conditions are appropriate. Critically, that decision may not simply turn on whether there is a problem with capacity. Since imposition of a Grampian condition effectively compels the developer to finance the necessary works, the LPA may find itself in the difficult position of having to decide whether this is appropriate. On that question, Lord Phillips indicated that the relevant principles were:

> "Is it reasonable to expect the sewerage undertaker to upgrade a public sewerage system to accommodate linkage with a proposed development regardless of the expenditure that this will involve?
>
> How long is it reasonable to allow a sewerage undertaker to upgrade the public sewerage system?
>
> Is it reasonable to allow the sewerage undertaker to delay planned upgrading of a public sewer in the hope or expectation that this will put pressure on the developer himself to fund the upgrading?"

These will not be easy issues for an LPA to determine. In the longer term, it may be, as Lord Phillips indicated, that:

> "more thought may need to be given to the interaction of planning and water regulation systems under the modern law to ensure that the different interests are adequately protected."

Alternative sites

The circumstances in which an arguably less damaging alternative is a relevant consideration when granting permission continues to throw up new cases.[51] The generally accepted approach is that the existence of a better alternative is irrelevant if the proposal under consideration is acceptable in its own right: see *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment*[52]; *R. (on the application of Mount Cook Land Ltd) v Westminster City Council*.[53] In this context, as Sullivan J. observed in *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government*[54]:

> "under the plan-led system there can be no doubt that conflict with the development plan is capable of amounting to a 'clear planning objection'."

[51] See the discussion in Robert McCracken's article "Alternative Sites in Planning Law" [2010] J.P.L. 852.
[52] *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P. & C.R. 293.
[53] *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346.
[54] *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538(Admin).

Derbyshire Dales DC v Secretary of State for Communities and Local Government[55] concerned a proposal for a wind farm. The Inspector concluded that the case was not one of the "narrow range" where alternatives should be considered as a matter of law. Although the proposal conflicted with development plan policy in some respects, the nature of the adverse impacts was such that a decision could properly be made on the merits of the case, balancing such impacts against other considerations. It was therefore not necessary to consider whether alternatives had been adequately pursued or convincingly discounted.

In the High Court, Carnwath L.J. drew a distinction between those cases where the decision-maker was *entitled* to consider alternatives (i.e. where the decision-maker would not err in law if alternatives were taken into account), and those cases where alternatives were *necessarily* relevant (i.e. where the decision would be flawed if alternatives were *not* taken into account). For the former category, the range of potentially relevant planning issues was very wide and, absent irrationality or illegality, the weight to be given to such issues was a matter for the decision-maker. However, "special circumstances" would be necessary to support an argument that a decision-maker was compelled (as opposed to merely empowered) to take alternatives into account.[56]

In rejecting the argument that this was a situation where the Inspector was compelled to take alternatives into account, Carnwath L.J. distinguished the case from those (such as *Bovale* and *Secretary of State v Edwards*[57]) where there had been a need for a particular facility in a defined area.[58] There was no national or local policy guidance requiring consideration of alternatives, and the Inspector had been entitled to proceed as he did.

The challenge in *R. (on the application of Langley Park School for Girls Governing Body) v Bromley LBC*[59] concerned a different sort of "alternative". The claimants had objected to the grant of planning permission for new secondary school buildings on Metropolitan Open Land,[60] inter alia on the grounds that there were other options for the layout of the proposed new buildings within the same site, which would have less effect on the openness of the MOL. The LPA's Planning Committee had been advised that the application should be treated on its individual merits. Allowing an appeal from the first instance decision of Wyn Williams J.,[61] the Court of Appeal held that this was an error.

In particular, Sullivan L.J. drew a distinction between the "alternative site" cases which were concerned with completely different locations for the same development, and the situation where an objector was arguing that a different layout *within the same application site* would avoid or reduce adverse effects. On the particular facts of the case before him, Sullivan L.J. observed that the impact of the proposal on openness and the visual amenity of the MOL was a highly material consideration, and that the ability to reduce the injury to the MOL by revising the layout was "certainly capable" of being a material consideration. Since it was being argued that an alternative layout *within the same site* would avoid or reduce injury, no "exceptional circumstances" were required in order to justify taking the other options into account.

As to the general approach, Sullivan L.J. said:

> "There is no 'one size fits all' rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be persuaded of the merits of avoiding or reducing it by

[55] *Derbyshire Dales DC v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin).
[56] *Derbyshire Dales DC v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin) at [17]-[20].
[57] *Secretary of State v Edwards* (1994) 69 P. & C.R. 607 CA.
[58] *Secretary of State v Edwards* (1994) 69 P. & C.R. 607 CA at[22] and [35].
[59] *R. (on the application of Langley Park School for Girls Governing Body) v Bromley LBC* [2009] EWCA Civ 734; [2010] J.P.L. 434.
[60] Which is afforded policy protection equivalent to the Green Belt.
[61] *R. (on the application of Langley Park School for Girls Governing Body) v Bromley LBC* [2009] EWHC 324; [2009] J.P.L. 1210.

> adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the Applicant that there was no possibility, whether by adopting an alternative scheme or otherwise, of avoiding or reducing that harm."

In this case, the Planning Committee had not even been advised to consider whether the injury to the MOL was such that there was a need to consider alternatives. The decision was therefore "seriously flawed" and should be quashed.

Finally, there is the question of how exhaustive a search for alternative sites needs to be. In *South Cambridgeshire DC v Secretary of State for Communities and Local Government*[62] the Court of Appeal upheld an Inspector's decision that there is no requirement in planning policy or case law for an applicant to prove that *no* other sites are available, and indeed that such a level of proof was practically impossible. Lack of evidence of a search could undoubtedly weigh against an applicant where there were policy or other objections to a proposed development; and evidence of a search over a reasonable period for a reasonable length of time could weigh in favour. These were all material considerations where the weight to be attached to them was a matter for the decision-maker. This approach has recently been followed by Blair J. in *Smarden Parish Council v Secretary of State for Communities and Local Government*,[63] concerning winter quarters for a travelling circus.

Viability

With the effects of the recession still biting, the viability of providing affordable housing as part of a residential proposal is frequently an issue. Where this is the case, the decision in *Kensington and Chelsea RBC v Secretary of State for Communities and Local Government*[64] illustrates the need for the Inspector to deal with it properly.

The proposal involved the change of use of an existing hotel in Knightsbridge to nine self-contained residential units, with no affordable housing. The developer sought to justify this with a "toolkit" appraisal showing a deficit of over £7 million; whereas the LPA's appraisal showed a positive value of over £10 million. Rather than grappling with the substance of the disagreements as to input values which produced these widely differing results, the Inspector simply observed that "the extent of the professional disagreement … affects the weight that could be given to the toolkit results". In circumstances where viability was a (indeed, it would seem *the*) principal important issue at the Inquiry, Sir Michael Harrison concluded that this was not enough: it was incumbent on the Inspector to reach a conclusion on the matter.

Non-discrimination

In considering whether to grant planning permission for a particular development, LPAs will invariably consider the impacts of the proposal on the environment, and (where relevant) on the local community, but it is relatively unusual to find an officer's report which carries out the latter analysis by reference to concerns such as race discrimination or the need to promote equal opportunities among people of different racial groups. The very recent decision of the Court of Appeal in *R. (on the application of Harris) v Haringey LBC*[65] may therefore be a wake-up call for a number of authorities.

[62] *South Cambridgeshire DC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 1010.
[63] *Smarden Parish Council v Secretary of State for Communities and Local Government* [2010] EWHC 701 (Admin).
[64] *Kensington and Chelsea RBC v Secretary of State for Communities and Local Government* [2010] EWHC 1092.
[65] *R. (on the application of Harris) v Haringey LBC* [2010] EWCA Civ 703.

Harris concerned the grant of planning permission for the redevelopment of Wards Corner, in Tottenham. The site included an indoor market comprising 36 units, in which 64 per cent of the traders were from Latin America or were Spanish speaking, and 33 residential units which were predominantly occupied by members of black and minority ethnic communities. The challenge was brought on the ground that the LPA had failed to discharge its duty under s.71 Race Relations Act 1976.

Section 71 provides that:

> "(1) Every body or other person specified in Schedule 1A or of a description falling within the Schedule shall, in carrying out its functions, have due regard to the need—
>
> (a) to eliminate unlawful racial discrimination; and
>
> (b) to promote equality of opportunity and good relations between persons of different racial groups."

In *Harris* there was no dispute that s.71 was applicable, or that the Committee Report had not referred to it. However, it was common ground that this would not matter if the committee had in substance addressed the requirements of s.71, for example through the application of some other policy with the same effect.

At first instance,[66] Keith Lindblom QC dismissed the challenge on the grounds that s.71 considerations had been "in the very focus of the Council's own [UDP] policies dedicated to the regeneration of Wards Corner" and that:

> "both a general impetus for regeneration and the specific aim of promoting the welfare of the communities, including the racial minority communities, which are principally concentrated in the most deprived parts of the borough"

provided the background to those policies. The Court of Appeal disagreed. In the leading judgment, Pill L.J. concluded that:

- There was sufficient potential impact on equality of opportunity between persons of different racial groups, and on good relations between such groups, to require that the impact of the decision on those aspects of social and economic life be considered;
- The section did not require LPA to promote the interests of racial minorities: the requirement was to have due regard to the need to promote equality of opportunity and good relations between persons of different racial groups. Neither aim was necessarily achieved by a proposal which might promote the economic interests of a particular group, even a deprived group;
- Although they may have been "admirable in terms of proposing assistance for ethnic minority communities", the UDP policies in this case were not focused on the specific considerations raised by s.71;
- "Due regard" required an analysis of the material before the Council with the specific statutory considerations in mind. It was necessary for the requirements of s.71 to form in substance an integral part of the decision-making process. The required "due regard" was not demonstrated in the decision-making process in this case.

Harris does not mean that s.71 will always be relevant. As Pill LJ made clear, there will be cases where the impact of a decision on s.71 considerations will be "so remote or peripheral" that the substance of the duty can be ignored. However, it would be a sensible precaution for authorities to include the potential relevance of s.71 as a threshold question before proceeding any further. Where s.71 is relevant, LPA's need to ensure that they do not fall into the trap of assuming that the promotion of the interests of a particular minority will satisfy s.71. There needs to be a proper analysis of the questions which s.71 raises.

[66] *R. (on the application of Harris) v Haringey LBC* [2009] EWHC 2329.

Jamie's school dinners?

Mr Oliver may have seized the nation's attention with his tales of Turkey Twizzlers, but what (if any) relevance do concerns about the eating habits of school-children have for planning authorities? In *R. (on the application of Copeland) v Tower Hamlets LBC*[67] the claimant challenged the grant of planning permission for a fast food-outlet on the ground that the LPA had not taken into account the proximity of the premises to a local secondary school. Members had been advised that the desire to promote healthy eating habits was a valid concern, but not a material planning consideration.

By the time the application for judicial review was heard, the LPA had received Counsel's advice that the proximity of the proposed take-away to the school was capable of being a material consideration. Counsel was therefore left with the unenviable task of arguing that, when officers had advised members that it was *not* a material planning consideration, they had not been expressing a view as to whether the issue was capable *in law* of being material, but merely indicating a personal view that it was not material in relation to this application. Unsurprisingly, Cranston J. had little difficulty in concluding that this flew in the face of the plain words of the officers' report. Officers had given "definitive advice that these matters should not be taken into account".

As a ruling on the legality of the LPA's decision in this case, Cranston J.'s decision is understandable, but there are obvious difficulties in taking the conclusion too far. What would happen if someone proposed a "health food" takeaway? Could the permission be conditioned to ensure that only healthy foods were sold? Could an LPA decide that it was not just interested in the health of school-children, but of the whole community, and refuse permission for fast-food outlets anywhere? This seems unlikely.

Reasons

Article 22(1) of the GPDO, which requires LPAs to give reasons for granting permission, has now been in force since 2003. It was therefore with a distinct (if understandable) hint of irritation that in *Health and Safety Executive v Wolverhampton City Council*[68] Collins J. observed that:

> "It is about time that planning officers were aware of it and what the courts have decided is needed."

Sadly, it seems that many authorities have still not caught up, and the requirement continues to cause local planning authorities problems.

In *Wolverhampton*[69] the Council's reasons had contained no summary of the policies in the development plan which were relevant, nor any reference whatsoever to the HSE's concerns. Collins J. observed that the risk created by the proximity of the development to the Liquid Petroleum Gas facility was a substantial issue, and:

> "anyone interested in the grant would want to know that a safety issue had been raised by [the HSE] and why the defendant had decided that it was right not to follow the advice given."

There was undoubtedly a breach of art.22.[70]

Article 22 seems to cause particular problems in cases where the decision to grant permission is taken contrary to officers' advice. In *Tesco Stores Ltd v Teignbridge DC*[71] the LPA's Head of Development Control had made a witness statement which candidly recognised that, at the time when his authority had resolved to grant permission:

[67] *R. (on the application of Copeland) v Tower Hamlets LBC* [2010] EWHC 1845 (Admin).
[68] *Health and Safety Executive v Wolverhampton City Council* [2009] EWHC 2688 (Admin).
[69] The facts of which are outlined above in the section on statutory consultees.
[70] *Health and Safety Executive v Wolverhampton City Council* [2009] EWHC 2688 (Admin) at [18].
[71] *Tesco Stores Ltd v Teignbridge DC* [2009] EWHC 3685 (Admin).

> "insufficient attention was paid to the reasons attached to grants of permission issue by the Council and, in effect, when the permission was produced (particularly one contrary to officer recommendation) the reasons were constructed by taking a list of policies from the body of the report to which a pro-forma wording was then added. I can confirm that this practice has now ended."

The case concerned the grant to Sainsbury's of planning permission for a food store on an out-of-centre site which was allocated for employment, and was the subject of development plan policies designed to protect that allocation. Shortly before the Sainsbury's application was considered, Tesco had applied for permission on what was said to be a sequentially preferable site. The Sainsbury's application was recommended for refusal, but members disagreed. In the section dealing with the reasons for granting permission (which had been arrived at in the manner described by the Head of Development Control) the decision notice boldly asserted that the application was in conformity with the development plan.

By the time of the hearing, it was common ground that "the grant of planning permission was defective in that the reasons for it were not accurately recorded within it". As in many of these situations, the issue was what, if any, relief the court should grant. Referring to Sullivan J.'s observation in *R. (on the application of Wall) v Brighton and Hove City Council*[72] that, in cases where members had gone against an officer's recommendation, there would have to be "very powerful" reasons for not quashing a decision notice which did not include summary reasons for granting permission, Rabinder Singh QC noted that this was a case where (contrary to what the reasons had asserted) it was common ground that the grant of permission was in breach of certain policies in the development plan, and where the reasons given did not deal adequately with that policy conflict. In terms of the sequential approach, for example, it was "very difficult indeed to distil from [the reasons] that there was any proper appreciation of the need to do any sequential exercise as between the Tesco site and the Sainsbury's site". He therefore quashed the decision.

Teignbridge might be regarded as a particularly clear case, in that it was not simply a case where inadequate reasons had been given, but a case where the reasons which had been given were plainly wrong. In that sense, there was understandable cause for concern about whether members had properly understood the issues they needed to address.

Environmental issues

EIA

Is there sufficient information to decide whether EIA is necessary?

