Legal Update

Neil King Q.C.

Introduction

It would be difficult to mould this paper so that it fitted into the theme of this year's Conference; so I have not attempted to do so. Nor have any particular theme or themes emerged during the course of the last year or so in terms of the decisions of the courts in the field of planning law. Nevertheless, as usual there is much of interest and importance that has been decided in the past year—tales as full of human fallibility, greed and cunning as one would be likely to find in any of our criminal or civil courts.

Standard required of Environmental Statements/scope of ''project'': *R. (on the application of Edwards) v Environment Agency* [2008] UKHL 22 (House of Lords, 16/4/08)

Facts: In 2001 a company operating a cement plant in Rugby applied to the Environment Agency for a permit under the Pollution Prevention and Control (PPC) Regulations 2000. The application included a proposal to replace some of the fuel (coke and petroleum coke) used in the plant with shredded tyres. In the words of Lord Hoffmann, ''the local people were sceptical and reluctant to be experimented upon'' and raised strong objection.

In the House of Lords, the appellant argued that the Agency had failed to discharge its statutory obligation of public consultation before reaching a decision on whether the plant, even though Best Available Techniques (BAT) were being used, would cause significant pollution as a result of the emission of particulate matter (PM_{10}) via low level point sources (LLPS).

The application for the permit had said nothing about the effect of adding the contribution of PM_{10} emissions from the LLPS to the ambient air quality, and these had not been included in the computer modelling of the emissions from the plant, partly because the main stack was a more significant source of emissions than the LLPS, and partly because it would have been very difficult to model these ''with any pretence at accuracy''.

The application was reviewed by the Agency's Air Quality Modelling Assessment Unit (AQMAU), which did attempt to undertake modelling of the LLPS emissions of PM_{10}. AQMAU concluded that, because of existing high background levels, the operation of the plant was likely to lead to local air quality objectives for PM_{10} being breached, although given modelling uncertainties and the ''worst-case'' assumptions made, this might not in reality take place. AQMAU's report was not made public at the time.

The Agency issued the permit subject to a condition that PM_{10} emissions were to be audited and, in the light of this, the operator was to propose any necessary further remedial work in order to achieve BAT.

Main issues:

(i) Had the Agency complied with its duty of consultation?
(ii) Was Environmental Impact Assessment (EIA) of the change to the burning of tyres required?

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Outcome: The House of Lords examined the Agency's duty of consultation under the Integrated Pollution Prevention and Control (IPPC) Directive[1] and PPC Regulations, and at common law. Lord Hoffmann, who delivered the main speech, held that:

(i) there was no breach of the Directive, since this required consultation only on "substantial changes" to the operation of an existing installation. Since the judge at first instance had found that the use of tyres, which was the only change proposed, would not have significant negative effects on human beings or the environment, this duty did not arise;
(ii) the application was not incomplete under the Regulations since these did not require computer modelling of environmental effects;
(iii) the gap in the environmental information about the effects of PM_{10} was not so manifest that the Agency could not reasonably have judged the application to be valid. In this context the House approved the remarks of Sullivan J in Blewett,[2] to the effect that any deficiencies in an environmental statement can be identified through the publicity and consultation processes, and that cases where a document purporting to be an environmental statement is so deficient that it could not reasonably be described as such will be "few and far between";
(iv) the Agency had been entitled to take account of (unpublished) information that had been supplied by the company pursuant to an informal request[3];
(v) (obiter, as the point was not argued before the HL) that the Agency had not acted in breach of a common law duty of fairness at common law in not disclosing the AQMAU report since it was not for the courts to impose a broader duty of public involvement than that imposed under the Directive and the Regulations. In any event, Lord Hoffmann took the view that the judge and the Court of Appeal had been right to treat what they considered to be a breach of the Agency's duty of fairness as insufficient to justify the exercise of their discretion to quash the grant of the permit. The reason for this was that, since AQMAU had reported, the actual emissions from the plant had been monitored, and it was clear that the operation of the plant had not resulted in any exceedances of the PM_{10} national air quality objectives.

Lord Hoffmann also took the view that the EIA Directive did not apply to the change in fuel. He drew attention to the distinction made in the Directive between the installation itself and the way it is used, and held that, because the use of tyres as fuel did not involve "the execution of construction works" or "other interventions in the natural surroundings and landscape", it did not fall within the definition of "project" in art.1 of the Directive. In circumstances where para.13 of Annex II to the Directive[4] did not apply, because it had been found as a fact that the introduction of tyres as a fuel would not have significant adverse environmental effects, to construe para.10 of Annex I[5] as requiring EIA in addition to an application under the PPC Regulations "would not be purposive but pedantic".[6]

[1] Directive 96/61/EC.
[2] *R. (on the application of Blewett) v Derbyshire CC* [2004] Env LR 29 at [41].
[3] Lords Mance and Brown disagreed with Lord Hoffmann on this point, although it did not affect the outcome of the appeal.
[4] "Any change or extension of projects . . . which may have significant adverse effects on the environment".
[5] "Waste disposal installations for the incineration . . . of non-hazardous waste with a capacity exceeding 100 tonnes per day".
[6] Again, Lords Mance and Brown did not agree, and took the view that the change to tyre burning did constitute a "project" within Annex I para 10; but again this did not affect the outcome of the appeal.

Lord Hoffmann went on to say that this interpretation of the Directive was not so plain as to be acte clair, so that, had it been necessary to do so in order to determine the appeal, he would have proposed a reference to the European Court of Justice. It was not necessary to do so, however, because even if the EIA Directive did apply, its requirements had been ''amply satisfied'' through the information contained in the IPPC application.

Practical implications: If in doubt, publish and consult on any additional information supplied in the course of an authority's consideration of a PPC application or a planning application requiring EIA. However, applications do not have to contain every conceivable piece of environmental information, and will not be held to be invalid unless manifestly deficient.

Application of Habitats Regulations to planning applications affecting SPAs: *R. (on the application of Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) (Sullivan J., 1/5/08)

Facts: A planning application had been made for housing development close to the Thames Basin Heaths Special Protection Area (SPA), designated as such under the Birds Directive.[7] The SPA was as a result protected by the obligations to avoid harm to the species for the protection of which the SPA was designated and their habitats contained in arts 6(2) and 6(3) of the Habitats Directive.[8]

These provisions are transposed into national law by reg.48 of the Conservation (Natural Habitats, &c.) Regulations 1994. This requires any plan or project that is likely to have a significant effect on a European site (including therefore an SPA) to be subject to ''an appropriate assessment of the implications for the site in view of that site's conservation objectives''.

The issue was whether the development of the appeal site in combination with other proposed residential developments in the area would be likely to have a significant effect on the SPA.

Natural England, on the basis of the proposed package of mitigation measures, withdrew its objections to the development. Its view was that, because of these measures, the development was not likely to have a significant effect on the SPA, and therefore that appropriate assessment of the proposal was not required. The mitigation measures principally comprised the provision of areas of ''suitable alternative natural green space'' (SANGS) to divert recreational pressure away from the SPA.

The Inspector was of the view that, applying the test in the Waddenzee case,[9] the probability of the proposals having a significant effect on the SPA in combination with other projects could not be discounted, and that there was insufficient information to enable an appropriate assessment to be carried out. The Inspector's position was supported by the Technical Assessor's Report to the South East Plan Panel on Natural England's Draft Delivery Plan for the SPA, in which the view had been expressed that, until it had been objectively demonstrated that the provision of SANGS would avoid any likely significant effect on the SPA, appropriate assessment of applications for housing close to the SPA would have be undertaken.

The Secretary of State disagreed with the Inspector. She took account of the fact that Natural England had withdrawn its objections, said that she gave ''great weight'' to their views, and concluded as a result that planning permission could be granted without the need to undertake an appropriate assessment.

