Recent Developments in Planning Case Law

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OVERVIEW

This year’s paper draws attention to a number of diverse topics. They include development plan challenges, due process in decision-making, specific enforcement issues, what constitutes a lawful development certificate, permitted development rights, ransom value and trees. When combined with consideration of the Barker litigation, and, a few other environmental cases one really has rather a mixed bag! They are addressed, for ease of delivery, in alphabetical order 1.

DEVELOPMENT PLAN CHALLENGES

The continuing procedural shortcomings of the development plan challenge process, evidenced in the new section 113(3) of the Planning and Compulsory Purchase Act 2004 were highlighted in Ensign Group Limited v First Secretary of State 2. There, a misreading of the Panel’s report into the Milton Keynes & South Midlands Sub-Regional Strategy had led to a reduction in housing numbers that, in effect, would lead to the loss of the appellants’ specific allocation for 1500 houses. The Court was faced with situation of acknowledged errors on the part of the Secretary of State but with the contention that that quashing of the relevant parts was not in the public interest, as it would create a policy gap. Accordingly, it was contended that the better course was for a “public statement” to be issued stating that errors had been made and how the RSS should be read. However, finding in favour of the appellants, Mr Justice Sullivan considered that it was better for all concerned that the erroneous figures should be quashed than for there to be a potential conflict between the local planning authority's duty under section 24(1) and its duty to have regard to the statement as a material consideration in the formulation of its Local Development Documents, if the Secretary of State considered it appropriate for the resulting policy gap to be filled pending the adoption of replacement policies, by guidance issued under section 19(2(a). He went on to comment that it was most unfortunate that the admitted error in the Strategy could not be remedied by some form of declaratory relief, and, that the

1 The contribution of my fellow presenter, Stephen Tromans to my achievement of a fuller written paper covering all the main topics, despite the overlap between us on planning related “environmental issues”, is particularly appreciated!

2 [2006] EWHC 255 (Admin)
power to quash, in whole or in part, was a blunt instrument, made the more blunt by the fact that a procedural error could not be properly remedied.

In Corus UK Limited v Erewash Borough Council\(^3\) judicial confirmation was provided by the Court of Appeal, upholding last year’s decision by Mr Justice McCombe\(^4\), that the appropriate procedural rules governing an application for an extension of time for an application under section 287 were those contained in CPR rule 3.1. The Court noted that whilst certainty was required in planning matters, and for that reason delay was to be firmly discouraged, it was also the function of the Court to ensure that public authorities acted lawfully and that the public were not artificially deprived of an opportunity to challenge the legality of a public act, which, here, would persist for three years if uncorrected. In all the circumstances it would not be unjust to refuse an extension for two or three days, the claim form having been issued on September 20 but not served until September 23, 2005.

Attention is also drawn to River Thames Society v First Secretary of State\(^5\), in which Mr Justice Underhill permitted a substitution of claimants to a section 288 challenge, holding that the relevant procedural requirement fell within the court’s inherent jurisdiction rather than CPR Part.19 in public law proceedings.

**DUE PROCESS**

In R (Springhall) v Richmond upon Thames LBC\(^6\) the principal issue before the Court of Appeal was the scope of an officer’s delegated powers. The challenge arose from the grant of planning permission to demolish and rebuild a neighbouring single storey dwelling within a conservation area and whether an SPG policy test had been satisfied concerning its retention. The decision is of particular interest in the court’s rejection of the idea that there is, in effect, a presumption against delegation where there is a real issue as to whether the application comes within the terms of the delegated powers as this would require a court to exercise a form of planning

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\(^3\) [2006] EWCA Civ 1175 (permission hearing)

\(^4\) [2005] EWHC 2821 (Admin)

\(^5\) [2006] EWHC 2829 (Admin), 21 September 2006. No transcript but reported by Lawtel