Some arguments just keep coming back. While it is not permissible for a LPA to decide to adopt a negative screening opinion on the basis that information as to environmental effects will be provided in the future,[73] LPAs are not required to ignore either the conditions proposed to limit the scope of the development or the conditions providing for ameliorative or remedial measures when deciding whether a proposal is EIA development.[74] However, if these general principles are clear, claimants and LPAs alike do not always find it easy to decide on which side of the line their particular case falls. Two decisions illustrate the problem.

[72] *R. (on the application of Wall) v Brighton and Hove City Council* [2004] EWHC 2582 (Admin).

[73] See Sullivan J. in *R. (on the application of Lebus) v South Cambridgeshire DC* [2002] EWHC 2009 (Admin); [2003] Env. L.R. 17; Ouseley J. in *Younger Homes (Northern) Ltd v First Secretary of State* [2003] EWHC 3058 (Admin).

[74] *R. (on the application of Catt) v Brighton and Hove City Council* [2007] EWCA Civ 298.

Zeb v Birmingham City Council[75] concerned the outline planning permission for a new stand and ancillary facilities at Edgbaston. The application was sch.2 development, but officers had concluded that it was not likely to have significant effects. The claimant complained that this conclusion was reached unlawfully on the basis that a number of issues (contamination, bats, traffic and archaeology) would be dealt with by "future reports".

Beatson J. rejected the challenge. The mere fact that further survey work was required did not show perversity. The screening opinion was not required to deal with every topic separately. There had been ground investigations concerning contamination. There was no evidence of bat roosts where they had been investigated; nor any evidence that specific rather than generic mitigation proposals were not realistic; there had been reports on archaeology and no objection from the planning archaeologist.

Zeb can be contrasted with *R. (on the application of Cooperative Group Ltd) v Northumberland CC*[76] where the decision that the proposal was not EIA development appears to have been taken largely on the basis of a five page letter from the developer which identified particular potential environmental issues without any description of the effects of the development on the environment by reference to those issues, but instead assured the LPA that these matters would be "fully addressed in the planning application". In Judge Pelling QC's words, the developer's letter was "in large part no more than an assertion that … EIA was not warranted coupled with a series of promises of work to be done in the future". He concluded that the LPA did not have available to it, and was not supplied with, sufficient information to make an informed judgment as to whether the development was likely to have a significant impact on the environment. The permission was quashed accordingly.

Rejecting expert advice that EIA is necessary

It is well established that the question whether a proposed development is likely to have significant effects on the environment is a matter of planning judgment, to which there may be a range of valid answers. But how far can an authority go before its decision that a proposal is *not* EIA development is irrational, in the *Wednesbury* sense? The decision of the Court of Appeal in *R. (on the application of Morge) v Hampshire CC*[77] suggests the answer is "quite a long way".

In the words of Ward L.J., *Morge* was "a case about bats and badgers, Beeching and bus-ways". Hampshire CC had granted permission for a bus route along the disused line of the old Fareham-Gosport railway. The claimant contended that this breached the Habitats Directive, inter alia because it was irrational for members to have concluded that a proposal of this scale would not have significant effects when various expert reports had expressly stated that the impacts would be significant.[78] The Court of Appeal disagreed. As Ward L.J. put it:

> "it is an attractive but beguiling submission. In my judgment, however, it goes too far. It confuses a conclusion which is reached against the weight of the evidence and a conclusion which is unlawful. The foundation of the argument is the assumption that reaching a contrary conclusion constituted an error of law because as a matter of law the Committee must willy nilly accept the experts' opinions, no other option being available to it. That must be wrong because it would emasculate the members' duty themselves to decide the question. It is their decision to make, not the experts. Whilst of course they must pay high regard to the evidence before them, they are not bound to follow it."

[75] *Zeb v Birmingham City Council* [2009] EWHC 3597 (Admin).
[76] *R. (on the application of Cooperative Group Ltd) v Northumberland CC* [2010] EWHC 373 (Admin).
[77] *R. (on the application of Morge) v Hampshire CC* [2010] EWCA Civ 608.
[78] The most important aspects of the Court of Appeal's decision are concerned with the interpretation of art.12 of the Habitats Directive, and are considered below.

EIA and extensions to existing development

In *R. (on the application of Baker) v Bath and North East Somerset DC*[79] Collins J. held that the EIA Regulations failed to transpose the European Directive requirements relating to extensions to existing development correctly, in as much as sch.2 states that the thresholds and criteria in col.2 of the sch.2 table are to be applied to the change or extension and not to the development as changed or extended. Collins J. said:

> "It seems to me that it is plain beyond any peradventure that it is not appropriate, in the light of the jurisprudence of the court and the purpose behind the Directive, to regard only the modification itself and not the effect on the development as a whole of any such modification to it."

Collins J. also concluded that art.10A of the Directive imposed an obligation to make it known to members of the public that they had the right to make an application to him/her pursuant to reg.4(8) to consider whether it was appropriate for there to be EIA before any development which could give rise to significant environmental effects was approved. In the absence of such information, the fact that such an application was theoretically possible was of no assistance.

It is understood that it is proposed to amend the law to take into account Collins J.'s decision. In the meantime, LPAs are advised that the Directive has direct effect and authorities must satisfy themselves that they have met its requirements.[80]

EIA and site-splitting

In *R. (on the application of Eley) v Watford BC*[81] Collins J. rejected a complaint that the requirement of EIA had been avoided by site-splitting, so as to bring the site area below the sch.2 thresholds.[82] Although the two applications were, coincidentally, dealt with by the Council at the same time, they had in fact been made a year apart and there had been separate considerations throughout of whether the developments should occur in each of the two sites.

Cumulative effect and s.106 agreements

Under sch.4 of the EIA Regulations, the information which is required in an Environmental Statement includes a description of the cumulative effects resulting from the development. In *R. (on the application of Brown) v Carlisle City Council*[83] the interested party had been granted planning permission for a Freight Storage and Distribution Facility at Carlisle Lake District Airport. The permission was subject to a s.106 agreement under which the interested party undertook to carry out repairs to the existing runway, and to use an existing recently constructed building as a passenger terminal. The claimant in the application for judicial review complained that in granting planning permission, the LPA had failed to comply with reg.3(2) of the EIA Regulations because the Environmental Statement did not address the environmental effects of the repair/renewal of the runway or completion of the passenger terminal building.

In the Court of Appeal, Sullivan L.J. rejected the defendant's argument that there was no significant functional link between the airport works and the freight distribution centre. No authority had been cited for the proposition that the connection between the two developments had to be an operational or functional one for the environmental effects of one of the developments to be part of the cumulative effects of another.

[79] *R. (on the application of Baker) v Bath and North East Somerset DC* [2009] EWHC 595; [2009] J.P.L. 1498.
[80] See Current Topics [2010] J.P.L. 294.
[81] *R. (on the application of Eley) v Watford BC* [2010] EWHC 436.
[82] The other half of the site was the subject to the separate challenge rejected by Wyn Williams J. in *Eley v Secretary of State for Communities and Local Government* [2009] EWHC 660 (Admin).
[83] *R. (on the application of Brown) v Carlisle City Council* [2010] EWCA 523.

The Planning Committee had not considered the freight distribution centre in isolation: indeed, it was only because of the delivery of the "airport works" through the s.106 agreement that the proposal was considered to accord with the development plan. The grant of permission was therefore unlawful.

EIA and the meaning of "Semi-Natural Areas"

Since the decision in *R. (on the application of Hall Hunter Partnership) v First Secretary of State*[84] it has been clear that polytunnels can amount to "operational development" which is subject to planning control. In *R. (on the application of Wye Valley Action Association Ltd) v Herefordshire Council*[85] the court had to grapple with the question whether an application for the erection of polytunnels was EIA development. In particular, was it a project for the use of a "semi-natural area" for intensive agricultural purposes within the sch.2 para.1(a)? Finding that land could be "semi-natural" even though it had been cultivated[86] Ian Dove QC concluded that:

> "A site which abuts a European designated site of nature conservation status, a Special Conservation Area and a Site of Special Scientific Interest, a site which is within the AONB, overlooked by a Scheduled Ancient Monument, to my mind clearly comes within the definition 'semi-natural' as a matter of law."

EIA and demolition

R. (on the application of Save Britain's Heritage) v SSCLG[87] concerned a challenge to the Town and Country Planning (Demolition—Description of Buildings) Direction 1995 on the ground that the EIA Directive[88] required EIA to be carried out prior to the demolition of a building. Although he concluded that the question was academic on the facts (because the demolition in that case did not fall within either sch.1 or sch.2 of the Regulations) HH Judge Pelling concluded that demolition was not within the scope of the Directive.[89]

EIA and retrospective permissions

In *Ardagh Glass Ltd v Chester City Council*[90] the court considered whether EC law permitted the retrospective grant of planning permission for EIA development. Famously, the case concerned the largest glass factory in Europe, which had been constructed in the period 2003–5 without planning permission but for which the LPA had purportedly granted retrospective permission in 2009. Upholding the first instance decision of HH Judge Mole QC, the Court of Appeal held that European law did permit retrospective approval of EIA development, provided that the decision-maker made it plain

> "that a developer would gain no advantage by pre-emptive development and that such development will be permitted only in exceptional circumstances."

[84] *R. (on the application of Hall Hunter Partnership) v First Secretary of State* [2006] EWHC 3482 (Admin).
[85] *R. (on the application of Wye Valley Action Association Ltd) v Herefordshire Council* [2009] EWHC 3428 (Admin).
[86] *R. (on the application of Wye Valley Action Association Ltd) v Herefordshire Council* [2009] EWHC 3428 (Admin), a conclusion which is not surprising given that [1(a)] refers to "uncultivated land *or* semi-natural areas".
[87] *R. (on the application of Save Britain's Heritage) v SSCLG* [2010] EWHC 979.
[88] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.
[89] NB—this is an issue which has recently been considered by the ECJ in *Commission v Ireland* (C-50/09) . The decision is still awaited.
[90] *Ardagh Glass Ltd v Chester City Council* [2010] EWCA Civ 172.

The Habitats Directive: protected species

Consolidated legislation

The Conservation of Habitats and Species Regulations 2010[91] consolidate and update the 1994 Regulations, and make provision for the transfer of certain licensing functions from Natural England to the Marine Management Organisation.

Article 12: What is "deliberate disturbance"?

As noted above, in *R. (on the application of Morge) v Hampshire CC*[92] the Court of Appeal had to consider the meaning of art.12 of the Habitats Directive, which requires Member States to take measures to prohibit all deliberate forms of killing of protected species, and "deliberate disturbance" of these species, particularly during the period of breeding, rearing, hibernation and migration. What constituted "deliberate disturbance"?

Following the decision of the ECJ in *Commission of the European Communities v Spain*[93] the court observed that the meaning of "deliberate" was not in dispute. In the context of art.12(1)(a), "deliberate" meant that the author of the act intended the capture or killing of a specimen, or at the very least accepted the possibility of such capture or killing. The more difficult question was what was meant by "disturbance".

On that issue, Ward L.J. said[94]:

> "Activity will not amount to disturbance at all if it is *de minimis*, i.e. too negligible for the law to be concerned by it. … the appellant submits that any activity above that minimal level is disturbance. I do not accept that submission …. The disturbance does not have to be significant but … there must be some room for manoeuvre which suggests that the threshold is somewhere between *de minimis* and significant. It must be certain, that is to say, identifiable. It must be real, not fanciful. Something above a discernible disturbance, not necessarily a significant one, is required. Given that spectrum, the decision-maker must exercise his or her judgment consistently with the aim to be achieved. Given the broad policy objective … disturbing one bat, or even two or three, may or may not amount to disturbance of the species in the long term. It is a matter of fact and degree in each case."

However, as Ward L.J. also pointed out, whereas art.12(1)(a) was concerned with the capture or killing of *specimens*, art.12(1)(b) was concerned with the disturbance of *species*. Having regard to the aim and purpose of the Directive, Ward L.J. said[95]:

> "I am driven to conclude that for there to be disturbance within the meaning of Article 12(1)(b) that disturbance must have a detrimental effect so as to affect the conservation status of the species at population level….
>
> 39. … whether the disturbance will have a certain negative impact which is likely to be detrimental must be judged in the light of and having regard to the effect of the disturbance on the conservation status of the species, i.e. how the disturbance affects the long-term distribution and abundance of the population of bats."

However, disturbance did not have to affect the physical integrity of the species. Indirect effects could constitute disturbance, whether by noise, vibration or light "or whatever".[96]

[91] Conservation of Habitats and Species Regulations 2010 (SI 2010/490).
[92] *R. (on the application of Morge) v Hampshire CC* [2010] EWCA Civ 608.
[93] *Commission of the European Communities v Spain* (C-227/01) [2004] E.C.R. I-8253; [2005] Env L.R. 20.
[94] *Commission of the European Communities v Spain* (C-227/01) [2004] E.C.R. I-8253; [2005] Env L.R. 20 at [35].
[95] *Commission of the European Communities v Spain* (C-227/01) [2004] E.C.R. I-8253; [2005] Env L.R. 20 at [37] and [39].
[96] *Commission of the European Communities v Spain* (C-227/01) [2004] E.C.R. I-8253; [2005] Env L.R. 20 at [40].

What then of art.12(1)(d), concerning the "deterioration or destruction of breeding sites or resting places"? Ward LJ made the following points about art.12(1)(d):

- It applies to both deliberate and non-deliberate acts;
- It protects specific sites, even at times of the year when they are not being used;
- It protects against both direct and indirect deterioration or destruction;
- It does not cover the loss of a *potential* site if the "ecological functionality" is safeguarded, for example by mitigation measures such as the provision of bat boxes.

Protected species: Level of information required before imposing conditions

As with decisions on whether EIA is necessary, the level of the information which LPAs need to possess before granting permission for proposals which may affect nature conservation issues is a matter on which the case-law has ebbed and flowed. Most delegates will be familiar with the decision in *R. v Cornwall CC Ex p. Hardy*,[97] where Sir Michael Harrison held that it was wrong to leave over to conditions a survey of bats in a mine shaft because the result of the survey might have given rise to a significant adverse effect. In those circumstances, the local planning authority could not rationally conclude that there were no significant major conservation effects until they had the data from the survey.

In practice, *Hardy* has not proved to be the elephant trap that some feared it might be, in part because it was a relatively extreme case in which the LPA had almost no information on which to base the condition. However, *R. (on the application of Woolley) v Cheshire East BC*[98] may yet reignite the debate that surrounded *Hardy*, at least in cases concerning species protected under the Habitats Directive. The analysis provides an interesting contrast to decisions such as *Zeb* and *Morge* (above) on whether a proposal is EIA development.

Woolley was argued against the backdrop of the Conservation (Natural Habitats) Regulations 1994, which set up the licensing regime for works involving the deterioration or destruction of breeding sites and resting places for protected species. Regulation 3(4) provided that local planning authorities must "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions". The proposal in *Woolley* involved the redevelopment of a site for three residential apartments. Surveys had identified a pipistrelle bat roost at the property. The officer's report had noted that a condition would have to be imposed to secure a method statement concerning the mitigation for bats. The question for the court was whether this was good enough.

For the LPA, it was argued that the only duty imposed by reg.3(4) was to note the existence of the Directive and Regulations and to note the existence of the relevant bats. Beyond stating that the applicant for permission needed a licence, the LPA need not go. However, HH Judge Waksman disagreed. In his view:

> "That approach disregards the very clear guidance set out in paragraph 116 of ODPM Circular 06/05 … In my view [engaging with the provisions of the Directive] involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is given. But it means that if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable 'other imperative reasons of overriding public interest' then the authority should act upon that and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning

[97] *R. v Cornwall CC Ex p. Hardy* [2001] Env L.R. 25.
[98] *R. (on the application of Woolley) v Cheshire East BC* [2009] EWHC1227 (Admin); [2010] J.P.L. 36.