[7] Directive 79/407/EEC
[8] Directive 92/43/EEC
[9] [2005] Env. L.R. 14 (ECJ)

Main issue: Could avoidance or mitigation measures (namely, the proposed SANGS) be taken into account at the first, ''screening'' stage, or could they only be taken into account at the second, appropriate assessment stage?

Outcome: Sullivan J held that proposed mitigation measures that formed part of the plan or project could be taken into account at the screening stage. That was notwithstanding advice to the contrary in the European Commission's guidance Assessment of plans and projects significantly affecting Natura 2000 sites. The judge said[10]:

> ''. . . if the competent authority is satisfied at the screening stage that the proponents of a project have fully recognised, assessed and reported the effects, and have incorporated appropriate mitigation measures into the project, there is no reason why they should ignore such measures when deciding whether an appropriate assessment is necessary.''

He also commented[11] that:

> ''The underlying principle to be derived from both the Waddenzee judgment and the domestic authorities . . . is that, as with the EIA Directive, the provisions of the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course.''

Practical implications: If there is a risk that a development may adversely affect a European site (directly or, as in this case, indirectly), it is of the utmost importance to ensure that a full mitigation and avoidance package is included as part of the planning application.

A secondary issue concerned the way in which the Secretary of State had applied the policy in PPS3 in relation to the weight to be given to the existence of a 5-year supply of housing land. She had concluded that, although there was a 5-year supply, this was ''fragile'' because it depended significantly on the delivery of housing from a major allocated housing site within that period in circumstances where a planning application for that other site had been refused and was in the course of being considered at a public inquiry.

The judge rejected the argument that, having found that there was a 5-year supply of housing land, the Secretary of State was not entitled effectively to apply a further test of ''fragility'' to which reference was not made in PPS3. On the contrary, he found that, on the facts of the case, the Secretary of State's observation was ''eminently reasonable''.

Pre-determination in local authority decision-making: *R. (on the application of Lewis) v Redcar and Cleveland BC* [2008] EWCA Civ 746 (CA, July 1, 2008)

Facts: In 1999, Redcar & Cleveland BC had adopted a local plan that included a site, owned by the Council, allocated for major leisure development with linked housing development. A scheme was prepared for the site in 2002, at which time the Council was Labour-controlled. A planning application was made in 2006 and generated substantial opposition. By this time, the Council was controlled by a political coalition of Conservatives, Liberal Democrats and Independents.

Local elections were due to be held on May 3, 2007. A special meeting of the Planning Committee was arranged to consider the planning application on April 3, 2007. Despite objections that such a

[10] [61].
[11] Paragraph 72.

meeting should not be held ''to determine such a controversial matter during the election period'', it went ahead. The Committee voted by a majority of nine to two, with two abstentions, to grant permission, subject to call-in. All the Coalition members of the Committee voted to grant permission. On May 1, the Council signed a development agreement with the applicant, on May 15, the Secretary of State decided not to call the application in, and on May 24, planning permission was granted.

The judge had decided that there had been a real possibility of bias or predetermination, on the basis that:

(iii) the Council owned the site;
(iv) the Coalition councillors who voted in favour of the application had already expressed their support for it, and not one of them, ''despite the formidable arguments on both sides'', had voted against it;
(v) the proposal had become a party political issue in the local elections;
(vi) the Council's own guidance advised against determining the application in the pre-election period;
(vii) one of the Coalition councillors who voted at the planning meeting was a member of the Council's Cabinet, which had expressed public support for the proposals;
(viii) the Council entered into a binding development agreement with the developer only two days before the election, thus ''tying the hands of its successor''.

Main issue before the Court of Appeal: Was there a real possibility that the members of the Committee who voted in favour of the grant of planning permission had closed their minds to the planning merits of the decision?

Outcome: No. Pill L.J. thought that the best way in which the claimant's (respondent's) case could be put was that the real reason why members had supported the development appeared to be political advantage rather than planning merits. No allegation was made that in fact they had closed their minds, but it was said that no good reason had been produced for holding the planning meeting in the pre-election period.

Pill L.J. strongly disagreed with a number of the judge's factual findings and their relevance to the outcome of the challenge. However, the key question remained whether the decision to hold the meeting in the pre-election period was justified.

Following a lengthy review of the authorities in relation to bias and apparent bias,[12] Pill L.J. concluded that the correct test to be applied was whether the court, putting itself in the shoes of the fair-minded observer, thought that there was a real risk or possibility that minds had been closed to the planning merits of the decision. In this, he (and Rix L.J.) rejected the appellant's contention that, in a planning context, the test was whether there had been actual rather than apparent bias or pre-determination. Central to the application of this test, however, was the recognition that councillors are not in a judicial or quasi-judicial position but are elected to pursue policies and are entitled (indeed expected) to express views on planning matters—what Rix L.J. described as ''a situation of democratic accountability''. Planning decision-makers are not therefore required to be

[12] Including *Porter v Magill* [2002] 2 A.C. 357; *Franklin v MTCP* [1948] A.C. 87; *R. (Alconbury) v SSE* [2003] 2 A.C. 295; *Condron v National Assembly for Wales* [2007] B.L.G.R. 8; *Georgiou v Enfield LBC* [2004] B.L.G.R. 497, *R. v SSE Ex p. Kirkstall Valley Campaign Ltd* [1996] 3 All E.R. 304; and *R. (on the application of Island Farm Development Ltd) v Bridgend CBC* [2007] B.L.G.R. 60.

impartial, but (as Rix L.J. put it) ''to address the planning issues before them fairly and on their planning merits''.

Thus, there was no appearance of pre-determination in a case where a councillor voted for a planning project that he had long supported, and the appeal was allowed.

Practical implications: Councillors are perfectly entitled to express views on planning applications during the application process and can vote on the application in accordance with those views. For good or ill, we have a democratic system for taking planning decisions, and so long as our elected representatives appear to listen to the arguments, they are not obliged to pay a great deal of attention to them.

A secondary issue concerned whether or not there had been a breach of reg.48 of the 1994 Habitats Regulations. An appropriate assessment fell to be made as the development would affect the sea and sand dunes close to the site that formed part of the Teesmouth and Cleveland Coast Special Protection Area. The task of undertaking the assessment was delegated to the Council's development control manager. Both Natural England and the Royal Society for the Protection of Birds had withdrawn their holding objections, because they considered that there would not be any adverse effect on the integrity of the SPA.

The contention that the Committee members had failed themselves to make the appropriate assessment was unsurprisingly rejected, on the basis that Natural England, RSPB and the relevant Council officer all knew what the relevant test was. The Committee was entitled to assume that this test had been properly applied by those persons and bodies, and that it had been met.

Importance of evidence explaining circumstances of decision where challenge to planning permission is made on procedural grounds: *R. (on the application of Ware) v Neath Port Talbot CBC* [2007] EWCA Civ 1359 (CA, 18/12/07)

Facts: National Grid had made applications for planning permission and hazardous substances consent in relation to a proposed natural gas pressure reduction station. Four councillors who were members of the Planning Committee had attended a public meeting of the Ratepayers Party, of which they were all members. Also at that meeting were a number of objectors to the applications who were members of a local residents' association.

There was no evidence that, at the public meeting, any of the four councillors had said anything which might be interpreted as a pre-determination of, or even a pre-disposition in relation to, the development.

The Planning Committee decided to defer consideration of the planning application for a site visit. The Council's Monitoring Officer then wrote to all members of the Committee advising them that, whilst they could still vote on the application even if they did not attend the site visit, failure to do so might call into question the decision making process. Two of the four Ratepayers Party councillors decided not to attend the site visit; one had already decided not to vote in any event, but the other still wished to do so. The Council's Principal Solicitor told him that it was advisable to have attended the site visit if he intended to vote. Both of these councillors left the meeting before the National Grid application came up for consideration. The other two Ratepayers Party councillors were also given advice by the Council's Principal Solicitor, and left before a vote was taken.