> permission on that ground. If it is unclear to the authority whether the requirement will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the Directive."

In those circumstances, an LPA could not discharge its duty simply by making the obtaining of a licence a condition of the grant of permission. That was not "in truth engaging with the Directive". The LPA was therefore in breach of reg.3(4).

At one level, the decision *might* seem to require little more than for the authority to consult Natural England on the question whether there was any reason why a licence might be refused. However, that presupposes that Natural England will furnish a meaningful response: in *Woolley* the LPA had consulted Natural England following the claimant's pre-action protocol letter, and been informed that Natural England did not have sufficient resources to provide a detailed commentary. Although the judge stated that the LPA's duty could be fulfilled "without input from Natural England",[99] it is not entirely easy to see how. If followed widely or too enthusiastically,[100] the case has the potential to raise significant problems for the timing and delivery of projects.

Woolley was referred to by the Court of Appeal in *Morge* where a similar statement of principle appears.[101] In so far as *Morge* stresses that (capture and killing aside) the issue is the effect on the conservation status of the species, rather than on individual specimens, it may reduce the burden which *Woolley* might otherwise impose.

The Habitats Directive: International sites

Article 6.3 of the Habitats Directive requires any "plan or project" which is not directly connected with the management of a special area of conservation, but is likely to have a significant effect upon it, to be subject to "appropriate assessment of its implications for the site in view of the site's conservation objectives". The past year has turned up two important decisions on the meaning of "plan or project".

The first, *R. (on the application of Boggis) v Natural England*[102] concerned the challenge to the decision to confirm the notification of the Pakefield to Easton Bavents Site of Special Scientific Interest. The SSSI is located along a stretch of the Suffolk Coast which has been (and still is) subject to continual erosion. The area was first notified as an SSSI in 1962, and the decision under challenge was an adjustment to the boundary which took into account the loss of much of the original SSSI to the sea. The claimants were local residents who were concerned that the notification would prevent them from carrying out coastal protection works which would protect their properties. At first instance, Blair J. upheld their challenge and quashed the confirmation, on the ground that the designation was (in part) a "plan" within the meaning of art.6.3 of the Habitats Directive. However, Natural England's appeal to the Court of Appeal succeeded.

On the question whether the notification was a "plan or project", Sullivan L.J. referred to the definition of "project" as set out in the decision of the ECJ in the *Waddenzee* case[103] and observed that "by no stretch of the imagination" could the SSSI be described as an "intervention" in the natural surroundings. Rather, it was a means of ensuring that any such intervention took proper account of the features that were of special interest in the SSSI. If anything, the intervention would be the prevention (without consent) of man's attempts to intervene. Sullivan L.J. indicated that the same was true of designations such as SSSIs,

[99] *R. (on the application of Woolley) v Cheshire East BC* [2009] EWHC1227 (Admin); [2010] J.P.L. 36 at [30].
[100] As the editors of JPL suggest may already be happening: see Current Topics [2010] J.P.L. 1.
[101] Though see Ward L.J.'s encapsulation of the law at *R. (on the application of Morge) v Hampshire CC* [2010] EWCA Civ 608 at [61]. In *Morge*, the Court of Appeal concluded that the Committee had had sufficient information before it.
[102] *R. (on the application of Boggis) v Natural England* [2009] EWCA Civ 1061; [2010] J.P.L. 571.
[103] *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) E.C.R. 2004 I-07405.

Conservation Areas, AONBs and National Parks which were designed to "flag up" the special interest of a feature and enable the imposition of more stringent controls than would otherwise be imposed. These were not themselves "plans" for the purpose of art.6.3.

The Court of Appeal also rejected an argument (which had not succeeded at first instance either) that, since it had the effect of allowing the erosion to continue, the designation was inconsistent with Natural England's statutory duty to conserve the geological features. As Sullivan L.J. explained, a geological exposure (as in the case of an exposed cliff or quarry face) is a geological feature, and the fact that it was exposed may be one of the reasons why it was of special interest. In those circumstances, a designation which was intended to help maintain the exposure was consistent with NE's statutory duty even if the erosion which maintained the exposure was at the expense of the destruction of the sediments and fossils themselves. Thus:

> "Whatever may be the meaning of conservation in other contexts, one would have thought that allowing natural processes to take their course, and not preventing or impeding them by artificial means from doing so, would be a well recognised conservation technique in the field of nature conservation. 'Conservation' is not necessarily the same as 'preservation', although in some, perhaps many, circumstances preservation may be the best way to conserve. Whether that is so in any particular case will be a matter, not for the lawyers, but for the professional judgment of the person whose statutory duty it is to conserve."

Conservation can therefore include the retention of an essentially destructive natural process, if that is what gives rise to the feature of special importance.

R. (on the application of Akester) v Department for Environment, Food and Rural Affairs[104] concerned proposals by Wightlink Ferries to introduce W-Class ferries on the route from Lymington to Yarmouth, which passes through internationally designated nature conservation sites. On behalf of a local residents' association, the claimants complained that DEFRA was in breach of art.6.2 because there was no regulatory power available to prevent Wightlink from doing this, even though the larger ferries were likely to have significant environmental effects on the international sites.

Before Owen J., the claimants, DEFRA and the Lymington Harbour Commissioners all agreed that a "plan or project" was involved, but Wightlink disputed this. Referring to the European jurisprudence, which stressed the "very broad" definition and meaning, Owen J. concluded that the effect of art.6.3 was that an action which could potentially have an effect on the environment or a European site should be considered to be a "plan or project". Since the introduction of W-class ferries could have such an effect, it was a plan or project. Under the legislative framework, Wightlink (as statutory harbour authority for Lymington pier) was the competent authority. Although Wightlink had considered the position of Natural England and had received a report on the likely effects of its proposal, commercial considerations had overridden or at the very least influenced the discharge of its public duties.

Section 106 obligations and conditions

On April 6, 2010, the long-awaited Community Infrastructure Levy Regulations 2010[105] came into force. This paper does not dwell in any detail on the proposals for CIL, not only because that would require a paper on its own,[106] but also because in February 2010, barely a fortnight before the Regulations were made, the Conservatives published their "Open Source Planning", which attacked the two-pronged approach to infrastructure development by way of s.106 agreements and CIL and promised that a Conservative Government would:

[104] *R. (on the application of Akester) v Department for Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin).
[105] Community Infrastructure Levy Regulations 2010 (SI 2010/948).
[106] See e.g. Jones & Paul, "The Community Infrastructure Levy: How will it Operate in Practice? [2009] J.P.L. 1267.

> "Simplify the system by returning planning obligations to their original function by limiting their use to stipulations relating directly to site-specific remediation and adaptation. At the same time, we will scrap CIL and non-site-specific planning obligations and instead introduce a single unified local tariff applicable to all residential and non-residential development (even a single dwelling), but at graded rates depending on the size of the development."

Whether this becomes the policy of the Coalition Government remains (at the time of writing) to be seen. For the moment, the policies of the previous government all remain available on the website of the Department of Communities and Local Government ("DCLG"), but the planning homepage is caveated with the opening statement that "following the change in government we are reviewing all content on this website". The continued existence of CIL must therefore be in considerable doubt.

Until this uncertainty is resolved, it seems unlikely that many local planning authorities will be leaping to implement CIL. Given the time and expense involved in progressing a charging schedule, it is inevitable that many authorities will decide to wait and see which way the wind is blowing before committing themselves to CIL. Where that is the case, s.106 obligations will continue to be the route by which developers are expected to contribute to infrastructure, until such time as the new government decides whether it wants to keep CIL or replace it with something else.

However, there is one respect in which the CIL Regulations are already affecting current practice, whether or not the particular authority has adopted CIL. For certain types of development, reg.122 now puts the policy test previously contained in para.B5 of ODPM Circular 05/2005 on a statutory footing. Only three limbs of the Circular test are replicated, the view having been taken that the other two were mere repetitions. Pursuant to reg.122, planning obligations may now be imposed only if they are:

- necessary to make the development acceptable in planning terms;
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development.

The stated rationale behind reg.122 is to reinforce the purpose of planning obligations in seeking only essential local contributions towards the granting of planning permission, rather than more general contributions which are better suited to the use of CIL.

There is a further consequence which may flow from the particular wording of the regulation. Regulation 122(2) covers planning obligations which "constitute a reason for granting planning permission for the development". This paper considers the recent case law on art.22 GDPO (duty to give reasons for granting planning permission) below. At present, most LPAs granting planning permission subject to a s.106 agreement do not refer to the agreement in the summary reasons they provide. However if, as reg.122(2) implies, the obligation is "a reason for granting planning permission", it is at least arguable that they should do.

Regulation 122 will not apply to every s.106 agreement. On its face, it applies where planning permission is granted for "development", but for the purposes of the Regulations, the definition of "development" is not the same as that set out in the TCPA 1990. Section 209 of the Planning Act 2008 defines "development" as "anything done by way of or for the purpose of the creation of a new building, or anything done to or in respect of an existing building". Buildings into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery are not included within this definition.

Regulation 122 will therefore not apply to activities such as mineral extraction or waste disposal. Paragraph 39 of the DCLG guidance "Community Infrastructure Levy: an Overview" indicates that it will not apply to structures which are not buildings, such as pylons and wind turbines; or to changes of use which do not involve an increase in floorspace. Paragraph 63 of the Guidance advises that, for developments not capable of being charged CIL, Circular 5/05 will continue to apply.

Most local authorities would doubtless contend that reg.122 will not make that much difference, because their "shopping lists" for s.106 obligations are always consistent with the Circular in any event. However, anecdotal evidence[107] is that the Inspectorate are taking reg.122 very seriously, and seeking quite detailed analysis of how any s.106 obligation being offered complies.

One other aspect of the Regulations which (if it remains in force) will come to apply whether or not the LPA in question has adopted CIL is reg.123(3), which provides that from April 6, 2014 (or locally on the date that a charging authority's first charging schedule takes effect, whichever is the sooner) local planning authorities will no longer be able to seek more than five individual planning obligation contributions towards infrastructure that is capable of being funded by CIL.

Although there is nothing in the Regulations which explicitly obliges LPAs to adopt CIL, reg.123 reflects a clear intention to force the phasing out of s.106 obligations in cases where CIL could be used. It is most likely to be relevant today in the context of major, phased developments, where there is an expectation that each successive phase will be accompanied by its own s.106, negotiated as the phase comes forward. Authorities and developers need to consider how they will deal with phases which are likely to commence post 2014, which (if reg.123 is still in force by that time) will be caught by its restriction.

Perhaps less controversially, reg.123 also restricts the scope of s.106 agreements by seeking to prevent any overlap with the fund raised by CIL, so as to prevent developers being charged twice in respect of the same item of infrastructure. Regulation 123(2) provides that where a charging authority sets out that it intends to fully or partially fund an item of infrastructure via CIL then that authority cannot seek a planning obligation towards the same item of infrastructure.

In terms of recent case-law, in *Dudley MBC v Secretary of State for Communities and Local Government*[108] Wyn Williams J. rejected the argument that a condition requiring a community and training centre to be "accessible and available to the whole community" was unlawful because it was imprecise and therefore unenforceable. In the context of the application (which included a mosque) it was clear that the condition was intended to ensure that the community centre was available to all communities within the borough in the sense that everyone, irrespective of their faith, was given an equal opportunity to access the facilities.

In *Leeds City Council v Secretary of State for Communities and Local Government*[109] the LPA challenged the grant of permission for residential development subject to a Grampian condition preventing the commencement of development until a scheme for the provision of affordable housing had been submitted and approved. The LPA argued that this was contrary to national guidance advising against the use of conditions requiring financial contributions towards infrastructure. Keith J. rejected the argument, observing that both Circular 11/95 and PINS advice to Inspectors stated that affordable housing could be conditioned.

On a different note, in *Robert Hitchins Ltd v Secretary of State for Communities and Local Government*[110] the court upheld the Planning Inspector's conclusion that planning permission for 750 dwellings should only be granted if subject to a condition requiring provision of a bond to secure the proposed unilateral undertakings to contribute to the extra costs of education. The proposal required substantial infrastructure and was to be developed over 15 years, and the Inspector was entitled to conclude that it was desirable to supplement the statutory means of enforcement with a bond.

Finally, in *Galliard Hotels Ltd v Lambeth LBC*[111] Nicol J. rejected an argument that the court should approach the interpretation of a s.106 agreement in the same way that, on current authority,[112] it would approach the interpretation of planning policy, saying this[113]:

[107] This author's own experience.
[108] *Dudley MBC v Secretary of State for Communities and Local Government* [2009] EWHC 2666 (Admin).
[109] *Leeds City Council v Secretary of State for Communities and Local Government* [2010] EWHC 1412 (Admin).
[110] *Robert Hitchins Ltd v Secretary of State for Communities and Local Government* [2010] EWHC 1157 (Admin).
[111] *Galliard Hotels Ltd v Lambeth LBC* [2010] EWHC 1773 (Admin).
[112] See the discussion below on the judicial approach to interpreting planning policy.
[113] *Galliard Hotels Ltd v Lambeth LBC* [2010] EWHC 1773 (Admin) at [15].

> "… I am not concerned with questions of planning judgment, but the meaning of the term of a contract. In the event of a dispute, that must be a matter for the Court to determine. A contract can, of course, give one party a choice or a degree of latitude, but the extent of that latitude and the nature of any correlative obligation which the other party assumes, raises issues of law which are for the Court. Moreover, this contract is expressed to impose 'planning obligations' … under s.106. Apart from contract, those obligations can be enforced by the means that the 1990 Act allows. Consequently both private and public law lead to the conclusion that the obligations must be capable of objective determination."

Nicol J. however rejected the claimant's complaint that a "libraries contribution" of £32,669 was an arbitrary figure, not fairly related to the scale of the development, and was simply an "enhancement" for the local area and therefore an immaterial consideration. Applying *Tesco Stores Ltd v Secretary of State for the Environment*,[114] the connection between the development and local libraries could not be described as *de minimis* and it was "quite unrealistic" to consider that Lambeth had "sold" the planning permission because of the libraries contribution. The precise amount was a matter for planning judgment on the local authority's part and negotiation on the part of both sides.

The meaning and scope of planning permissions

The traditional approach to the construction of planning permissions is that set out in *R. v Ashford BC Ex p. Shepway DC*[115] where Keene J. (as he then was) propounded a three-stage approach:

- The general approach in construing a planning permission which is clear, unambiguous and valid is that regard may be had only to the planning permission itself;
- It is permissible to look at documents which are incorporated by reference. However, a planning application is not incorporated by reference merely because it is referred to on the face of the permission;
- If there is ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity.

This general principle was sensibly revisited in *Barnett v Secretary of State for Communities and Local Government*[116] where Sullivan L.J. (whose decision was upheld by the Court of Appeal[117]) held that a decision notice granting full planning permission must be construed by reference to the approved plans.

In the most recent case, *Stevenage BC v Secretary of State for Communities and Local Government*[118] the court was faced with a retail unit which had been erected subject to conditions preventing its sub-division, but where there had been a subsequent grant of full planning permission for development which, on the face of the decision notice, was described only as the "recladding of existing retail units, relocation of Moben units and erection of new café building", but the plans for which showed the sub-division of the internal units. HH Judge Waksman QC upheld the Inspector's conclusion that the permission included the internal works. Pointing out that cases where there were extreme differences between what was shown on the plans and what was described in the notice were likely to be picked up at the application stage, the judge observed that:

[114] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All E.R. 636.
[115] *R. v Ashford BC Ex p. Shepway DC* [1999] P.L.C.R. 12.
[116] *Barnett v Secretary of State for Communities and Local Government* [2008] EWHC 1601 (Admin).
[117] *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476; [2009] J.P.L. 1597.
[118] *Stevenage BC v Secretary of State for Communities and Local Government*[2010] EWHC 1289 (Admin).