The original Claim form alleged that the councillors had been pressurised by officers into not voting on the basis of a misapprehension of law. The grounds of challenge then changed, following the

service of evidence from the councillors, to an allegation that they had decided not to vote because they had attended the public meeting, and had not attended the site visit.

Main issue: Had the councillors been given incorrect advice by officers?

Outcome: The Court of Appeal found that, contrary to what the judge had concluded, there was no evidence that the councillors had been given the wrong advice, or had in any way been pressurised into not voting on the application. They had clearly been told that the decision whether or not to vote was for them to take.

Practical implications: Mummery L.J. commented[13] that the particular facts of the case "underline the importance of the evidence and of the court identifying correctly and with some precision the advice that was in fact given to councillors and the respects (if any) in which the advice was wrong."

Whether Court of Appeal has jurisdiction to allow landowners to appeal even though not party to proceedings below: *MA Holdings Ltd v R. George Wimpey UK Ltd* [2008] EWCA Civ 12 (CA, 24/1/08)

Facts: MA Holdings Ltd (MA) owned a site that was allocated for residential development in the Local Plan. Wimpey owned unallocated land to the north.

Wimpey applied to the Court under s.287 of the Town and Country Planning Act 1990 to quash the allocation of MA's site and another site. MA was not served with the proceedings and did not apply to be joined as a party, but was aware at all material times of Wimpey's application. The Council defended the proceedings but the allocation of both sites in the Plan was quashed.

The Council decided not to appeal, but MA decided that it wished to do so and served notice of appeal with detailed grounds.

Main issue: Did the Court have jurisdiction to hear MA's appeal, given that it was not a party to, and took no part in, the proceedings below?

Outcome: Yes. The definition of "appellant" in the Civil Procedure Rules, r.52.1(3)(d), as "a person who brings or seeks to bring an appeal" should be given its plain and ordinary meaning, and did not require an appellant to be a party to the proceedings in the lower court.

MA, like all intending appellants in such cases, required permission to appeal. The Court of Appeal found that, in the circumstances, MA could not be criticised for not applying for permission to appeal in the court below, nor for waiting to see whether the Council intended to seek permission to appeal. It also found that it was irrelevant to the exercise of the Court's discretion (whether to give MA permission to appeal) that it was unlikely that MA would have succeeded in an application to be made a party to the proceedings below.

Practical implications: It is perhaps surprising that the Court of Appeal gave such a clear indication that, in its view, MA would not have been likely to have been joined as a party to the proceedings in the court below, on the basis that "the interests of MA and the Council were in all material respects the same".[14] The lower risk option for a developer whose site allocation is under legal challenge must surely remain to apply to be joined, but not necessarily to participate in the hearing.

[13] [45]
[14] [28]

Application of Green Belt policy in gypsy cases: *R. (on the application of Wychavon DC) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692 (CA, June 23, 2008)

Facts: Temporary planning permission had been granted on appeal for the continued stationing of a mobile home and a touring caravan on a site in the Green Belt in Worcestershire. The judge had quashed the decision on the basis that the Inspector had misinterpreted Green Belt policy as set out in PPG2. The development was ''inappropriate'' in the Green Belt, so that very special circumstances had to be shown in order to justify it.

Also relevant was Circular 01/2006, relating to the provision of sites for gypsies and travellers. Paragraph 49 of the Circular advised that PPG2 applies equally to applications for planning permission for gypsies and travellers, and that alternatives should be explored before Green Belt locations are considered.

The Inspector had found that the proposal would materially encroach on the Green Belt, that there would be some loss of openness and so some harm to the purpose of Green Belt policy, as well as harm to the area's rural character and mostly unspoiled appearance. He also found that there was a significant general unmet need for additional gypsy sites in the area, and a lack of alternative sites available to the applicant family.

Having given ''substantial weight'' to the harm to the Green Belt, the Inspector concluded that (i) the need for more gypsy sites and (ii) the lack of alternatives did not themselves constitute very special circumstances. However, he added to these considerations (iii) the fact that the Council intended to address the need for gypsy sites in their forthcoming (joint) Core Strategy, and concluded that very special circumstances existed such as to justify the grant of a temporary (five-year) planning permission.

Main issue: Was the judge right to find that the three factors which together the Inspector had found amounted to very special circumstances were not in fact ''very special'' but merely ''commonplace''?

Outcome: No. The word ''special'' in para.3.2 of PPG2 was not simply the converse of ''commonplace'', but connoted that a qualitative judgment had to be made as to the weight to be given to particular factors. Gypsies enjoyed a special position under planning policy, and this was reflected in Circular 01/2006. Thus, the loss of a gypsy family's home, with no immediate prospect of replacement, was capable in law of being regarded as a ''very special'' factor for the purposes of PPG2.

Carnwath L.J. distinguished between the judgment that had to be made by the decision-maker at the general level and at the particular level. The general level relates to the value society attaches to the protection of the homes of gypsies as individuals—which is a matter that ought to be addressed in terms by national policy guidance, but is not—as against the public value represented by the protection of the Green Belt.

The Court also disapproved the two-stage test suggested by Sullivan J. in the Chelmsford case[15] in favour of the formulation used by the same judge in *Doncaster MBC v SSETR*[16]: that is, whether harm by reason of inappropriateness and any further harm to openness and Green Belt purposes was

[15] *R. (on the application of Chelmsford BC) v First Secretary of State* [2004] 2 P. & C.R. 677 at [58]
[16] [2002] J.P.L. 1509 at [70]

clearly outweighed by factors amounting to very special circumstances justifying an exception to Green Belt policy.

Practical implications: Any circumstance, or combination of circumstances, is capable of amounting to very special circumstances such as to justify inappropriate development in the Green Belt. That includes the personal circumstances of the applicant. Thus a decision maker, provided he follows the approach indicated in the Doncaster case, ought to be able to justify the outcome that he thinks is the ''right'' (or fair) one.

Compliance by gypsies with enforcement notices: *Sevenoaks DC v Harber* [2008] EWHC 708 (Admin) (Divisional Court, April 3, 2008)

Facts: In January 2005, an enforcement notice was served by the Council alleging a breach of planning control by making a material change of use of land from agriculture to use as a residential caravan site. The notice required cessation of the use, the removal of the caravans and associated hard standings and structures, and the reinstatement of the land to its former condition.

The landowner appealed on grounds (a) and (g) (that planning permission should be granted, or that the time for compliance with the notice should be extended). The ground (a) appeal was dismissed, but the time for compliance was extended to March 27, 2007.

The landowner, who is a gypsy, failed to comply with the notice, and the Council charged him with an offence under s.179 of the Town and Country Planning Act 1990. The offence was failure to take the first of the steps required by the notice (namely, to cease the use). He relied on the statutory defence under s.179(3), namely that he had done everything he could reasonably be expected to do to secure compliance with the notice. He argued that there were insufficient gypsy sites in the area, and that he had no direct access to a road from his land so he had asked his neighbours if they would agree to his moving his caravan across their land, but they had refused. This meant that he would have to dismantle the caravan in order to be able to move it. He said he was in these circumstances not able to cease the use because there was nowhere else for his children to sleep.

The justices had found the landowner not guilty because the statutory defence had been made out.

Main issue: On those facts, was it open to the justices to find that the landowner had done all he reasonably could to comply with the notice?

Outcome: No. The Court applied the decision in *R. v Beard*,[17] that before a defence could arise under s.179(3) the landowner had to show that compliance with the notice was not within his own unaided powers. The question is whether he himself has the resources and the ability to comply with the notice, without the assistance of others.

Keene L.J., who gave the judgment of the Court, did not accept the landowner's argument that the effect of ECHR art.8 was that it would be unreasonable and disproportionate, on the facts, to require the landowner to comply with the notice. That was because (as had been decided in Beard) the considerations which are relevant to proportionality are allowed for in the legislative scheme relating to the enforcement of planning control. The concept of proportionality is taken into account when the local planning authority decides whether, in its discretion, to issue an enforcement notice, and then again if there is an appeal. It does not therefore need to be taken into account at the next stage of criminal prosecution.

[17] [1997] 1 P.L.R. 64 (CA)

Thus, s.179(3) ''is concerned with [the landowner's] ability to comply, not with wider issues of hardship or the reasonableness of compliance''.[18] The Court thus found that the justices had erred in regarding it as unreasonable to require the landowner to comply with the first step required by the notice by ceasing to live in the caravan, even though he could have so complied, on the grounds that he had no other home to go to. Hardship was not relevant: ''He patently could have ceased living in the mobile home and required no-one else's assistance to achieve that end''.[19]

Equally, had the charge related to the failure to remove the caravan, the landowner could have done so by dismantling and removing it from the land. The hardship involved in doing so would not be relevant to that either.

Practical implications: It is the responsibility of those who receive an enforcement notice, and their responsibility alone, to comply with it.

Fairness in refusing adjournment where technical issue raised at inquiry: *R. (on the application of Poole) v SSCLG* [2008] EWHC 676 (Admin) (Sullivan J, March 14, 2008)

Facts: Planning permission had been refused for the erection of four houses, contrary to officers' recommendation, on the ground that the proposal constituted over-development that would adversely affect the character and appearance of the site and locality.

The applicant's appeal was dismissed for one reason only, namely the likely effect of the development on one of the trees on the northern boundary of the site, which was a young beech tree subject to a Tree Preservation Order (TPO). The Inspector found that the development of one of the proposed houses ''would represent a continued threat to the protected tree'' because of pressure from the occupiers to have it felled, and that it would not be possible to impose a planning condition which would prevent that conflict.

The Council failed to serve a Statement of Case, but its planning witness's proof of evidence expressed the view that the tree in question had ''the capacity to grow considerably and therefore would have an impact on the proposed dwelling and may in time result in the tree having to be felled. . . . This is another indication of the cramped nature of the development.'' The appellant's witness said that all the TPO-protected trees would be retained.

Before the inquiry the Council and the appellant agreed a Statement of Common Ground (SoCG), in which it was stated that the majority of the TPO-protected trees could be retained, and that the loss of any such trees could be mitigated by re-planting secured via planning condition. The appellant had understood from discussions preceding agreement of the SoCG that the Council had agreed that all the trees shown on the application plans as being retained could be retained, including therefore the tree in question.

At the start of the inquiry, the Inspector asked for confirmation of which protected trees would be felled. The Council's witness then gave evidence on a number of matters not included in her proof of evidence, suggesting in the course of this that, whilst the SoCG covered the Council's major concerns, there were ''still issues . . . about [the] TPO beech''.

This situation led the appellant to ask for an adjournment of the inquiry on the grounds that time was needed to respond to the new matters raised in the Council's evidence, through expert aboricultural

[18] Keene L.J. at [31]
[19] Keene L.J. at [32]

evidence. The appellant said that, in effect, the Council was resiling from what was said in the SoCG about the protected beech tree.

The Inspector refused the request for an adjournment on the basis that the matter of the tree was not a new issue as it had been covered in the appellant's planning witness's proof of evidence. In the event, following cross-examination, it had become clear that the Council's witness accepted that the tree could be adequately protected through the imposition of a planning condition, as had been agreed in the SoCG.

The appellant's witness was then cross-examined, and he asserted that the tree could be trimmed back as required. The Inspector also asked him a question about this, in response to which he said that the roots of the tree would not be damaged.

The Inspector submitted a witness statement to the Court in which she explained what had happened at the inquiry and said that she was entitled to disagree with what had been said by both sides' witnesses.

Main issue: Should the Inspector have allowed an adjournment, in order to give to the appellant ''an adequate opportunity of considering [a] fresh matter''?[20]

Outcome: Yes. Sullivan J. said that the central question was whether the Council's witness had said anything new in her evidence about the tree. The reason for refusal had not suggested that the survival of the tree was an issue that the applicant needed to address, and (in the absence of a Statement of Case) this remained so until the Council's evidence was received. The appellant had then ''addressed the issue in an entirely reasonable way'' by agreeing an SoCG. The appellant's understanding of the Council's position in relation to the tree had moreover been confirmed as correct through cross-examination.

Therefore, whilst the Inspector was entitled to use her expertise to form her own judgment,[21] and indeed to reach the conclusions that she did, the question whether the appellant had been given a fair opportunity to comment had to be judged in the context of the emphasis in the Rules and in Circular 05/00 on encouraging the parties to focus their evidence and submission on matters that are in dispute. Thus, if one party reasonably believes that an issue has been resolved through the SoCG, it may be unfair to allow that issue to be reopened without giving the relevant party the opportunity to address it, if necessary by calling expert evidence from a witness who has not submitted a proof of evidence. This may require an adjournment to be granted.

Importantly, the judge saw the issue as being a technical rather than an aesthetic one. Therefore, if the SoCG was to be departed from, then the appellant ''should have been given a reasonable opportunity to call the kind of arboricultural evidence that it would have called if it had known this matter continued to be in issue prior to the inquiry''.[22]

Practical implications: Appellants should take every possible step to clarify, in advance of the inquiry, whether technical matters are in dispute with the planning authority. If in doubt, ask. Difficulties can still of course arise if the authority changes its position, or if third parties raise technical issues which were not anticipated. In that event, if an adjournment is needed in order to

[20] Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, r.16(10)
[21] See *Westminster Renslade Ltd v SSE* [1983] J.P.L. 454
[22] [47]

prepare evidence to deal with these, it may be as well to have a copy of this decision to help persuade the Inspector that fairness requires this to be allowed.

Fairness and common sense in the interpretation of a minerals planning permission: *R. (on the application of Bleaklow Industries Ltd) v Secretary of State* [2008] EWHC 606 (Admin) (Sullivan J., 7/3/08)

Facts: In May 2005 an enforcement notice was issued alleging a breach of planning control comprising ''the winning and working of limestone other than in accordance with Planning Permission 1898/9/69''. That permission had been granted in 1952 by the Minister for Housing and Local Government, and was for ''the winning and working of fluorspar and barytes . . . and any other minerals which are won in the course of working these minerals''.

The mineral operator contended that limestone was being won and worked for the purpose, or as a consequence, of winning and working fluorspar, in accordance with the permission; the minerals authority said it was being worked for its own sake.

The claimant appealed against the enforcement notice and the notice was upheld. The Inspector decided that the phrase ''in the course of'' in the 1952 permission meant that the winning and working of fluorspar had to be the ''predominant or primary'' activity, that the working of limestone had to be secondary, and that it was ''the relative scale of the minerals worked which is determined by the terms of the permission''. He considered that the economics of working the minerals was not of direct relevance to the interpretation of the permission, and rejected the argument that substantial amounts of limestone could be worked if this was required for practical reasons. He concluded that if the ratio of limestone to fluorspar and barytes was above 2:1 then ''the operations will not be within [the] terms'' of the permission.

At the conclusion of the appellant's closing submissions, the Inspector had raised a question in very general terms about the ''general ratio of limestone to fluorspar'' and its relevance to the question whether limestone extraction was ''in the course of working'' fluorspar. However, neither he nor any of the parties at the inquiry had raised the possibility of interpreting the permission by reference to a fixed ratio of limestone to fluorspar. It was in fact clear from the evidence before the inquiry that the application of a 2:1 ratio was a practical impossibility and would thus have the effect of negating the benefit of the permission entirely.