> "in more modest cases where planning permission has been granted, if the plans show a material addition to the decision notice the commonsense approach is not to rule them out per se but instead to look at them with some care to see whether they really are part of the proposed works. Alternatively in some cases they may suggest that there is a problem of ambiguity to be resolved under *Ashford* principles."

Stevenage is also interesting for its consideration of s.75(3) TCPA 1990. This is the provision which stipulates that, if planning permission is granted for the erection of a building without specifying the purpose for which the building is to be used, the permission is to be construed as including permission to use the building for the purpose for which it is designed. By virtue of s.336 TCPA, the "erection" of a building includes its extension or alteration. On this basis, the Inspector in Stevenage concluded that permission to reclad the building was an "alteration" which engaged s.75(3). Since the permission did not specify a purpose for the "new" building, it could be used for any purpose for which it had been designed.

HH Judge Waksman rejected this. It was necessary to focus on the actual works permitted. If these were concerned only with altering the exterior of the building, the relevant "building" for the purposes of s.75(3) was the exterior. It made no sense to ascribe the purpose of a retail warehouse to that part of the building which had been altered, and since one could not assign the purpose of retail warehousing to the part of the building affected by the works, the subsequent permission did not de-restrict the conditions originally imposed on the building.

Permitted development rights and the GPDO

The decision in *R. (on the application of Townsley) v Secretary of State for Communities and Local Government*[119] raises two interesting points about the scope and use of permitted development rights. Planning permission had been granted for a new dwelling house. The building as constructed included a balustrade around the flat roof to the rear of the house which was not part of the approved plans. When the LPA took enforcement action, the Inspector concluded that the balustrade materially affected the external appearance of the building, and was therefore within the definition of "development". However, he allowed the appeal on the basis that the balustrade would have been[120] permitted development under sch.2 Pt C of the GPDO, which relates to alterations to the roof of a dwelling house. Paragraph C1 limits Pt C to those cases where the development does not "result in a material alteration to the shape of the dwelling house". The Inspector was satisfied that this requirement was met.

In the High Court, Collins J. quashed that decision. Although not ultimately finding it necessary to reach a conclusion on the point, the judge observed that it was very difficult to reconcile the Inspector's conclusion that the balustrade materially affected the external appearance of the building, with his finding that it did not materially alter the shape of the dwelling house. While this cannot mean that a material effect on the appearance of a building will invariably affect the shape, it suggests a need for care in explaining the difference between the two.[121]

More importantly, Collins J. concluded that the Inspector had erred in regarding the balustrade as permitted development, because the rights granted under sch.2 Pt C were for alterations to "a dwelling house". In the present case, when the balustrade was erected there was no dwelling house because the house was still under construction.

[119] *R. (on the application of Townsley) v Secretary of State for Communities and Local Government* [2009] EWHC 3522 (Admin).

[120] By the time of the High Court proceedings, the GPDO had been amended, so that the balustrade could no longer have been constructed as permitted development.

[121] Collins J.'s comments have to be seen in the context of this particular case: if it was impossible to have any alteration to a roof which materially affected the appearance of the building but did not materially affect its shape, then Pt C would have been meaningless: alterations which did not affect the appearance would not be development at all; whereas those which affected both appearance and shape would fall foul of the proviso to Pt C.

While some might see the outcome in *Townsley* as overly legalistic, the decision reinforces the point that one cannot combine a planning permission with GPDO rights in the initial construction. GPDO rights can only be relied upon once the building itself has been completed, in accordance with the planning permission.

Lawfulness and enforcement

Implementation of planning permission in breach of condition—What is happening to Whitley?

Most practitioners will be familiar with "the *Whitley* principle"—i.e. the general rule that development which is carried out in breach of conditions attached to a planning permission is not carried out pursuant to that permission and therefore cannot be relied on to implement that permission. However, *Whitley* itself establishes certain exceptions to that general principle, and following a review of the subsequent case-law in *Hammerton* Ouseley J. concluded that the principle which underlay *Whitley* was that development which, as a matter of public law, could not be enforced against was capable of implementing the permission to which it related.

Thus expressed, the principle is a broad one, and how far it will reach is still being explored. The most recent decision on the area is that of the Court of Appeal in *Rastrum Ltd v Secretary of State for Communities and Local Government*[122] overturning the first instance decision of Sir George Newman.[123]

The facts of *Rastrum* were complicated. In 1981, outline planning permission had been granted subject to the standard conditions relating to the approval of reserved matters and subsequent commencement of development. Although application was made within the normal three year period for approval of all reserved matters, a partial approval only was granted on January 31, 1985. No further reserved matters application was made, but in January 1987—just short of two years before the partial approval of reserved matters—an access was constructed.

In the years which followed, the LPA took a somewhat uneven approach to the status of the 1981 permission. For Rastrum's argument of legitimate expectation, the high-water mark was a s.106 agreement entered into by the Council in 1992 for an alternative development proposal in which it was agreed that, if the alternative proposal was implemented (which it never was) the Council would be free to revoke the 1981 permission without compensation. Rastrum argued that there was a clear inference that the Council believed the 1981 permission was still extant.

The land subsequently changed hands. When it came into Rastrum's ownership, Rastrum applied for a Certificate of Lawfulness. When the Council refused, Rastrum appealed.

At the Inquiry, it was common ground that the condition precedent requiring approval of all reserved matters had not been satisfied when the access works had been carried out. Rastrum's case therefore focussed on the contention that the LPA's conduct over the years had given rise to a legitimate expectation that the permission had been implemented and so was still alive, and (when that argument was rejected by the Inspector) this was the ground on which the High Court challenge was brought. However, at the judge's prompting, Rastrum amended this mid-way through the hearing[124] to add an argument that, since the physical works carried out in 1987 were now immune from enforcement, the breach of condition was similarly immune, with the result that the development as a whole was now lawful. Perhaps not surprisingly

[122] *Rastrum Ltd v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1340.
[123] *Rastrum Ltd v Secretary of State for Communities and Local Government* [2009] EWHC 184; [2009] J.P.L. 1159.
[124] *Rastrum Ltd v Secretary of State for Communities and Local Government* [2009] EWHC 184; [2009] J.P.L. 1159 at [44].

(since he had been the author of it) Sir George Newman found this argument conclusive, and quashed the Inspector's decision. He also concluded that the Inspector had not sufficiently investigated the arguments on legitimate expectation.

The Court of Appeal disagreed with both conclusions. On the time-bar issue, Sullivan L.J. accepted that the access works themselves were immune from enforcement, but did not agree that this meant they were capable of being a lawful implementation of the permission. In particular, by the time they had been carried out it was too late to submit the necessary application for approval of the outstanding reserved matters, with the result that, after March 1984, the permission was already effectively dead. On the question of legitimate expectation, Sullivan L.J. found that there was no unambiguous representation by the LPA that the permission was still alive. In any event, the LPA had no power to revive a permission which was in fact already "dead" by the time the access works had been carried out. There was also no evidence that Rastrum had actually relied on any representation that might have been made.

The Court of Appeal's decision significantly reduces the scope for an argument, based on the obiter comments of Ouseley J. in *Hammerton*, that development which was carried out in breach of condition but can no longer be enforced against because of the effluxion of time may be capable of implementing a permission. It also reaffirms the "orthodox" line of authorities on the scope of legitimate expectation in planning law.

Time limits for enforcement

As the editors of the Planning Encyclopaedia Monthly Bulletin observed[125] "the latest fashion in planning seems to be for clandestine development". The last year has turned up three high-profile cases on development which has been deliberately concealed from the Local Planning Authority in the hope of acquiring immunity from enforcement.[126]

Of these, the most celebrated (if only for the audacity of the landowner) is *Fidler v Secretary of State for Communities and Local Government*,[127] the case of the farmer who ambitiously concealed the construction of an entirely new mock-Tudor house (complete with castle-like turrets formed from old grain silos), behind a wall of straw bales. So successful was this disguise that it deceived not only the LPA, but also a Planning Inspector who visited the site for the purposes of another inquiry. Four years after the building itself had been constructed, Mr Fidler took down the straw bales and claimed that his new dwelling was lawful.

As is now well-known, that claim failed. The LPA took enforcement action on the basis that the building was not "substantially complete" until the bales were removed; that decision was upheld by the Planning Inspector on appeal; and the High Court challenge to the Inspector's decision was dismissed.

The decision has received something of a mixed press.[128] However, it is important to understand that the statutory test in s.171B(1) TCPA 1990 is whether the building *operation* (as opposed to the building itself) is substantially complete. In reaching his conclusion that construction and removal of the straw bale wall, the Inspector had Mr Fidler's own explicit evidence that the wall had been erected specifically to conceal the development, and that it had always been his intention to remove the bales once immunity had been achieved. In the circumstances, it is perhaps not surprising that the Inspector found there was sufficient connection to conclude that the straw wall was part of the overall "building operation", and that the building operation was not complete until the wall had been removed. Thereafter, it was a matter of fact and degree whether this meant that the building operations were not "substantially complete" until the wall had been taken down.

[125] *Monthly Bulletin*, March 2010.
[126] See Claire Fallows' article "Establishing Lawfulness by Deception" [2010] J.P.L. 965.
[127] *Fidler v Secretary of State for Communities and Local Government* [2010] EWHC 143 (Admin); [2010] J.P.L. 915.
[128] See the Current Topics item at [2010] J.P.L. 537.

On this basis, while factually interesting, *Fidler* in reality does little more than provide a particularly graphic illustration of the point established by the House of Lords in *Sage v Secretary of State for the Environment, Transport and the Regions*[129] that it is necessary to take a holistic approach to the concept of "building operations" and that particular works may be part of a building operation even if they would not amount to a building operation or even development in their own right.

Notwithstanding the above, *Fidler* has been given permission to appeal. However, the reasons for that have more to do with the next two cases on concealment.

Curiously, the decisions in *R. (on the application of Welwyn Hatfield Council) v Secretary of State for Communities and Local Government*[130] and *Sumner v Secretary of State for Communities and Local Government*[131] raise an issue which has been lying in wait ever since the 1991 amendments to the TCPA 1990, but has gone largely unnoticed for almost 20 years. The simple point is this: s.171B TCPA sets out specific but different periods for immunity from enforcement action against (a) operational development and (b) material change of use. What then happens if the relevant breach of planning control involves both operational development *and* a change of use? Are there two separate periods for enforcement, or should the two distinct breaches in some way be conflated? *Welwyn* and *Sumner* reach different conclusions on this issue, in part because of the differing facts and in part because *Welwyn* was a case involving use as a dwelling, whereas *Sumner* was concerned with an industrial use.

In *Welwyn*, the landowner had obtained planning permission for an agricultural barn, but the building which he erected—although externally in keeping with the planning permission—was from the outset internally fitted out as a dwelling-house. The building was completed in August 2002 and Mr Beesley moved in almost immediately. On August 24, 2006 he applied for a Certificate of Lawfulness. The LPA refused, but Mr Beesley's appeal was upheld by the Planning Inspector.

In the High Court,[132] Collins J. quashed that decision on the ground that s.171B(2) only affords immunity in cases where there has been a "change of use of a building" to use as a dwelling, and that since Mr Beesley had only ever intended to use the building as a dwelling, its use had not changed. While the building itself was lawful, the use as a dwelling was not.

That decision was overturned by the Court of Appeal. Referring to *Arun DC v First Secretary of State*[133] Richards L.J. began his analysis from the point that, in the case of homeowners, Parliament had specifically opted for a shorter period of enforcement for changes of use because of the serious loss or hardship (including the loss of their homes) which would be caused by enforcement proceedings long after the event.[134] Against this backdrop of a "special protection for people's homes"[135] Richards L.J. concluded that there were two ways of looking at the case.[136] Either the building in question was permitted to be used only for agricultural storage,[137] in which case its use as a dwelling was properly to be regarded as a change of use; or in the short period between completion of the building and its residential occupation the building had *no* use, and the change from no use to use as a single dwelling constituted a change of use.

Significantly, Richards L.J. also:

[129] *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 22; [2003] 1 W.L.R. 983.

[130] *R. (on the application of Welwyn Hatfield Council) v Secretary of State for Communities and Local Government* [2010] EWCA Civ 26.

[131] *Sumner v Secretary of State for Communities and Local Government* [2010] EWHC 372 (Admin); [2010] J.P.L. 1014.

[132] *R. (on the application of Welwyn Hatfield Council) v Secretary of State for Communities and Local Government* [2009] EWHC 966 (Admin); [2010] J.P.L. 352.

[133] *Arun DC v First Secretary of State* [2006] EWCA Civ 1172.

[134] This is no doubt true up to a point. However, the legislative policy is not always consistent on this point. Hence, e.g. breach of an agricultural occupancy is subject to the ten-year rule because (since the building was already a dwelling, albeit one occupied by an agricultural worker) the breach of planning control does not involve the "change of use" of that building to use as a dwelling. Similarly, stationing a caravan on land for residential purposes involves the change of use of *land*, rather than of a "building", and so requires 10 years' use before immunity from enforcement arises.

[135] *Arun DC v First Secretary of State* [2006] EWCA Civ 1172 at [16].

[136] *Arun DC v First Secretary of State* [2006] EWCA Civ 1172 at [29].

[137] Note however, the contrast between this and Richards LJ's earlier conclusion that "looked at as a whole, the physical design and features of what was built by Mr Beesley were those of a dwellinghouse, not a hay barn. Its character and purpose, and its proper classification for planning purposes, were those of a dwellinghouse": *Arun DC v First Secretary of State* [2006] EWCA Civ 1172 at [24].

- rejected an argument by the LPA, based on *Murfitt v Secretary of State for the Environment and East Cambridgeshire*[138] that an enforcement notice against a material change of use of land could require the removal of associated operational development, even if that operational development would itself have been immune from enforcement[139];
- specifically declined to reach any conclusion on an argument which was apparently pressed on behalf of the Secretary of State that, once a building had become immune from enforcement, use of the building for the purpose for which it was designed must also be lawful.[140] However this was an issue which the court was unable to side-step in *Sumner*.

Unlike *Fidler* and *Welwyn*, *Sumner* was not about a dwelling. Instead, it concerned a building which had been constructed for the purpose of vehicle repairs. By the time enforcement action was taken, the building itself had been in existence for more than four years and was immune from enforcement, but the Inspector concluded that the use was not. In the High Court, the disappointed landowner contended, by analogy with s.75 TCPA 1990,[141] that since the building had been constructed for the purpose of carrying out vehicle repairs, that use acquired immunity at the same time as the building itself. Not surprisingly, reference was made to the Secretary of State's argument in *Welwyn*, which was to precisely the same effect. In *Sumner*, however, the Secretary of State's position changed, and Collins J. agreed. The change of use and the building operation were two separate concerns to which separate enforcement periods applied. The building was lawful, but could only be used for the (previous) lawful use of the land. The Court of Appeal has since refused permission to appeal.