Main issue: Had the Inspector acted unfairly in failing to give the appellant the opportunity to call evidence in relation to a ratio-based approach?

Outcome: Yes. The Inspector had entirely failed to engage with the implications of undisputed geological evidence that a fixed ratio approach would not be practical. In particular, to impose a ratio of 2:1 was manifestly unreasonable.

Whilst the judge agreed with the Inspector that the winning and working of fluorspar must be the ''primary'' activity under the permission, and that the winning and working of limestone the ''subordinate or secondary'' operation, he did not agree that it followed that this would be reflected in the proportions of the minerals worked. The purpose of the permission was to enable fluorspar to be won and worked, not to limit the amount of limestone that could be won and worked: thus the permission allowed the removal of as much or as little limestone as was reasonably necessary in order to win and work the fluorspar. The operator was entitled to take into account economics, practicality and safety in deciding, within the bounds of reasonableness, how to win and work the fluorspar under the permission.

One of a number of secondary issues in the case concerned the contention by the minerals planning authority at the inquiry that, whilst as much limestone could be won as was necessary in order to get at the fluorspar, it then had to be disposed of as waste because the terms of the permission meant that it could not be worked in the sense of being exploited for its own sake. This, unsurprisingly, was rejected as untenable.

Practical implications: Planning permissions need to be interpreted in a commonsense way. The Inspector's introduction, without the matter having been raised or discussed at the inquiry, of a ratio-based approach to the interpretation of the permission, was frankly bizarre. Regrettably for the parties, the result of the quashing of the decision is that a fresh inquiry (the first one lasted 10 days) must be held. However, it is important to note that permission to appeal to the Court of Appeal has now been granted.

Inspector's inquisitorial duty at informal hearing: *Francis v First Secretary of State* [2008] EWCA Civ 890 (CA, 11/6/08)

Facts: The claimant had been granted planning permission to use the ground floor of premises in a conservation area as a tea room and coffee shop, subject to a condition that no cooking could take place on the premises at any time. An application to remove the condition was refused on the grounds of the impact on the neighbourhood due to the resulting increase in odours, noise and general activity in the area.

As part of the application, the claimant had proposed the installation of a high-level ventilation duct, but the Council considered that this would harm the ''visual and acoustic amenities'' of the area. Therefore, as part of its appeal submission, the claimant proposed instead a low-level system, which was approved by the Council's environmental health department.

The claimant's appeal was conducted by way of an informal hearing. The Inspector dismissed the appeal on the basis that a high-level ventilation duct was needed, but that without a firm proposal for this it was not possible properly to assess the effect on the conservation area.

The basis of the claimant's challenge was that the Inspector had failed to perform the inquisitorial role expected of him at an informal hearing. In particular, he had unfairly failed to identify the question of the suitability of the proposed ventilation system as one of the main issues that he identified at the start of the hearing, in accordance with his duty under r.11(5) of the Town and Country Planning (Inquiries Procedure) Rules 2000. The claimant's perception, and that of her professional advisor, had been that that issue of whether or not a high-level extraction duct was required had fallen away, so they had not addressed it but had instead directed their evidence to the alternative low-level system.

The claim was dismissed by the High Court, and the claimant appealed.

Main issue: Had the Inspector been under an obligation to raise the question of the need for a high-level ventilation system at the hearing, given that this was central to his reasoning which led to the appeal being dismissed?

Outcome: No. The Inspector's inquisitorial duty did not extend to having to ''root out the case which the appellant has singularly . . . failed to put'', particularly where (as here) the appellant is professionally represented. The appellant's representative ought to have appreciated that the need for a high-level duct remained an issue, and it was therefore incumbent on the appellant to address this. Contrasting the position in *Castleford Homes Ltd v Secretary of State for the Environment, Transport and*

the Regions,[23] Pill L.J. found that the Inspector was entitled to assume that the appellant knew of the issue in relation to the high-level duct, and to conclude that the appellant had decided, on advice, to ''stake all on the adequacy of the low level system''.

The Court concluded that an Inspector's inquisitorial duty at an informal hearing ''does not relieve an appellant of the responsibility of preparing and setting out a case which can form the basis of the discussion'' at the hearing.

Practical implications: Although at first blush it may seem harsh that the Inspector's decision turned on an issue that was not raised or discussed at the hearing, namely the need for and impact of a high-level ventilation duct, on the facts of the case both the judge at first instance and the Court of Appeal found that the appellant should have appreciated that this remained a live issue, and therefore should have addressed it through relevant evidence. Keene L.J. commented that, had the appellant not been professionally represented, there would have been a ''stronger argument'' for the Inspector to have played a more interventionist role. Nevertheless, the decision serves to underline the importance of identifying relevant issues in advance of a hearing or inquiry and ensuring that they are addressed by appropriate evidence.

Correct approach to designation of conservation areas: *R. (on the application of Arndale Properties Ltd) v Worcester CC* [2008] EWHC 678 (Admin) (Sullivan J., March 13, 2008)

Facts: This was a legal challenge to a conservation area designation. The original designation was made in July 2006, and then it was re-designated (owing to an admitted error) in November 2006. The area so designated included a cricket pavilion at the Claimant's sports ground, which was the original ground of Worcestershire County Cricket Club (WCCC). The pavilion was already the subject of some protection as a building of local interest in the Worcester Local Plan.

The pavilion was in poor condition and would have cost £140,000 to repair. The claimant served notice of demolition under s.80 of the Building Act 1984, in response to which the Council asked the Secretary of State to list it. English Heritage thought that the building was not worthy of listing, and the Secretary of State accordingly declined the Council's request.

The claimant had made a planning application for residential development which had been refused and appealed. The application did not include any proposals for the pavilion, and at the inquiry into the appeal the claimant indicated that, once some nesting birds in the roof had flown the nest, the pavilion would be demolished.

One week after the close of the inquiry, the Council's Planning Committee was asked to consider an urgent item of business, namely the designation of a new conservation area that included the pavilion. The special architectural and historic interest of the area was summarised in the officer's report, in which reference was made to the fact that the area included ''the original cricket ground of [WCCC] and its original pavilion''. The report also stated that: ''Whilst the justification for the designation of this area is clear, the timing has obviously been brought forward by the recent events''. The report was unaccompanied by any background papers.

The conservation area was designated with immediate effect. The letter notifying the claimant of the designation pointed out that the demolition of the pavilion without the prior grant of conservation area consent would be a criminal offence.

[23] [2001] EWHC Admin 77 (Dyson J.)

When the claimant asked for an explanation of the basis of the designation, the Council responded that it was based on the information provided at the public inquiry, ''not least'' the evidence of the claimant's own conservation witness. In fact the only material in that evidence relevant to the pavilion was some historic maps.

The Council had accidentally included some land in the conservation area that lay outside its administrative boundaries. This however was later rectified through the re-designation in November.

The witness statement from the Council's planning officer admitted that the ''initial impetus'' for considering the designation of a conservation area had been his desire to retain the pavilion. However, he said that he had gone on to apply the advice in PPG15 to see whether proper justification in fact existed. He also said that it had not been appropriate to consult local residents, businesses and other interests, which PPG15 said was ''highly desirable'', because this might have increased the risk that the pavilion would be demolished, and because there would be extensive consultation when the conservation area appraisal was subsequently prepared.

Main issue: Had the power to designate conservation areas been used for an improper purpose, namely to prevent the demolition of the pavilion?

Outcome: Yes. Looking at the totality of the evidence, Sullivan J. rejected the planning officer's evidence that his desire to retain the pavilion was only the initial impetus for considering the designation of the conservation area; it was in fact the sole impetus, and the designation was merely a pretext to prevent the demolition taking place. The judge thought it significant that the officer's own evidence to the planning inquiry had not suggested that the area might be worthy of designation as a conservation area.