Reverting to *Welwyn*, the Court of Appeal's decision raises interesting questions about whether the original planning appeal in *Fidler* was conducted on the right basis. The enforcement notice in that case was against operational development, but there was uncontested evidence that Mr Fidler and his family had been living in the building for more than four years. On a wider view of the legislative purpose, as summarised in *Welwyn*, it might be argued that this would have supported a case of immunity, if that had been argued. On the other hand, it was Mr Fidler's own evidence that residential use began *before* the building was substantially complete,[142] in which case there would have been no factual "window" within which he could establish a change of use in the *Welwyn* sense.

At any rate, notwithstanding the fact that Mr Fidler's *use* of the building was not raised at either the planning appeal or in the High Court, the Court of Appeal has now given Mr Fidler permission to appeal on the basis of a *Welwyn*-type argument. At the same time, the LPA in *Welwyn* has been given permission to take that case to the Supreme Court, with the appeal listed for February 2011. Given the reasons for granting Mr Fidler permission to appeal, it seems likely that the *Fidler* appeal will be stayed pending the Supreme Court's decision.

Intensification

Although it is not always easy to prove, the idea that there can be a material change of use arising out of the intensification of an existing use is well established. But where it is made out, how far can an enforcement notice go in specifying the limits within which the use must be kept?

[138] *Murfitt v Secretary of State for the Environment and East Cambridgeshire DC* (1980) 40 P. & C.R. 254.
[139] *Murfitt v Secretary of State for the Environment and East Cambridgeshire DC* (1980) 40 P. & C.R. 254 at [31]-[32].
[140] *Murfitt v Secretary of State for the Environment and East Cambridgeshire DC* (1980) 40 P. & C.R. 254 at [26].
[141] Which provides that, where planning permission is granted for a building, this carries with it consent to use the building for any purpose stated in the permission or, if no such purpose is stated, consent for the use of the building for the purpose for which it was designed.
[142] Indeed, this would have been so even if one looked only at the building itself, irrespective of the straw bales.

In *Chas Storer Ltd v Secretary of State for Communities and Local Government*[143] the LPA had issued an enforcement notice alleging a material change of use by reason of intensification of the use of land for the collection and baling of paper and use for the collection and bulking of green waste. The requirements imposed by the enforcement notice placed limits on the number of vehicle movements, and the hours and days of operation, with the sort of precision that might be expected of conditions on a planning permission.

On appeal, the Planning Inspector had concluded that there had been a significant increase in vehicle movements and some expansion of the days and hours of operation, but that if this were the whole story, it would not have been a material change of use. However, there had been a change in the nature of the materials which were accepted at the site. The receipt and bulking of co-mingled waste had specific impacts from noise during handling and increased the presence of vermin. Overall, there had been a material change of use. Although he varied some of them, the Inspector upheld the notice with requirements designed to keep the use to levels which were roughly commensurate with the lawful use in 1996.

Allowing the subsequent challenge under s.289 TCPA 1990, Stephen Morris QC rejected the Secretary of State's argument that the Inspector had found that it was both the co-mingling of waste and the increased vehicle numbers which amounted to a material change of use. The Inspector's decision had been clear in finding that the co-mingling of waste was the critical factor and that without it, the increase in vehicles and expansion of hours would not have been material. The Inspector was not entitled to impose requirements which went beyond what was necessary to confine the relevant activities to lawful use. He therefore erred by imposing requirements restricting vehicle movements and hours of operation.

Compelling enforcement

Before taking enforcement action, LPAs must be satisfied not only that there has been a breach of planning control, but that it is "expedient" to enforce against that breach. Because the question of expediency usually carries with it a host of considerations which are matters of planning judgment, the courts are generally reluctant to order LPAs to take enforcement action merely because it is legally possible for them to do so.[144] To do otherwise would effectively usurp the LPA's discretion. However, the decision of HH Judge Mole QC in *Ardagh Glass Ltd v Chester City Council*[145] indicates that this will not always be the case.

The facts of *Ardagh* have already been highlighted. Given the large, phased nature of the development, there were competing views over the date by which it was "substantially complete", which gave rise to a real possibility that a significant part of the development might become immune if enforcement action was not taken promptly. Addressing the question whether the LPA should be compelled to take enforcement action, HH Judge Mole QC agreed with the views of a local resident that:

> "it would be disgraceful if the … development were to achieve immunity because enforcement action was not taken in time…. It would be a betrayal by the planning authorities of their responsibilities and a disgrace upon the proper planning of this country …."

The judge therefore ordered the LPA to issue enforcement notices within 14 days. In order to avoid the possibility that the LPA could "under enforce", and so engage s.173(11) TCPA 1990 (by which deemed permission would be granted for buildings, works and activities which are not enforced against), he specifically ordered that the notices require the removal of the building works and the cessation of activities. "No less than that would meet the point".

[143] *Chas Storer Ltd v Secretary of State for Communities and Local Government* [2009] EWHC 1071 (Admin); [2010] J.P.L. 83.

[144] See, e.g. the astonishing history described in *R. (on the application of Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government* [2009] EWHC 3238 (Admin) where, even after six successive, successful applications for judicial review of the LPA's decision, the court declined to order the LPA to take enforcement action and merely required it to consider whether enforcement action should be taken.

[145] *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin). As noted above, HH Judge Mole's decision has been upheld by the Court of Appeal [2010] EWCA Civ 172, but this point was not considered.

Ardagh Glass was relied on by the claimant in *R. (on the application of Baker) v Bath and North East Somerset Council*[146] but—commenting that "each case is fact sensitive", Judge Birtles concluded that *Baker* was a different case. At no time had it ever been concluded that the proposal was EIA development; the court was not in a position to say it *was* EIA development; the screening process was likely to take place in the near future. The further delay was a matter of (at most) weeks away.

Enforcement, revocation, discontinuance and the relevance of compensation

Section 97 TCPA 1990 (power to revoke planning permission where the development has out been carried out) and s.102 TCPA 1990 (power to order any use of land to be discontinued or any buildings to be altered or removed) almost certainly find their place among the less well-used powers of local planning authorities. A sceptic might be forgiven for thinking that one of the reasons for this is that the exercise of both powers will usually result in the payment of compensation. But is this a relevant consideration?

For some time now, it has been thought that the answer was "no". In *Alnwick DC v Secretary of State for the Environment Transport and the Regions*[147] Richards J. held that the amount of compensation payable by a local planning authority was irrelevant to the Secretary of State's decision to exercise his default powers so as to make a revocation order in respect of the grant of planning permission for s supermarket. But was he right, and if so, was the same thing true of decisions under s.102? These two questions were considered by Ouseley J. in *R. (on the application of Usk Valley Conservation Group) v Brecon Beacons National Park Authority*.[148]

Usk concerned the purported grant of permission for the relocation of a camping site. Having granted permission, the NPA became concerned about its validity, but also realised that certain conditions which had been attached with the intention of extinguishing the use of the site from which relocation had been intended were possibly not effective. When considering how best to deal with the situation, the authority rejected a discontinuance inter alia on the grounds of cost, and decided to issue an enforcement notice instead.

In the subsequent application for judicial review, Ouseley J. found that the permission was unlawful, and quashed it. However, he went on to consider the LPA's decision on enforcement. Understandably, the claimants relied heavily on *Alnwick*. On this issue, Ouseley J. declined the NPA's invitation to distinguish discontinuance under s.102 from revocation under s.97, but agreed that he should not follow *Alnwick*. While the development plan and other material considerations guide the decision on what is in the interests of the proper planning of an area, s.102 and s.97 require a decision on what is expedient in those interests. On the question of expediency, Ouseley J. said:

> "An expedient decision would, to my mind, necessarily require attention to be paid to the advantages and disadvantages of taking one or other or none of the available steps under s.102. These advantages and disadvantages should not be confined to those which the subject of the notice would face; they should be measured against the advantages and disadvantages to the public interest at large, including the costs and effectiveness of the various possibilities. The question of whether the cost to the public is worth the gain to the public is, I would have thought, the obvious way of testing expediency ….
>
> It would be extraordinary for Parliament to require a decision, which could have very large adverse financial consequences, to be taken by a public body which at no stage could lawfully consider those consequences, however great or disproportionate the cost …"

[146] *R. (on the application of Baker) v Bath and North East Somerset Council* [2009] EWHC 3320 (Admin). A further chapter in the *Hinton Organics* litigation.

[147] *Alnwick DC v Secretary of State for the Environment Transport and the Regions* (1999) 79 P. & C.R. 130.

[148] *R. (on the application of Usk Valley Conservation Group) v Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin).

The conflict between *Alnwick* and *Usk* was explored by the Court of Appeal in *Health and Safety Executive v Wolverhampton City Council*.[149] The background to the HSE's challenge to the grant of permission has been described above. However, the HSE had also sought judicial review of Wolverhampton's refusal to revoke or modify the consent. Critically, although the HSE's request had initially related to the entirety of the permission, it had subsequently realised that, since three of the four blocks for which permission had been granted had already been constructed, the LPA would at most have power to prevent the construction of "Block D". Coincidentally, this was the block most at risk.

At first instance, Collins J. could see nothing irrational in the LPA's decision. He gave four reasons for this: revocation was impossible, because blocks A, B and C had been completed; revocation was inappropriate, because the planning permission was not being quashed; revocation would put the developer out of business, even if compensation was eventually payable; and there was no immediate risk, because the HSE had failed to take immediate action.

In the Court of Appeal, Sullivan L.J. agreed that the first three of these would have been compelling reasons for Wolverhampton to decide not merely that it should not, but that it could not lawfully exercise its powers to revoke the entire permission; but concluded that they did not justify the failure to consider exercising its powers under s.97 TCPA 1990 to prevent the construction of Block D. It was irrational for Wolverhampton to fail even to consider this, and the LPA should be ordered to reconsider.

Significantly, because Wolverhampton had taken into account its liability to pay compensation when deciding not to revoke,[150] and was likely to do so again on the redetermination, the Court of Appeal addressed the question whether this was permissible. On this issue, the members of the Court of Appeal disagreed.

While observing that the appearance of the word "expedient" in ss.97 and 102, but not in s.70 was not a sufficient basis for distinguishing what was relevant when deciding whether to make a revocation or discontinuance order from what was relevant when determining an application for planning permission, Sullivan L.J. agreed with Ouseley J. that *Alnwick* was wrongly decided and said it should not be followed. The introduction of the planning system in 1948 meant that there were many pre-existing uses and buildings which, from a purely planning perspective, were inappropriate. Correcting the planning "errors" which had occurred prior to July 1, 1948, however "expedient" that might have been in purely planning terms, would have been hugely expensive. Parliament could not have intended that decisions on revocation and discontinuance should be taken regardless of public expense.

Pill L.J. disagreed. In his view, what was capable of amounting to a material consideration for the purposes of s.97 must be the same as in relation to the determination of planning applications under s.70. Only financial considerations which fairly and reasonably related to the development were capable of being material considerations.

The casting vote was therefore left to Longmore L.J., who agreed with Sullivan L.J. However, this was subject to the important caveat that:

> "That does not … mean that a planning authority would be entitled to refuse to modify or revoke a planning permission previously granted by invoking a vague concept of cost to the public purse. If the fact of compensation is to be a factor in its decision, the planning authority will have to say in terms what the amount of compensation is likely to be and precisely why it is expedient for that sum not to be paid in circumstances in which modification or revocation might otherwise be appropriate. That is unlikely to be an easy or straightforward exercise."

[149] *Health and Safety Executive v Wolverhampton City Council* [2009] EWHC 2688 (Admin).
[150] Indeed, this was arguably the only thing it had taken into account.

For the moment, therefore, the tide is with Ouseley J. in *Usk*.[151] However, the judgments of Sullivan and Pill L.JJ. on this issue were both long and carefully reasoned, and there are aspects of both which make good sense. Whether, and if so when, the Supreme Court will be called upon to consider the issue remains to be seen, but it may be that the answer lies somewhere between the two. A regime in which LPAs could refuse to contemplate discontinuance, revocation or modification simply because it would cost money is one which most would regard as unacceptable[152]; but it is hard to quarrel with Ouseley J.'s observation that it should at least be possible to ask whether the cost to the public is worth the public gain. The difficulty is: how to equate an environmental impact with a financial cost, not least when local authorities have other (non-planning) calls on their money.

Listed building enforcement

In *C&P Reinforcement Ltd v East Hertfordshire DC*[153] Cranston J. concluded that a listed building enforcement notice which required that within a month steps be taken to retain the remains of the listed building in a safe and protected manner was of permanent effect, creating an obligation to retain the listed building at all times until the notice was rescinded.

Injunctions

Under s.187B TCPA 1990, a local authority may (in cases where they consider it necessary or expedient) apply to the court for an injunction to restrain any actual or apprehended breach of planning control, *whether or not they have exercised or are proposing to exercise any of their other powers of enforcement*. However, injunctive relief is a discretionary remedy, and the court is not well-equipped to assess the planning merits of a particular case. To what extent should the court refuse an injunction in circumstances where there is a pending appeal to the Secretary of State?

In *Barnet LBC v Alder*[154] the defendants had changed the use of a dwelling house to private school without planning permission. An application for retrospective permission was refused in 2004. A subsequent enforcement notice was upheld on appeal on grounds relating to loss of housing and effect on the living conditions of adjoining properties. Following the appeal decision, the LPA gave the defendants additional time to find alternative premises, but when this proved impossible the defendants contended that the concerns which had led to the dismissal of their appeal could be resolved. A further planning application was made in 2008, but refused. When the LPA commenced court proceedings seeking an injunction, the defendants argued that their appeal against the refusal of planning permission was outstanding, with a decision anticipated in only four months.

Walker J. concluded that, but for the pending appeal, the facts pointed overwhelmingly to the grant of an injunction; and that in terms of the pending appeal, he could not give any substantial weight to the prospects of success. He therefore granted an injunction, but (stressing that he did not do so in order to await the outcome of the appeal) suspended its operation for some five months so that "orderly arrangements" could be made for the pupils to continue their education without interruption.

In *Brentwood BC v Ball*[155] Stadlen J. refused to order an injunction to restrain the unauthorised use of land by a group of gypsies as a caravan site. Contrary to the advice in *South Buckinghamshire DC v Porter (No.1)*[156] there was no evidence that, before deciding to apply for an injunction, the LPA had investigated

[151] And has the approval of the editors of the J.P.L.: see Current Topics [2010] J.P.L. 849.
[152] And, indeed, was clearly not what Sullivan L.J. was endorsing: see *Health and Safety Executive v Wolverhampton City Council* [2009] EWHC 2688 (Admin) at [59].
[153] *C&P Reinforcement Ltd v East Hertfordshire DC* [2009] EWHC 3128 (Admin).
[154] *Barnet LBC v Alder* [2009] EWHC 2012 (QB).
[155] *Brentwood BC v Ball* [2009] EWHC 2433 (QB).
[156] *South Buckinghamshire DC v Porter (No.1)* [2003] UKHL 26.

or considered the personal circumstances of the defendants, or had considered whether the matter was sufficiently urgent to justify an injunction. The defendants were not cynical or ruthless people who had set out to further their own ends in complete disregard for or lack of interest in the law. They were desperate to find a site where they and their families could settle down both without danger and without breaking the law. They had a planning appeal pending which had a real prospect of success. In the circumstances, it would not be proportionate to grant an injunction.

Compulsory purchase

Section 226(1) TCPA 1990 provides that:

> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area—
>
> (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land …
>
> (1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects—
>
> (a) the promotion or improvement of the economic well-being of their area;
>
> (b) the promotion or improvement of the social well-being of their area;
>
> (c) the promotion or improvement of the environmental well-being of their area."

National guidance indicates that the well-being power is intended to be wide-ranging, and to reverse the "traditionally cautious approach" of local authorities to the improvement of their communities.[157] However, the recent decision of the Supreme Court in *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*[158] places a significant limit on the use of s.226 to authorise the acquisition of land "A" on the strength of improvements in well-being which might then flow from the redevelopment of land "B".

Tesco controlled a site known as the Royal Hospital in Wolverhampton, which the LPA wanted to regenerate. Tesco also owned 14 per cent of another site, about half a mile away, at Raglan Street. The remaining 86 per cent of the Raglan Street site was controlled by Sainsbury's. Both Tesco and Sainsbury's wanted to redevelop the Raglan Street site: Tesco had been granted planning permission for its proposal; and there was a resolution to approve an alternative proposal by Sainsbury's. It appears that there was little to choose between the rival plans. However, Tesco offered to cross-subsidise the regeneration of the Royal Hospital site (which it argued was not financially viable in isolation) by linking it with its proposal for Raglan Street. On this basis, the LPA agreed to make a CPO in respect of Sainsbury's interest in the Raglan Street site, on the basis that it would then transfer the land to Tesco. Sainsbsury's challenged that decision.

In the proceedings which followed, it seems to have been clear throughout that (in the absence of agreement between Sainsbury's and Tesco) the only way in which the Raglan Street could come forward for redevelopment was through the exercise of compulsory purchase powers. In so far as a CPO would facilitate the carrying out of development on the Raglan Street site, it was therefore common ground that the test in s.226(1)(a) was met. The question was whether, when deciding to make the CPO in respect of the Raglan Street site, the Council was entitled to take into account the commitment by Tesco to secure the redevelopment of the unconnected Royal Hospital site. The issue was relevant both in terms of s.226(1)(a) and s.226(1A).

[157] See ODPM's "Power to Promote or Improve Economic, Social or Environmental Wellbeing" paras 6–7; Circular 6/2004 Appendix A para.8.
[158] *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20. See commentary at [2010] J.P.L. 952.

At first instance and in the Court of Appeal[159] the LPA's decision was upheld. In the Court of Appeal, Sullivan L.J. said[160]:

> "the statutory language may appear somewhat negative and convoluted, but in my view the underlying policy objective is clear. Sub-section 226(1)(a) focuses the local authority's attention on what is proposed to take place on the CPO site itself. While the local authority must be satisfied that the CPO will facilitate the redevelopment of the CPO site itself, sub-section 226(1A) requires it to look beyond the benefits that will accrue on the CPO site itself, and to consider whether, and if so to what extent, its redevelopment is likely to bring economic/social/environmental well-being" benefits to a wider area."

However, when the case reached the Supreme Court, Sainsbury's appeal was allowed by a 4:3 majority. All seven members of the court gave reasons, and not all the reasons are entirely consistent.

One of the ways in which redevelopment carried out on a CPO could, in principle, bring about such benefits was by acting as a catalyst for the development or redevelopment of some other site.

However, the majority[161] all agreed with the reasons given by Lord Collins.

As to s.226(1)(a), Lord Collins observed that the Council had purportedly resolved to make the CPO for the purpose of facilitating the development of both the Raglan Street site and the Royal Hospital site, and that this alone would be sufficient to vitiate the decision.[162] This much seems obvious: when s.226(1)(a) refers to facilitating development, redevelopment or improvement of "the land", it is clearly referring to "the land" which is the subject of the CPO. However, both at first instance before Elias J. and in the Court of Appeal, the court had concluded that there would be no point in quashing the resolution on that ground alone, since a "more felicitously worded resolution" could be passed if the benefits to be derived from the Royal Hospital site were relevant under s.226(1)(a) or s.226(1A).

On this issue, Lord Collins concluded that one should apply principles similar to those which governed the grant of planning permission,[163] which he summarised in these terms:

> "First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material … There must be a real connection between the benefits and the development."

However, because of the "serious invasion of proprietary rights involved in compulsory acquisition" a strict approach to the application of these principles was required. Applying that to the facts of the case before him, he went on to say:

> "74 The power of compulsory acquisition must be capable of being exercised under s.226(1)(a) before the limitation in s.226(1A) applies. Once it applies the local authority must think that the development will contribute to the achievement of the well-being benefits. Section 226(1A) does not permit the Council to take into account a commitment by the developer of a site part of which was to be the subject of a CPO to secure the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the

[159] *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2009] EWCA Civ 835; [2010] J.P.L. 497.
[160] *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2009] EWCA Civ 835; [2010] J.P.L. 497 at [25]-[26].
[161] Lord Collins, Lady Hale and Lords Walker and Mance.
[162] *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2009] EWCA Civ 835; [2010] J.P.L. 497 at [69].
[163] Or, as Lord Mance put it at [98], the considerations admissible in relation to compulsory purchase are "no wider" than those admissible in relation to the grant of planning permission. See also Lady Hale at [91]; Lord Phillips at [120].

area. The Council was entitled to come to the view for the purposes of s.226(1A) that the Raglan Street site development would contribute to well-being in its area, but not on the basis of the benefits which would derive from the Royal Hospital site development. The Raglan Street site development will not, in any legally relevant sense, contribute to the achievement of the well-being benefits flowing from the Royal Hospital site development.

75 But that matters little since the crucial question is whether the Council was entitled to take it into account under s.226(1)(a). There can be no doubt that, even if there was no express reference in s.226(1)(a) to the local authority taking into account material considerations (by contrast with s.0(2)) only relevant matters may be taken into account. For the reasons given above, the claimed financial connection between the two sites was not such as to amount to a relevant matter. It is true, as Sullivan LJ said, that the financial viability of a proposed redevelopment scheme would be a highly material factor, and that a proposed re-development of a CPO site might have to be cross-subsidised. But Sullivan LJ was wrong to conclude that it followed that a cross-subsidy *from* a CPO site to another was a material consideration. The fact that a conditional agreement for sale linked the obligation to carry out works on the Royal Hospital site was not a relevant consideration."

Not everyone will agree with the conclusion that the considerations which are relevant when deciding whether to CPO land should be no wider than those which are relevant when deciding whether to grant planning permission,[164] and it is arguable that the decision unduly restricts the intended width of s.226. However, that is what the Supreme Court has decided. Their Lordships' decision also has potential implications for enabling development on sites which have no physical nexus to the beneficial development which is enabled.

Appeals to the Secretary of State

Validity of the Appeal

Although local planning authorities sometimes refuse to register applications on the ground that the applicant has failed to provide sufficient information, the Secretary of State has traditionally been willing to entertain appeals against such "non-determination" on the basis that the Inspector can decide whether the underlying application was valid, and his right to do so has been upheld by the courts.[165] However, the Town and Country (General Development Procedure) (Amendment) (England) Order 2006[166] introduced new requirements relating to the information which must accompany any application for planning permission. In particular:

- for both outline and full applications, there is a requirement to provide design and access statements; and in the case of applications for outline permission, art.3 GDPO requires certain details to be specified, which effectively define the parameters of the proposed development. Artcle 20(3) provides that a "valid" application is one which (where necessary) includes a design and access statement.[167]Section 327A provides that an LPA*must not* entertain an application which fails to comply with the requirements;

[164] In the Court of Appeal, Sullivan L.J. expressly concluded that they could not automatically be read across.
[165] See *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Bath and North East Somerset DC* [1999] 1 W.L.R. 1759.
[166] Town and Country (General Development Procedure) (Amendment) (England) Order 2006 (SI 2006/1062).
[167] See also the new Government Guidance on the information requirements and validation of planning appeals, which took effect from April 6, 2010: [2010] J.P.L. 708.

- section 62(3) TCPA 1990 provides that a local planning authority may "require that an application for planning permission must include … such particulars as they think necessary"; while art.20(3) of the 1995 GPDO (as amended) defines a "valid application" as an application which consists of … the particulars or evidence required by an authority under s.62(3) ..".[168]

To what extent do the 2006 changes affect the Secretary of State's power to entertain an appeal where the LPA considers that the procedural requirements are not met? Two recent cases, dealing with slightly different alleged "defects" in the initial application, have reached different conclusions.

In *Parker v Secretary of State for Communities and Local Government*[169] an application had been made for outline permission in circumstances where some of the details required by art.3 GPDO had only been provided shortly before the Inquiry. It is clear from High Court judgment that the application was initially treated by the LPA as valid, and indeed refused. However, on appeal the claimant (who appeared at the Inquiry as a third party objector) raised the issue of failure to comply with arts 3 and 4C; and it appears[170] that these arguments were to some extent supported by the LPA. However, the Inspector concluded that there was sufficient information *before the Inquiry* to determine the appeal.

On the s.288 challenge, Keith Lindblom QC accepted the Secretary of State's submissions:

- that s.79(6) TCPA 1990[171] gives the Inspector, once seized of an appeal, power to deal with it even if the LPA would have been bound to refuse it; and
- that an application which fails the procedural requirements of arts 3 and 4C of the GDPO is not necessarily void. In the case of all such procedural defects, even those relating to mandatory requirements, the question for the court is whether their being enforced would cause prejudice.

Parker is to be contrasted with *Newcastle upon Tyne City Council v Secretary of State for Communities and Local Government*[172] where Langstaff J. rejected the argument that s.62(3) TCPA 1990 and art.20(3) left the Secretary of State with the power to determine whether a particular requirement thought necessary by the local planning authority was indeed necessary. In Langstaff J.'s view, the legislation makes the LPA the arbiter of what information is necessary. While the Secretary of State was entitled to ask whether an applicant has acted sufficiently so as to comply with the requirements of the LPA, (s)he could not override the requirements which the LPA has imposed. Anyone wishing to challenge an LPA's decision as to what was necessary should proceed by judicial review, not by an appeal under s.78 TCPA 1990.

In the same judgment, Langstaff J. incidentally rejected the further argument pressed by the LPA, that the Secretary of State's decision on validity should be taken separately and in advance of the appeal. It was for the Secretary of State to decide how the issue of validity which was open to him on any appeal should be resolved.

There is a clear tension between the decisions in *Parker* and *Newcastle*. Article 20(3) requires compliance with both arts 3, 4 and s.62(3) before an application is "valid". Although the requirement for design and access statements is imposed under the GDPO, the impetus for it stems directly from s.62(5) TCPA 1990.

[168] Article 20(3) is subject to the proviso (in art.20(3A)) that the particulars required are included in a list which was published on the LPA's website before the application was made.

[169] *Parker v Secretary of State for Communities and Local Government* [2009] EWHC 2330 (Admin). Reversed on appeal on other grounds: see [2010] EWCA Civ 461.

[170] *Parker v Secretary of State for Communities and Local Government* [2009] EWHC 2330 (Admin) at [24]: "These alleged shortcomings in the application were noted in closing submissions for the Council and the claimant."

[171] TCPA 1990 s.79(6) provides that:

"If, before or during the determination of … an appeal in respect of an application to develop land, the Secretary of State forms the opinion that, having regard to the provisions of … the development order and any directions given under that order, planning permission for that development —

(a) could not have been granted by the local planning authority …

he may decline to determine the appeal or proceed with the determination."

[172] *Newcastle upon Tyne City Council v Secretary of State for Communities and Local Government* [2009] EWHC 3469; [2010] J.P.L. 904.

It is not immediately obvious why the Secretary of State should be able to entertain an appeal where the originating application failed to contain the information required by national law, but not be able to determine an appeal where the originating application failed to contain information required by the local authority as part of its own check-list.

Inspectors and bias

It is neither unusual nor surprising that many Planning Inspectors have previously worked in local government. Obviously if, while employed by a local planning authority, an Inspector has been involved with a particular site, or recently involved with a particular area, it will usually be inappropriate to appoint that Inspector to determine an appeal which is closely connected. Conversely, planning is a small world in which it is inevitable that Inspectors will come across people they have known in a previous life. It therefore seems extreme to say that an Inspector can *never* determine an appeal in which one of the parties is a local planning authority for whom (s)he has previously worked. But where between these two poles should the line to be drawn?

This was the issue which fell to be determined in *R. (on the application of Ortona Ltd) v Secretary of State for Communities and Local Government*.[173] In that case, the Inspector had been concerned with an appeal where the main issue was the effect of the proposed development on public transport, highway safety and the free flow of traffic. The LPA's reasons for refusal specifically cited policies from the transport section of the Norfolk Structure Plan. More than four years previously, the Inspector had himself worked for Norfolk CC. In particular (although this only became apparent in the Court of Appeal) he had been employed by Norfolk from 1975–2003, had specifically been involved in the formation of the County's transport policy (including the local transport plan), and from 2000 had been responsible for development control matters relating to highways.

In the High Court, while accepting that there was no actual bias, Collins J. quashed the Inspector's decision inter alia on the ground of apparent bias. In particular, Collins J. said:

> "the highways issues, the policies relied on, were county council policies and they were policies in being at the time the inspector was working for the council. In those circumstances it is at least possible, perhaps probable, that he had concerned himself with such policies…"

It will be apparent that this was a relatively broad basis for a finding of bias, which had the potential to prevent any Inspector from determining an appeal involving any authority in which (s)he had previously worked, so long as policies which might have been in place at that time continued in force. It is therefore not surprising that the Secretary of State appealed. In so doing, the Secretary of State provided additional information both on the practical implications of Collins J.'s approach and on the details of the Inspector's employment at Norfolk.

Although the Court of Appeal upheld Collins J.'s overall decision, it did so on rather narrower grounds. Sullivan L.J. said this:

> "The inspector in the present case had worked for Norfolk CC for very many years from 1975–2003. In my view that would not in itself have been sufficient to give rise to any real fear of apparent bias. Nor would the fact that the inspector had been involved at some unspecified level with structure plan policies generally, which would necessarily have included transport policies. What is of critical importance in the present case is the inspector's responsibility within the county council for transport planning, including the local transport plan, in which capacity he had been responsible for the formulation of the transport policies in issue in the appeal … This responsibility was coupled with his responsibility for the practical application of those policies at local level as the officer responsible

[173] *R. (on the application of Ortona Ltd) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 863; [2010] J.P.L. 361.

> for development control matters relating to highways. This was not a planning officer who had been peripherally involved with the policies in issue in this appeal. He had been directly responsible for the formulation and implementation of those policies…
>
> The question is not a mechanistic one to be answered simply by asking: How many years ago did the inspector leave the authority? A number of factors may well be relevant. The seniority, for example, of the inspector within the authority. Was he the county planning officer? Was he a lowly planning assistant? How long was he involved with policy formulation? To what extent was he involved? Was it merely part and parcel of a much broader role within the authority concerned or was he directly responsible for that area of policy? These and other factors will all be relevant…"

The position arrived at makes an interesting contrast with the care which (as appears from Sir Michael Pitt's paper) is taken to ensure that IPC Commissioners have no conceivable interest in the cases in which they are involved. It also suggests that PINS's assessment of the suitability of Inspectors to determine particular appeals may have to be taken on a more specific and fact-sensitive basis.

Procedural fairness

Although Statements of Common Ground can help both the parties and the Inspector to cut to the chase at an appeal, Inspectors are not bound to accept a point just because the parties themselves do not dispute it. However, Inspectors who wish to disagree with an SoCG need to take particular care that they do not fall foul of the requirements of natural justice. As Sullivan J. observed in *R. (on the application of Poole) v Secretary of State for Communities and Local Government*[174]:

> "If a party to an inquiry reasonably believes that a matter which was in dispute has been dealt with by way of agreement in a statement of common ground, it may well be unfair to allow the apparently agreed issue to be reopened without giving the party a proper opportunity to address the issue, if necessary by calling appropriate expert evidence."