In the first place, the judge took account of the fact that the planning officer in his witness statement had effectively resiled from the letter in which he had relied, as part of the justification for the designation, on the evidence of the claimant's witness at the planning inquiry, on which indeed the designation could not rationally have been based.

Sullivan J. also considered that the fact that:

(ix) the designation was considered as a matter of urgency;
(x) the report itself was ''manifestly inadequate'' if the Council's focus really was (as was claimed) on identifying an area of special architectural or historic interest the character or appearance of which it was desirable to preserve or enhance;
(xi) the letter giving notification of the designation repeatedly emphasised that the demolition of the pavilion must not take place; and
(xii) there had been a complete absence of any consultation,

collectively demonstrated that the Council's real focus was not on the special interest of the area but on the desire to prevent the demolition of the pavilion.

The judge also found that the officer's report had entirely failed to include sufficient information on the basis of which any reasonable planning authority could sensibly conclude that the area possessed special historic and architectural interest, or what the character or appearance of the area might be that it was desirable to preserve or enhance.

Practical implications: The decision confirms that it is wholly improper for a local planning authority to designate a conservation area on the basis that it wishes to preserve a particular building

or buildings. It must identify, following a thorough assessment, the special historic or architectural interest of the area in question, and also what the character or appearance of that area is which it is desirable to preserve or enhance. The fact that there are buildings of historic or architectural interest in the area may contribute to the area's special interest, but the fact that these could not be demolished without consent following designation is not itself material to the decision whether or not to designate.

Alteration to general extent of Green Belt in UDP: *R. (on the application of Satnam Millennium Ltd) v Warrington BC* [2007] EWHC 2648 (Admin) (Sullivan J., 26/10/07)

Facts: The claimant owned part of a site of some 58.5 hectares known as Peel Hall, immediately to the north of Warrington. The general extent of the North Cheshire Green Belt had first been defined in the 1979 Cheshire Structure Plan, and then again in the Cheshire Replacement Structure Plan (approved in 1992). The Key Diagram's ''broad depiction'' of the Green Belt showed it as being to the north of the M62. Warrington, and Peel Hall, lie to the south. The Secretary of State's approval letter stated that there was to be ''no change to the overall extent of the Green Belt''.

Peel Hall had been included in the draft Warrington Borough Local Plan as an Area of Search to accommodate future development needs. The Local Plan Inspector concluded that it should not be included in the Green Belt, on the basis that its proximity to existing housing development and to the motorway meant that it lacked true countryside character, and that the M62 ''provided the most logical and defensible boundary for the Green Belt hereabouts''. The Local Plan was never adopted because of the designation of Warrington as a unitary authority in 1998.

Prior to the publication of the first Deposit Draft of the Unitary Development Plan (UDP) in June 2001, application had been made for planning permission for a healthcare development on part of Peel Hall. The Council refused planning permission on the grounds (inter alia) that the site should be treated as Green Belt pending the adoption of the UDP, but later changed its position on the basis that the site was plainly excluded from the general extent of the Green Belt as defined in the Structure Plan because it lay to the south of the M62.

In the 2001 Deposit Draft UDP, Peel Hall was excluded from the Green Belt, the southern boundary of which ran along the M62, as anticipated by the Structure Plan; and it was one of 20 areas of land that were designated as ''safeguarded land'', which made provision for Warrington's development needs beyond 2016.

Revised regional planning guidance, in the form of RPG13, was then published in its final form in March 2003. This reduced significantly the rate of housing development in Warrington previously required by the Structure Plan, and focussed growth instead on Liverpool and Manchester/Salford. For Warrington, the emphasis was to be on regenerating and restructuring the older urban areas, and ''not allowing further significant outward expansion of the settlement on to open land beyond existing commitments''.[24]

As a result of this, in the Revised Deposit Draft UDP Peel Hall, along with all of the other Areas of Search, were included in the Green Belt. At the UDP inquiry, the Council's witness had explained that the Council had placed ''a great deal of weight'' on the (then) emerging regional guidance, and that the Areas of Search were no longer needed in order to meet post-2016 housing requirements.

[24] RPG13 policy SD2

Nowhere in the UDP was it expressly stated that the new RPG13 had led the Council to alter the strategic extent of the Green Belt.

The claimant objected to the inclusion of its land in the Green Belt, and appeared at the UDP inquiry to promote its objection. It argued that there had been an alteration to the general extent of the Green Belt, and therefore that it was necessary for the Council to justify the alteration on the basis of exceptional circumstances. The Inspector concluded that:

(xiii) there was no need to safeguard the site for possible future development;
(xiv) the exclusion of the site from the Green Belt did not constitute a change to the general extent of the Green Belt as defined in the Structure Plan;
(xv) the site fulfilled a Green Belt purpose, namely assisting in urban regeneration.

The Inspector concluded accordingly that Peel Hall had properly been included in the Green Belt.

Main issue: In including Peel Hall in the Green Belt, had the Council been making an alteration to the general extent of the Green Belt, in respect of which therefore exceptional circumstances had to be shown, in accordance with para.2.6 of PPG2?

Outcome: Yes. Whilst the general extent of the Green Belt may be fixed with greater or less precision depending on the particular content of the relevant text and Key Diagram, in this case the only reasonable interpretation of this particular Key Diagram was that, to the north of Warrington, the Green Belt was shown as extending to the M62 as its southern boundary. That boundary was precise and unambiguous, and had previously been treated as such by the Council. It followed that, by excluding the Claimant's land from the Green Belt, the general extent of the Green Belt had been altered. The Council had not sought to argue that the changes in regional policy introduced by RPG13 amounted to exceptional circumstances.

Practical implications: All 20 landowners whose land had previously been included in the UDP, along with Peel Hall, as land which was safeguarded to meet possible future development needs, objected to the subsequent inclusion of their land within the Green Belt; but only the claimant had argued that what the Council had done amounted to an alteration to the general extent of the Green Belt as fixed by the Structure Plan, and only the claimant had challenged the adoption of the UDP. The result was that the UDP Proposals Map was quashed only insofar as it included the claimant's land, resulting in (as the judge commented) an anomalous boundary to the Green Belt in this area. Clearly the other landowners would have been well advised to have made their own challenges to the UDP adoption.

In the event, that anomaly seems likely to lead to uncertainty about the status of all of the land in the area to the south of the M62. The Council may perhaps try to rely on exceptional circumstances to put Peel Hall back into the Green Belt as part of its Local Development Framework process, and the other landowners may attempt on the same basis to have their land taken out.

The judge gave the Council permission to appeal but this has not been pursued.

Application of "materially larger" test to development on Metropolitan Open Land: *R. (Heath & Hampstead Society) v Camden LBC* [2008] EWCA Civ 193 (CA, 19/3/08)

Facts: Planning permission was granted by Camden Council for the demolition of an existing house and its replacement by a substantially larger one. It would be no higher than the existing one, but would be well over twice as large in terms of floor space, volume and footprint.

The site was on land designated as Metropolitan Open Land (MOL), where the policy approach was the same as for Green Belt land, as set out in PPG2. Paragraph 3.4 defines appropriate development in the Green Belt as including the ''limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below)''. Paragraph 3.6 advises that:

> ''Provided that it does not result in disproportionate additions over and above the size of the original building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces.''