Two recent decisions illustrate the point Sullivan J. was making, and give some guidance on just how far Inspectors may need to go to ensure their decisions are procedurally fair.

In *R. (on the application of Gates Hydraulics Ltd) v Secretary of State for Communities and Local Government*[175] noise had been one of two reasons for refusal. However, following the exchange of proofs a Statement of Common Ground was agreed which stated that all noise issues relevant to the appeal could be dealt with by condition. When the Council's noise expert confirmed this in evidence, the appellant decided not to call any noise evidence in reply. Although this decision was apparently taken without reference to the Inspector, the Inspector acquiesced and agreed to put the questions she had to another of the appellant's witnesses. In her decision letter, however, she dismissed the appeal inter alia on noise grounds.

Quashing that decision, Frances Patterson QC said that, upon conclusion of the Statement of Common Ground and upon confirmation of its status in cross-examination, the claimant had a reasonable expectation that noise and disturbance were no longer a main issue at the public inquiry. If it had appeared to the Inspector that she was of a different view, that was something she should have made clear to ensure the claimant had a "fair crack of the whip". It was procedurally unfair for the Inspector to come to the conclusion she did without providing the claimant an opportunity to address her concerns.

[174] *R. (on the application of Poole) v Secretary of State for Communities and Local Government* [2008] EWHC 676 (Admin).
[175] *R. (on the application of Gates Hydraulics Ltd) v Secretary of State for Communities and Local Government* [2009] EWHC 2187 (Admin).

In *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Communities and Local Government*[176] the Statement of Common Ground stated that the development in question was inappropriate in the Green Belt. In so doing, it reflected an understanding which had been shared by the LPA, the developer and the objector (SSOBT) for more than 10 years. At no point during the inquiry did the Inspector or anyone else suggest otherwise. However, three weeks after the inquiry had closed, the Inspector wrote to the parties inviting them to make representations on the question. SSOBT's reply explained why the company considered that the development inappropriate but went on to say that, if the Inspector was not minded to agree, the inquiry should be reopened so the matter could be considered orally.

When the Inspector refused to reopen the inquiry, commenting that the parties had had ample opportunity to express their view, and went on to allow the appeal on the basis that the development was appropriate, his decision was quashed by consent on the grounds of procedural unfairness.

Other difficulties can arise where one of the parties at an inquiry has asked another party to produce certain information, but the other party has declined. As the decision in *Barnes v Secretary of State for Communities and Local Government*[177] indicates, this is unlikely to provide a ground for challenging the Inspector's decision unless there has been a specific application to the Inspector requesting disclosure of the missing information. In *Barnes*, the local residents' representative had gone no further than to comment that objectors had been unable to verify the developer's evidence, because certain data had not been disclosed. This was not enough.

Treatment of witnesses

In *R. (on the application of Host Palace Ltd) v Secretary of State for Communities and Local Government*[178] the claimant complained that the Inspector had allowed the Council's witnesses to "ramble" but had insisted that the appellant's witnesses answer the questions put to them in short order, if possible with a "yes" or "no" answer. The judge disagreed. While the note of the hearing demonstrated that there were a number of occasions when the Inspector asked the witness to answer the question that had been put to him, all he was doing was insisting that an expert witness got to the point. There was nothing in the material before the court to suggest that the appeal process was unfair.

In practice, challenges of this sort will always be difficult, not least because what might seem to one party to be differential treatment by an Inspector will normally be a response to the way in which a particular witness is responding to cross-examination. If other witnesses are more direct, the Inspector will not need to keep reminding them to answer the question!

Disagreeing with expert evidence

Georgiou v Secretary of State for Communities and Local Government[179] is another in the long line of cases holding that an Inspector is not obliged to accept an expert's report, even if it has not been challenged, but is entitled to use his own experience, expertise and common sense and to take into account the findings from the site visit.

[176] *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Communities and Local Government* [2009] EWHC 3238 (Admin).
[177] *Barnes v Secretary of State for Communities and Local Government* [2010] EWHC 1742 (Admin).
[178] *R. (on the application of Host Palace Ltd) v Secretary of State for Communities and Local Government* [2009] EWHC 3721 (Admin).
[179] *Georgiou v Secretary of State for Communities and Local Government* [2010] EWHC 2209 (Admin).

Inspectors and site visits

Site visits are routinely carried out as part of every planning appeal. In most cases, Inspectors are willing (subject to obtaining the necessary permissions) to visit and/or look at anything which the parties to the Inquiry believe is relevant to the appeal. However, although the precise extent of the site visit would normally be regarded as a matter within the Inspector's discretion, the decision in *Fry v Secretary of State for Communities and Local Government*[180] indicates that failure to include in the site visit a matter which is central to the appeal may be a ground of challenge.

Fry concerned enforcement action against the insertion of four dormer windows in a listed building. It was common ground that, immediately before these works had taken place, there had been no dormers, but part of the claimant's case under Ground (e) (that listed building consent should be granted) was that there had historically been dormers in precisely the same locations, as evidenced by reveals which remained in the attic space. The claimant asserted that he had invited the Inspector to inspect the interior roof space in order to see the evidence, but that the Inspector had declined. Ouseley J. concluded that there was scope for confusion as to whether the written representations indicated that the works which had been carried out had obliterated all evidence of the former dormers, or whether it was simply the roof timbers which had been obscured. Given the importance to the claimant of the issue as to what could be seen of the former windows, the Inspector ought to have done as he was asked to do and inspected the interior of the roof. Failing to do so meant that what could be a material consideration was ignored.

Mistake of fact

The annals of planning law are replete with cases where claims that Inspectors have "failed" to take a relevant consideration into account have been dismissed on the ground that the allegedly relevant consideration was one which the Inspector had never been asked to consider. However, there is a growing number of challenges which have argued, by reference to developments elsewhere in public law, that this response is no longer enough.

The key authority which has led this trend is the decision, from the sphere of asylum law, of the Court of Appeal in *E v Secretary of State for the Home Department*,[181] where Carnwath L.J. said:

> "In our view the time has now come to accept that mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in the statutory context where the parties share an interest in co-operating to achieve the correct result…. Without seeking to lay down a precise code the ordinary requirements for a finding of unfairness are apparent from the above analysis … First there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established' in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant or his advisers must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

The decision of the Court of Appeal in *R. (on the application of Connolly) v Havering LBC*[182] confirms[183] that these principles apply equally to the decisions of Planning Inspectors.

In *Connolly* the interested party had sought planning permission for extensions to the north and south of his property. For reasons which are not clear, the claimants (who were the adjoining landowners to the north) were not notified. Planning permission was nevertheless refused by the LPA, but only on the basis

[180] *Fry v Secretary of State for Communities and Local Government* [2009] EWHC 1052 (Admin).
[181] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49.
[182] *R. (on the application of Connolly) v Havering LBC* [2009] EWCA Civ 1059.
[183] In the previous first instance decision in *Eley v Secretary of State for Communities and Local Government* [2009] EWHC 660 (Admin), Wyn Williams J. had reached the same conclusion.

of the impact of the proposed southern extension: the officer's report expressly stated that the northern extension was considered acceptable. The interested party appealed against that decision. However, before the appeal was determined, he also submitted a revised application for the northern extension alone. This time, the claimants were notified and objected, and the application for the northern extension was refused.

Mr Connolly's appeal was dealt with by written representations. The Council's Questionnaire enclosed the officer's report and said that it would send a further statement setting out the relevant planning history. In reliance on this, the claimants did not include the Council's more recent decision on the second application (for the northern extension alone) in their letter of objection. However, the Council subsequently decided not to add to the analysis set out in the officer's report. Consequently, when the Inspector determined the appeal, she was unaware that the Council had expressed any concerns about an extension to the north of the interested party's property. Notwithstanding the fact that she nevertheless went on to discuss the claimants' objection and to give reasons for dismissing it which were based on her own view of the acceptability of the proposal, the Court of Appeal concluded that there had been "unfairness arising out of a mistake of fact" as to the previous planning history, which had played a material part in the Inspector's decision and justified quashing it.

The principles in *E* have also been applied in *Historic Buildings and Monuments Commission for England (English Heritage) v Secretary of State for Communities and Local Government*[184]; *R. (on the application of Majed) v Camden LBC*[185]; *Cox v Secretary of State for Communities and Local Government*[186] and in *Jobson v Secretary of State for Communities and Local Government*,[187] but in all four cases the court found that the criteria for establishing mistake of fact had not been made out.

In *Majed*, the report to committee had stated that the development was "approximately 25 metres from the nearest property". It was agreed that this was wrong, but Sullivan L.J. found that the distance was given in the context of a discussion of overlooking and loss of privacy. Because there were no windows in the development which was the subject of the challenge and which were capable of overlooking the neighbour's property, the error could not have affected the decision.

In *Cox* the "missing" information was a document which indicated that the radiation levels associated with a proposed telecommunications mast would be 1/5 of the International Commission of Non-Ionising Radiation Protection guidelines. The claimant's argument was that, since the radiation levels associated with most masts are less than 1/100 of the ICNIRP guidelines (and in most cases as low as 1/1000) this information could have influenced the Inspector's conclusion that the proposal before her was "well within" the guidelines. Robin Purchas QC disagreed, concluding that the "missing" information could not have affected the Inspector's conclusion. Following the principles summarised in *Eley v Secretary of State for Communities and Local Government*[188] the judge also rejected an argument that the information should have been disclosed by T-Mobile when making their appeal. The Court of Appeal has refused permission to appeal.[189]

In *Jobson* the Inspector had refused an application inter alia because of its visual impact on the countryside, having concluded that the application site was "clearly visible" from the A697. The claimant maintained that this was a mistake of fact, because the property was not generally visible from the A697. Not surprisingly, Langstaff J. concluded that this did not satisfy the requirements in *E*, not least because the fact said to be wrong in this case was plainly contentious.

[184] *Historic Buildings and Monuments Commission for England (English Heritage) v Secretary of State for Communities and Local Government* [2009] EWHC 2287 (Admin); [2010] J.P.L. 451.

[185] *R. (on the application of Majed) v Camden LBC* [2009] EWCA Civ 1029; [2010] J.P.L. 621.

[186] *Cox v Secretary of State for Communities and Local Government* [2010] EWHC 104 (Admin).

[187] *Jobson v Secretary of State for Communities and Local Government* [2010] EWHC 1602 (Admin).

[188] *Eley v Secretary of State for Communities and Local Government* [2009] EWHC 660 (Admin) , referred to in Morag Ellis QC's "*Planning Law Update*" to the 2009 Conference.

[189] Both on the papers and at a renewed oral hearing: see the decision of Stanley Burnton L.J. on July 13, 2010.

Enforcement appeals

Under s.176(1) TCPA 1990, the Secretary of State has the power, on appeal against an enforcement notice, to correct any defect, error or misdescription in the enforcement notice or to vary its terms, if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority. The power is frequently used to cut down the scope of enforcement notices which have gone too far—but to what extent does it allow an Inspector to alter the plan attached to the notice so as to *increase* the area of land to which it applies?

Prior to the decision in *Howells v Secretary of State for Communities and Local Government*,[190] the case law on this issue (as cited in the Planning Encyclopaedia) was all concerned with s.88 TCPA 1971, the predecessor to s.176. Unlike s.176, s.88 had restricted the Secretary of State's power to amend enforcement notices to non-material corrections. In *Howells* Frances Patterson QC held that the s.176 power is not constrained to reducing the area to which the plan relates, but can be used to extend and enlarge it, subject to the fundamental constraint that this does not cause injustice to either party.

Enforcement decisions—consequences of remission

Where an Inspector's decision to grant planning permission has been successfully challenged in the courts under s.288 TCPA 1990, the court's power is simply to quash the Inspector's decision. In those circumstances, it is well established that the consequence is that the Secretary of State is obliged to consider the entire application de novo.[191] However, as the decision in *R. (on the application of Perrett) v Secretary of State for Communities and Local Government*[192] indicates, the same is not true when challenging an Inspector's decision on an enforcement appeal.

In particular, the normal[193] route for challenging a decision on an enforcement appeal is s.289 TCPA, where the power of the court is not to set aside or vary the decision, but simply to remit the matter for rehearing and redetermination.[194] In *Perrett*, the claimant had appealed to the Secretary of State against five separate enforcement notices on grounds (a), (b), (d), (f) and (g). The Inspector allowed two of the appeals but dismissed the remainder. When the claimant then challenged the Inspector's decision under s.289, the Secretary of State conceded that the Inspector's analysis of the ground (a) appeals had been flawed. The s.289 appeal was therefore disposed of by a consent order remitting the appeals to the Secretary of State for redetermination. When it came to arranging the rehearing, PINS eventually decided to limit the scope of the inquiry to the matter which had been conceded, i.e. ground (a).

Upholding the decision of Mitting J. at first instance,[195] the Court of Appeal concluded that the Secretary of State was entitled to restrict the scope of the rehearing in this way. While there was nothing to prevent a more extensive rehearing, it was for the Secretary of State to decide on the scope of the rehearing which was required in order to remedy the error identified by the court.

[190] *Howells v Secretary of State for Communities and Local Government* [2009] EWHC 2757; [2010] J.P.L. 741.

[191] See *R. (on the application of Perrett) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1365; [2010] J.P.L. 999 at [18], and the cases cited therein at [21]–[22].

[192] *R. (on the application of Perrett) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1365; [2010] J.P.L. 999.

[193] The possible exception to this is where the decision on the enforcement appeal is to grant planning permission under ground (a). In those circumstances, it is not clear whether the appropriate route is s.288 or s.289: see *Wandsworth LBC v Secretary of State for Transport, Local Government and the Regions (Enforcement Notice)* [2003] EWHC 622 (Admin); [2004] 1 P. & C.R. 32.

[194] Section 289(5)(a) and para.22.6C of the Practice Direction to CPR Pt 52.

[195] *R. (on the application of Perrett) v Secretary of State for Communities and Local Government* [2009] EWHC 234; [2009] J.P.L. 1151, reported in Morag Ellis QC's paper to last year's conference.

The decision will be of particular importance to those involved in s.289 challenges where the Secretary of State offers to consent to judgment. If the concession is made in relation to the Inspector's assessment of only one of the grounds of appeal, while the challenge extends to two or more, claimants will need to consider carefully whether to continue with the remainder of their challenge in order to establish the need for a wider rehearing.

Challenges in the courts

Which procedure?

The vast majority of appeal decisions are challengeable only under s.288 or s.289 TCPA 1990. In practice, the court has been prepared to treat challenges which have erroneously been made by way of an application for judicial review under Civil Procedure Rules Pt 54 as if they had been brought under s.288, but only where the application for judicial review was lodged within the six-week period required for a s.288 challenge. This position has been confirmed by the Court of Appeal in *A v East Sussex CC*.[196]

Standing: who is a person aggrieved?

The right to challenge decisions of the Secretary of State under s.288 TCPA 1990 is limited to "persons aggrieved". Most challenges are brought by one or other of the main protagonists in the appeal, whose status as a "person aggrieved" is self evident. Beyond that, the decision of the Court of Appeal in *Eco-Energy (GB) Ltd v First Secretary of State*[197] indicates that a person will be aggrieved if they were the appellant in the planning process, someone who took a "sufficiently active role" in the planning process (probably a substantial objector, "not just somebody who objected and did no more about it") or someone who has a relevant interest in the land. In this context, there is longstanding authority that "any person who has attended and made representations at the inquiry" should have the right to establish in the courts that the decision is bad in law.[198] Two recent decisions take these principles further.