The Council officer had advised members that the new house was not ''materially larger'' than the existing one. Her reasoning was that:

(xvi) the replacement of the house raised no land use policy issues;
(xvii) whilst the size and bulk of the front elevation would be greater when viewed from Hampstead pond, the basement and part of the ground floor would not be visible and there would as a result be no ''serious harm'' to views from the fringes of the Heath or its setting;
(xviii) most of the increased bulk would be at the rear of the site, and hence ''not visible from the public realm'';
(xix) there would be ''[no] material loss in garden space'';
(xx) whilst the larger footprint meant that there would be a ''minor decrease in the area designated MOL'', the contribution that the garden made to the MOL as a whole would not change.

She concluded, on that basis, that the development would ''only have a minimal impact on the character and setting of the MOL'' and would ''not harm the integrity of the MOL''.

Main issue: Does the ''materially larger'' test import (i) (solely or primarily) a simple comparison of the size of the existing and proposed buildings, or (ii) a broader planning judgment as to whether the new building would have a materially greater impact than the existing one on the interests which MOL policy is designed to protect?

Outcome: The judge had taken the view that the test was ''primarily an objective one by reference to size''. The Court of Appeal agreed. The context for the ''materially larger'' test in para.3.6 of PPG2 was that of categorisation of development that is either appropriate or inappropriate, rather than individual assessment. The emphasis in the test was therefore on relative size, not relative visual impact. This was reinforced by the use of the word ''limited'' in relation to extensions and alterations in the same paragraph, and the emphasis given to the word ''original'' where reference is made to the size of ''the original building'', signifying how tightly the policy was intended to be drawn. The concept of ''[dis]proportiona[lity]'' was also clearly related to relative size.

Thus, the general intention of the policy in para.3.6 of PPG2 was that the new building should be similar in scale to that which it replaces. Whilst the word ''materially'' gave some scope for flexibility and the exercise of planning judgment and common sense, in a case where the increase in size was small but the effect was insignificant in planning terms, this did not justify stretching that word to produce a different, broader test. The Council could not therefore have reasonably concluded that a building that was more than twice as large as the original was ''not materially larger''.

Practical implications: A replacement dwelling in the Green Belt, or on MOL, that is more than minimally larger in terms of its floor area, volume and/or footprint will be treated as inappropriate development. Planning permission can only be granted therefore where there are very special circumstances justifying it.

Postscript: In the course of his judgment, Carnwath L.J. referred to and followed the approach to the interpretation of policy set out in the decision of the Court of Appeal in *R. v Derbyshire CC Ex p. Woods*,[25] namely:

> ''If the decision maker attaches a meaning to the words [of a policy] they are not properly capable of bearing, then it will have made an error of law . . .''

In *R. (Raissi) v Secretary of State for the Home Department*,[26] however, the Court of Appeal expressed some doubt about the correctness of this approach. In that case, the appellant had been arrested on September 21, 2001 on suspicion of having been involved with the attacks on the World Trade Centre. He was publicly labelled a terrorist, which had had a devastating effect on his life and his health. He made a claim against the Home Secretary under an ex gratia compensation scheme for those who were acquitted at trial, whose convictions were quashed on appeal, or who were granted royal pardons. One of the issues in that case was how policy statements such as the ex gratia payment scheme should be interpreted.[27]

In the course of its judgment, the Court commented that in planning cases the courts had ''tended to ask only whether the meaning attributed to the words of the policy was a reasonable one'', but that even in these cases the courts had not been unanimous. The Court said it had ''some difficulty'' with the reasonable meaning approach, and went on to decide itself what the scheme that was the subject of the policy statement in that case meant.

Grant of planning permission by mistake where need for s.106 agreement overlooked: *R. (on the application of Carroll) v South Somerset DC* [2008] EWHC 104 (Admin) (Collins J., 14/1/08)

Facts: An application for planning permission was made in March 2006 for residential development on a Greenfield site on which a number of previous applications had been refused. The application was contentious, and it was therefore decided to put it before the relevant Committee for decision. The Head of Development and Building Control had delegated authority to enter into s.106 agreements on behalf of the Council.

In September 2006, contrary to the officer's recommendation, members resolved to grant planning permission subject to a number of conditions, and subject to the conclusion of a s.106 agreement covering the phasing of the development, off-site highway works, affordable housing, education contributions, and an open space and landscape management plan.

The application was referred to the Secretary of State, who decided that she did not wish to call it in for her own decision. The Head of Development and Building Control was accordingly notified by the officer responsible for the application that the permission could be issued. Unfortunately

[25] [1997] J.P.L. 958
[26] [2008] EWCA Civ 72 (CA, 14/2/08)
[27] [107]–[123]

that officer had overlooked the requirement for the s.106 agreement. The permission was therefore granted, on November 21, 2006, before the agreement had been entered into.

On March 30, 2007 the Council wrote to the applicant for planning permission informing them of the mistake. On May 4, the Council's solicitor asked the applicant and landowner to agree that the purported permission was of no effect, and suggested that the Council could issue proceedings to quash the permission and the parties could enter into an appropriate consent order.

The landowner was not surprisingly less than enthusiastic about this course of action. In short, its response was that the permission was valid, that there was no question of entering into a s.106 agreement, but that the landowners wanted to ''ensure that any concerns you have are addressed''. Its position subsequently softened in that it indicated a willingness to negotiate appropriate s.106 obligations, but the Council decided to make a claim for judicial review. The claim was in fact made by the leader of the Council and was lodged in early July 2007.

Main issue: Was planning permission granted without proper authority, on the grounds that the officer had made a mistake in issuing the permission before a s.106 agreement had been entered into?

Outcome: Yes. The only sensible construction of the Council's resolution to grant permission ''subject to the applicant entering into a section 106 agreement'' was that the agreement had to be in place before the permission was granted. Furthermore, the Council had acted quite properly in commencing proceedings to have the permission quashed even though the landowner had offered to enter into negotiations, following the grant of permission, with a view to concluding a s.106 agreement. Furthermore, the landowner had not suffered any prejudice because ''they were the recipients of an unlawful planning permission and therefore they had nothing on which they could properly rely''.

Practical implications: This is another example of a case where a local authority has effectively applied to quash one of its own decisions. The quashing of the permission was inevitable, once the judge had decided that the Council's decision had been to grant permission only after a s.106 agreement had been concluded.

Collins J. also complained strongly (as he has done on other occasions) about the excessive amount of paper in the court bundles, and urged parties to put in relevant extracts from documents rather than the whole document. He commented that ''planners are often rather bad at this . . . because it is easier . . . [to] shove everything in''.

Relevance of viability to affordable housing targets in Core Strategy housing policy: *Persimmon Homes (North East) Ltd v Blyth Valley BC* [2008] EWCA Civ 861 (CA, 29/7/08)

Facts: Policy H4 of the Council's draft Core Strategy, which was submitted to the Secretary of State on April 28, 2006, required at least 30 per cent affordable housing to be provided as a proportion of all new housing developments in the borough. The site size threshold was set at 10 dwellings.

The Core Strategy Submission Draft Technical Paper explained how this target had been set. The third option (30 per cent affordable) was chosen on the basis that it was ''considered to be a more realistic target in recognition of site viability issues''. This was based on an independent Housing Needs Study, published in 2004, that had been commissioned by the Council.

A revised version of PPS3 was published on November 29, 2006. This included a revised definition of affordable housing which excluded low cost market housing, and required a local planning

authority's plan-wide target for the amount of affordable housing to reflect an informed assessment of the economic viability of the proposed target.[28]

The Council submitted to the Inspector who held the examination into the Core Strategy a document entitled ''PPS3 Compliance Statement'' which made no reference to the requirement in para.29 of PPS3 for an informed assessment of the economic viability of proportions of affordable housing, but stated that the Core Strategy complied with PPS3 because ''it sets a borough-wide target for the provision of affordable housing based on an up-to-date assessment of local need''.

A number of house builders appeared at the examination, and objected to the borough-wide affordable housing target on the basis that it had been arbitrarily selected, lacked a credible and robust evidence base, and failed to comply with PPS3.

The Inspector concluded that the Core Strategy did accord with PPS3, on the basis that although a target of 30 per cent affordable housing would only satisfy part of the significant affordable housing need in the borough, it was consistent with the target in a neighbouring local authority, which was within the same market housing area; and that, since 40 per cent would not be viable and 10 per cent would not adequately address the significant need, ''a 30 per cent target is the most appropriate option''.

Main issue: Was it open to the Inspector, on the evidence before him, to find that policy H4 complied with PPS3, and was consequently ''sound'' within the meaning of s.20(5)(b) of the Planning and Compulsory Purchase Act 2004 and PPS12?

Outcome: No. Keene L.J. found that the need for an informed assessment of the viability of any plan-wide percentage figure for affordable housing is a ''central feature of the PPS3 policy on affordable housing. It is not peripheral, optional or cosmetic. It is patently a crucial requirement of the policy.'' There had been no assessment of the economic viability of the 30 per cent target figure; it followed that policy H4 was flawed.

The Inspector had not mentioned this requirement in his report, but if he had thought that viability issues could be left to individual planning applications, this was wrong, since para.29 of PPS3 is concerned with the content of development plans. Equally, the 2004 Housing Needs Study could not have met that requirement, since it was carried out before the new PPS3 was published and the change to the definition of affordable housing contained within it, and in particular the exclusion of low cost market housing from that definition.

The Court also found that the 2004 version of PPS12, in which it was stated that ''the presumption will be that the development plan document is sound unless it is shown to be otherwise as a result of evidence considered at the examination'', was misleading, and that the advice given in the 2008 version, which states that ''the starting point for the examination is the assumption that the local authority has submitted what it considers to be a sound plan'', is more appropriate.

Practical implications: Even though individual housing applications may themselves be the subject of economic viability appraisal in connection with the affordable housing element of the development, it is essential for planning authorities, in preparing Development Plan Documents

[28] PPS3 para.29 provides that plan-wide targets for affordable housing ''should . . . reflect an assessment of the likely economic viability of land for housing within the area, taking account of risks to delivery and drawing on informed assessments of the likely levels of finance available for affordable housing including public subsidy and the level of developer contribution that can reasonably be secured''.

(DPDs) that include policies setting affordable housing targets, to undertake an economic viability assessment that follows the approach set out in para.29 of PPS3.

There is also a wider point to note about the way in which local planning authorities, in preparing their emerging DPDs, are expected to take account of revised national (or regional) planning policy that is published after the document in question has been submitted for examination.

As will be observed from the way in which the main issue was characterised, the Court took the view that the Council's Core Strategy would not be ''sound'', and would therefore be unlawful, if it failed to comply with PPS3, in particular the advice about testing affordable housing targets for economic viability. In fact, the revised version of PPS3 was published after the submission of the Core Strategy to the Secretary of State, but (as Keene L.J. observed[29]) the Council neither made the case that there had not been time to carry out an informed economic viability study as required by PPS3, nor did it elect (in accordance with the option presented in the letter that accompanied the publication of PPS3[30]) to ''set out the steps they would be taking to address any issues arising from this PPS through an early plan review''. It elected instead to make the case that the plan complied with the new PPS, which the Court found it did not.

Therefore, had the Council decided to address economic viability matters through an early plan review, it seems unlikely that this challenge would have been necessary, or indeed successful, had it been made.

Interpretation of s.106 agreement: *Southampton CC v Hallyard Ltd* [2008] EWHC 916 (Ch) (Morgan J., 25/2/08)

Facts: Planning obligations had been entered into through a s.106 agreement in relation to a development in Southampton. Barratt Homes was to develop the application site, known as Custom House, and a company called Cindan was to develop a site which it owned in St Mary's Street, Southampton, for affordable housing, using financial contributions from Barratts secured through the provisions of the s.106 agreement. The agreement included obligations on both Barratt and Cindan, and both were identified as persons entering into the relevant obligations, but the agreement failed to state what Cindan's interest in the St Mary's Street site was.

Main issue: Given that the nature of Cindan's interest had not been stated in the agreement, had the requirements of subs.106(9)(c) of the Town and Country Planning Act[31] been complied with?

Outcome: No. The nature of the interest of the person in the relevant land must be expressly stated in the agreement.

The judge commented that, even if the words ''his interest in the land'' in subs.(9)(c) did not require there to be a proprietary interest, the agreement was still defective because it did not expressly state what that interest was. However, he went on to say[32] that his ''reaction to the language of

[29] [30] and [31]

[30] ''The Government wants to move as quickly as possible to a development plan policy framework which reflects this PPS. Local planning authorities . . . should consider the extent to which emerging local development documents . . . can reasonably have regard to the policies in this statement, depending on their state of preparation. As far as is practicable, changes should be made to emerging spatial plans so that they reflect PPS3 policies, but this should not be done at the expense of putting in place an effective policy framework for housing as quickly as possible. Where it is not practicable for changes to emerging plans to be made, local planning authorities . . . should set out the steps they will be taking to address any issues arising from this PPS through an early plan review.''

[31] ''A planning obligation may not be entered into except by an instrument, executed as a deed which (c) identifies the person entering into the obligation and states what his interest in the land is''

[32] [76]

section 106 [was] that it does require that the covenantor in relation to the planning obligation has a proprietary interest in the land''. His main reason for saying this, and for distinguishing the decision of the Court of Appeal in Pennine *Raceway Ltd v Kirklees MBC,*[33] was that the wording of s.106, as amended by the 1991 Act, differs materially from the original wording, and from s.52 of the Town and Country Planning Act 1991, which is what was considered in the Kirklees case. In particular, the judge drew attention to the change from the phrase ''interested in land'' in s.52 to ''interest in land'' in s.106, as amended.

It followed that the obligations imposed on Cindan under the agreement were not planning obligations within s.106; so that s.106(3), which makes a planning obligation enforceable against successors in title, could not be relied on by the Council.

The judge noted that it had not been argued that the requirements of s.106(9) were directory not mandatory, and commented that ''the language of subsection (9) is not a promising start for a submission of that kind''.

There were seven other questions considered by the judge in this case. Probably the secondary issue of the greatest general relevance was whether s.106(1)(d)[34] covered an obligation to repay money to the Council in certain specified circumstances: the Court held that it did.

Practical implications: It appears that the failure to state Cindan's interest in the St Mary's Street site was a simple oversight, but one with major consequences, since Cindan had transferred its freehold interest in that site to another company, and a loan had been advanced to that company which had been secured through a charge on the site. As a result of the Court's decision, however, the obligations in the agreement are not enforceable against either the new site owner or the chargee.

The lesson is therefore a simple one: those responsible for drafting s.106 agreements and undertakings must check that all the matters listed in subs.(9) are stated or identified in the instrument.

Regulatory changes

Finally, the following recent statutory instruments are of particular importance:

(xxi) the Town and Country Planning (Local Development) (England) (Amendment) Regulations 2008,[35] which make changes to the timing of the submission of local development schemes to the Secretary of State and the Mayor of London, and impose new duties in relation to public participation in the preparation of development plan documents and statements of community involvement; and

(xxii) the Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008,[36] which give effect to the decision of the House of Lords in *R. (on the application of Barker) v Bromley LBC*,[37] and which therefore extend the scope of the EIA Regulations to applications for the approval of reserved matters and of other details of a development required by planning condition to be approved before all or part of the development can be begun.

[33] [1983] QB 382

[34] Which provides that a planning obligation may ''requir[e] a sum or sums to be paid to the authority on a specified date or dates or periodically''

[35] SI 2008/1371, which came into force on June 27, 2008

[36] SI 2008/2093, which came into force on September 1, 2008

[37] [2006] UKHL 52