The first involved an application under s.288 TCPA 1990 to quash a Tree Preservation Order. Unusually (some might say bizarrely), the claimant in *Bowen v Bristol City Council*[199] had been employed by the defendant LPA as its arboricultural officer, and had been the case officer appointed to investigate complaints about the felling of trees on the property. He had no legal interest in the property and did not live in the immediate vicinity. Having inspected the site, he decided that no illegal activity had taken place, and concluded that the LPA should not make a TPO in respect of some 27 remaining trees. Following substantial local interest, the Planning Committee subsequently resolved to make a TPO. The judgment records that the claimant "[felt] passionately that a Woodland TPO … was completely unjustified", and it was apparent that he had made his views known to his employer. He did not, however, register any objection, as a private individual, to the making of the order.

While Wyn Williams J. recognised that the claimant had taken in active interest in the planning process *in the sense that he was an employee of the decision-maker*, he was not a person who took a sufficiently active role in the sense indicated in *Eco-Energy*. He was therefore not a "person aggrieved".

In *Historic Buildings and Monuments Commission for England (English Heritage) v Secretary of State for Communities and Local Government*[200] one of the claimants was a local resident who was a "longstanding" member of the local community development group and lived (literally, so it was said)

[196] *A v East Sussex CC* [2010] EWCA Civ 743.
[197] *Eco-Energy (GB) Ltd v First Secretary of State* [2004] EWCA Civ 1566.
[198] *Turner v Secretary of State for Environment* (1974) 28 P. & C.R. 123.
[199] *Bowen v Bristol City Council* [2009] EWHC 1747 (Admin).
[200] *Historic Buildings and Monuments Commission for England (English Heritage) v Secretary of State for Communities and Local Government* [2010] EWCA Civ 600.

"in the shadow" of the proposed development, but had not made any representations to the local authority or at the Public Inquiry. He had attended parts of the Inquiry, but had not signed the attendance list. At first instance,[201] HH Judge Mole QC concluded that the claimant

> "did not play a sufficiently active role in the planning process properly to be described as 'aggrieved' within section 288."

That decision was upheld by the Court of Appeal. Pill L.J. summarised the relevant principles in the following terms:

> "1. Wide access to the courts is required under s.211 …
> 2. Normally, participation in the planning process which led to the decision sought to be challenged is required. What is sufficient participation will depend on the opportunities available and the steps taken …
> 3. There may be situations in which failure to participate is not a bar …
> 4. A further factor to be considered is the nature and weight of the person's substantive interest and the extent to which it is prejudiced … The sufficiency of the interest must be considered.
> 5. This factor has to be assessed objectively. There is a difference between feeling aggrieved and being aggrieved.
> 6. What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under s.288 …
> 7. The participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person's interest if he has not participated in the planning procedures …
> 8. While recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interests relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings."

The claimant's participation in the planning process was insufficient to acquire standing; and the absence of any representations from him about the loss of amenity at his property deprived the other parties of the opportunity to assess the extent of his loss. The court could not make good that deficiency.

Time limits

Statutory challenges under s.288 and 289 must be brought within fixed timescales. In contrast, CPR Pt 54.5 requires applications for judicial review to be filed "promptly, and in any event not later than 3 months after the grounds to make the claim first arose". As regards the point at which time starts to run, it is well established that the grounds for making a claim arise when at the point when the decision is made, not when the claimant finds about them (although the reasonable failure of a claimant to become aware of the decision until some time after the decision was taken may be a ground for court to exercise its discretion to extend time).[202] As regards the requirement of promptitude, it is equally well-established that this can mean that applications are made within three months but are still not "prompt".[203] Notwithstanding the

[201] *Historic Buildings and Monuments Commission for England (English Heritage) v Secretary of State for Communities and Local Government* [2009] EWHC 2287 (Admin).
[202] *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] A.C. 603 at [133]-[134].
[203] see e.g. *R. v Independent Television Commissioners Ex p. TV NI Ltd The Times* December 30, 1991.

doubts expressed by Lord Steyn in *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)*[204] the Court of Appeal in *Hardy v Pembrokeshire CC (Permission to Appeal)*[205] has held that the requirement of promptitude does not breach art.6(1) of the European Convention on Human Rights.

These domestic decisions do not, however, take into account the effect of Community law, and the recent decision of the European Court of Justice in *Uniplex (UK) Ltd v NHS Business Services Authority*[206] suggests that they may need to be reviewed.[207] The case concerned a challenge under public procurement legislation, in circumstances where European Directives require Member States to ensure an effective right to review decisions on the ground that they have infringed Community law. Domestic legislation required proceedings to be brought "promptly and in any event within three months from the date when grounds for bringing the proceedings first arose", with a discretion to extend time where the court considered there was good reason to do so. The ECJ was asked to give a preliminary ruling on the questions:

- whether the domestic time limit should be interpreted so that the grounds for bringing proceedings were first taken to arise at the date of breach of the applicable public procurement provisions, or from the date when the tenderer knew or ought to have known that the procurement procedure and award infringed Community law;
- how the court should then apply the requirement of promptitude and/or exercise is discretion.

On the first issue, the ECJ concluded that the guarantee of effective procedures for review could only be realised if the periods laid down for bringing proceedings only started to run from the date on which the claimant knew or ought to have known of the alleged infringement. On the second question, the ECJ observed that:

> "the objective of rapidity … must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations."

and that:

> "A national provision … under which proceedings must not be brought 'unless … those proceedings are brought promptly and in any event within three months' gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made 'promptly' within the terms of that provision."

Uniplex is a public procurement case which, on the face of it, has nothing to do with planning law. However, Member States are under a not dissimilar obligation to ensure effective remedies for breaches of Community law on environmental issues, and in *R. (on the application of Bateman) v South Cambridgeshire DC*[208] the defendant and interested party are recorded as not having persisted in an argument about promptitude on the basis that principles in *Uniplex* applied. Significantly, the reasoning in *Uniplex* has the potential to affect not only the time limits on judicial review, but also the fixed time limits under ss.288 and 289, in situations where the claimant only becomes aware of a breach of Community law some time after the decision was taken.

[204] *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] UKHL 23.

[205] *Hardy v Pembrokeshire CC (Permission to Appeal)* [2006] EWCA Civ 240, citing the decision of the European Court of Human Rights in *Lam v United Kingdom* (No. 41671/98) (July , 2001).

[206] *Uniplex (UK) Ltd v NHS Business Services Authority* (C-406/08) [2010] P.T.S.R. 1377; [2010] 2 C.M.L.R. 47.

[207] See Current Topics [2010] J.P.L. 540, and the discussion in Jones "Some Practical Impacts of European Union Law upon the Procedure for Judicial Review" [2010] J.R. 139 and Lewis "Current Issues in Remedies in Judicial Review" [2010] J.R. 144.

[208] *R. (on the application of Bateman) v South Cambridgeshire DC* [2010] EWHC 797.

The practical difficulties in deciding on which side of the line a case might fall can be seen from *Zeb v Birmingham City Council*,[209] where the grounds for challenging the grant of planning permission related to the absence of an Environmental Statement. The claim was brought 11 weeks after the grant of planning permission, but six months after the resolution to grant, ten months after the claimant had become aware of the screening opinion and 12 months after the screening opinion had been made. These matters told against the claimant. However, when the Letter before Claim was sent (3 weeks after the grant of permission) both the defendant and the interested party asked for further time to reply. In the end, Beatson J. did not find it necessary to determine whether there had been undue delay. However, it is clear from his judgment that the issue was finely balanced. Factually difficult situations such as this illustrate the sort of tightrope which claimants sometimes have to walk, and can only add weight to the arguments in favour of a fixed and certain deadline.

Promptitude was also at the forefront of the arguments in *Health and Safety Executive v Wolverhampton City Council*. The HSE did not become aware of the fact that planning permission had been granted until December 2008 four months after the event. By this time, works were already well advanced.[210] In the months which followed, the HSE sought to persuade Wolverhampton to revoke the permission or take steps to relocate the LPG facility. However, these proved unsuccessful and the claim for judicial review was eventually lodged in July 2009, 11 months after the permission had been issued and seven months after the HSE learned of it.

As noted above, Collins J. refused to quash the permission because of the delay in bringing proceedings. There was unchallenged evidence that three of the four locks were complete and that, if it could not proceed to their occupation, the developer would face commercial ruin. This was not the developer's fault: there was no reason why it should have appreciated that the Council had made mistakes and it had received no notification from the HSE that there was any possibility of a claim. The only point which concerned Collins J. was the possible resulting risk to those occupying the flats, but on this issue he observed that the failure of the HSE to take any positive action before July 2009 indicated that it could not have believed that the risk was unacceptable. The argument that the HSE had sought to avoid litigation by trying to persuade the LPA to revoke the permission was "no good excuse".[211]

Aarhus

The Aarhus Convention, which is concerned with the public interest in effective environmental challenges, is increasingly being deployed by claimants, especially in areas such as Protective Costs Orders and the need to offer undertakings in damages when seeking interim injunctive relief. However, it seems that it will not be in every planning dispute that *Aarhus* is relevant. In *Morris v SSCLG*[212] Sullivan L.J. rejected a complaint based on the Aarhus Convention inter alia on the ground that:

> "The applicant was representing the Chestnut North Side local residents' association, a local amenity group which was opposed to this particular development on essentially local amenity grounds: that the proposed development was too large, that the residential mix was inappropriate and so forth. While the dispute might be described as an environmental one in the most general sense, it was essentially a very localised planning dispute and, realistically, Aarhus principles were not engaged."

[209] *Zeb v Birmingham City Council* [2009] EWHC 3597 (Admin).
[210] Construction in fact began a month *before* permission was granted!
[211] Counsel for the HSE had said its actions in this respect were "sub-optimal". Collins J. preferred to describe them as "unsatisfactory".
[212] *Morris v Secretary of State for Communities and Local Government* [2010] EWCA Civ 248. The judgment concerns the application for permission to appeal from the first instance decision of Mr John Howell QC.

If, as this decision suggests, there is a sliding scale where Aarhus is sometimes applicable and sometimes not, we can only hope that at some stage there will be guidance (whether from the courts or in amendments to the Civil Procedure Rules[213]) on how to decide where the line is drawn.

The judicial approach to the interpretation of policy

For many years the "orthodox" approach to scrutiny of Inspector's decisions about the meaning of policy has been that set out in *R. v Derbyshire CC Ex p. Woods*[214] where Brooke L.J. held that it was for the court to determine as a matter of law what words are capable of meaning, but if in all the circumstances the wording of a relevant policy document was properly capable of more than one meaning, a planning authority which adopted and applied a meaning which the words were capable of bearing would not have gone wrong in law. The court would only intervene if the judgment on the meaning was perverse. It is only if the decision-maker attaches a meaning to words which they are not capable of bearing that he will have failed properly to understand the policy.

Although *Woods* has generally been followed,[215] it has not been without its critics. Famously, in *Cranage Parish Council v First Secretary of State*[216] Davis J. whilst applying *Woods* said that the courts must be wary of an approach to interpretation[217]:

> "whereby a decision-maker can live in the planning world of Humpty Dumpty, making a particular planning policy mean whatever the decision-maker decides it should mean."

The argument that it should be for the courts to determine what the words of a particular policy meant was given a significant boost by the decision of the Court of Appeal in *R. (on the application of Raissi) v Secretary of State for the Home Department*.[218] This case concerned the meaning of ministerial policy for ex gratia payments to people who had been detained but then released without charge or acquitted. Reviewing the authorities, the Court of Appeal said:

> "We have some difficulty with the reasonable meaning approach. One presumes that, if the minister has applied a meaning to some part of the policy, then the minister, without announcing any change in the policy, could not in a later case adopt another meaning, arguing that both meanings are reasonable and it is up to him or her to choose which meaning to use in any particular case. If that is right, then the reasonable meaning approach would only benefit the minister when interpreting the meaning of a particular part of the policy for the first time."

Significantly, however, *Raissi* did not expressly overrule or disapprove of *Woods*. Nonetheless, many commentators would argue that there is no logical distinction between planning policy and any other area of public law, and that *Raissi* should apply across the board.

This point has now been raised in the High Court on a number of occasions. In *R. (on the application of Kensington and Chelsea RLBC) v Secretary of State for Communities and Local Government*[219] and *R. (on the application of Vale of White Horse DC) v Secretary of State for Communities and Local*

[213] See the Note on *Morgan & Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 at [2009] J.P.L. 979.
[214] *R. v Derbyshire CC Ex p. Woods* [1997] J.P.L. 958.
[215] By the Court of Appeal as well as in the High Court: see e.g. *R. (on the application of Heath & Hampstead Society) v Camden LBC* [2008] EWCA Civ 193.
[216] *Cranage Parish Council v First Secretary of State* [2004] EWHC 2949 (Admin).
[217] See also Sedley L.J. at [16] in *First Secretary of State v Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520 ".. the interpretation of policy is not a matter for the Secretary of State. What a policy means is what it says".
[218] *R. (on the application of Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72.
[219] *R. (on the application of Kensington and Chelsea RLBC) v Secretary of State for Communities and Local Government* [2009] EWHC 1854 (Admin).

Government[220] Robin Purchas QC held that, in terms of the approach to planning policy, *Raissi* had not overruled the earlier authorities and that *Woods* should continue to apply. These two decisions were followed by Nicol J. in *Robert Hitchins Ltd v Secretary of State for Communities and Local Government*.[221]

However, on the one occasion that the question has come before the Court of Appeal (in *Johnson Brothers v Secretary of State for Communities and Local Government*)[222] the court found it unnecessary to answer it and declined to do so. Sullivan L.J. observed that it was:

> "precisely because the point is so important that it should be answered only when the answer will make a real difference to the outcome of the appeal."

For the moment, therefore, the orthodox approach prevails in the High Court, but the issue potentially remains live for the Court of Appeal on another day.

Strike out/Summary judgment

Court challenges can take time to be dealt with. While the Secretary of State may be content for matters to be listed and dealt with in the normal way, the delays can be frustrating for developers who are cast in the role of second defendant. However, where claims are thought to be hopeless, it may be possible to have them thrown out more quickly by applying for summary judgment. Although this is not the usual way of disposing of s.288 applications, the possibility has been recognised for some time.[223] Recent decisions suggest that well-judged applications remain a useful tool: see *Wiltshire CC v Secretary of State for Communities and Local Government*.[224]

[220] *R. (on the application of Vale of White Horse DC) v Secretary of State for Communities and Local Government* [2009] EWHC 1847 (Admin).

[221] *Robert Hitchins Ltd v Secretary of State for Communities and Local Government* [2010] EWHC 1157 (Admin). The *Woods* approach was also taken by Carnwath L.J. (at [42]) in *Derbyshire Dales DC v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); and by Frances Patterson QC in *R. (on the application of Gates Hydraulics Ltd) v Secretary of State for Communities and Local Government* [2009] EWHC 2187 (Admin); albeit in both cases without discussion or argument.

[222] *Johnson Brothers v Secretary of State for Communities and Local Government* [2010] EWCA Civ 254.

[223] See *Evans v First Secretary of State* [2003] EWCA Civ 1523.

[224] *Wiltshire CC v Secretary of State for Communities and Local Government* [2010] EWHC 1009 (Admin). It will, however, be noted that it only appears to have been possible to obtain an early hearing of the application in this case because an unrealistic time-estimate was given. Had a realistic estimate been given, the judgment suggests that the application would not have been heard much before the substantive hearing.