\(^6\) [2006] EWCA Civ 19
judgment. Accordingly, a planning decision made under a scheme of delegation can only be challenged on the standard grounds of judicial review. The judgment also contains a useful restatement of the principles of law applicable to the interpretation of planning policy.\(^7\)

The issue of apparent bias has arisen in three separate decisions. In the first, \(R (Sager House Chelsea Limited ) v First Secretary of State & Kensington & Chelsea RBC\)\(^8\) the charge was made in the context of a High Court challenge of an inspector’s decision refusing planning permission for the residential redevelopment of the site of a redundant electricity transformer station. The inspector had, held, amongst other matters, that the proposed flatted development would cause significant harm to the privacy and sense of enclosure of neighbouring residential properties and to the views from an adjoining conservation area. He stated that he had given significant weight to the relevant planning guidelines which he considered had the status of supplementary planning guidance (SPG) as they generally followed the guidelines in Planning Policy Note PPG12. The judge, Sir Michael Harrison, rejected the contention that such a finding was not perverse as the inspector had stated that they only generally followed PPG12 guidance rather than there had been complete compliance. Nor was the inspector’s decision on the issue of privacy and sense of enclosure perverse nor could it be said that he had failed to have regard to the relevant policies of the UDP or to the expert evidence from the claimant’s surveyor. On the sixth ground of challenge, the judge found that a fair-minded and informed observer, having considered all the facts, would not have concluded that there was a real possibility that the inspector’s decision was infected by bias. On the final seventh ground, it was asserted that it is essential to the fairness, openness and efficiency of the appeal process that an inspector should disclose the time spent preparing for the inquiry or the extent of his understanding of the proposals or his provisional opinion on the key issues so that the parties had a fair opportunity to direct presentation of their cases. It was acknowledged to be a novel ground which would be making new law! Having rejected such requirements as not only requiring widespread consultation, the judge also considered them to be invidious. As he points out in his conclusions, it was evident that the claimant and its experts felt strongly that this was the wrong decision,

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\(^7\) Following \textit{R v Derbyshire County Council, ex parte Woods} [1997] JPL 958 and \textit{Cranage Parish Council v First Secretary of State} [2004] EWHC 2949 (Admin)

\(^8\) [2006] EWHC 1251 (Admin)
and, that their case, in reality, involved rearguing the merits of the case where the issues were, par excellence, issues involving planning judgment.

A similar approach was taken by Mr Justice Newman in the second case, *R (Port Regis School Limited) v North Dorset District Council & Shaftsbury Agricultural Society* ⁹. There, the challenge arose from a proposal that one of the rooms of a pavilion to be erected on a new agricultural showground would be set aside for a use by a Masonic lodge. The allegation of apparent bias arose from the fact that two of the councillors who had attended and voted at the meeting were freemasons. However, although both councillors had declared that they were freemasons in accordance with the LPA’s code of conduct, neither of them had declared an interest as freemasons because they did not consider that their freemasonry gave rise to any prejudicial interest; and at the hearing it transpired, as the judge records, that by the time of the committee meeting the Lodge had withdrawn its interest in the proposal although that fact was unknown to the LPA members present! Although acknowledging that the secrecy said to surround freemasonry undoubtedly gave rise to suspicion and heightened the concept of fraternity could play the judge found that it was of little substance here; for a fair-minded observer of the facts in connection with freemasonry, and, having regard to the circumstances of the instant case, would not have concluded that there was a real possibility of apparent bias affecting the LPA’s decision to grant planning permission. His reasoning includes an analysis of the concept of “mutual assistance” and that it did not require unquestionable support under any circumstances. His reasoning is important for, as he points out, although the case concerned local government, the determination of the principal issue could have implications in many areas of public life. An appeal has been made but has not been heard.

In the third, *National Assembly for Wales v Condron* ¹⁰, the apparent bias issue arose from an alleged remark made in a chance meeting between the Chair of the Planning Decision Committee, Carwyn Jones AM and one of the objectors to a highly controversial opencast mining scheme, Mrs Jennie Jones. The application had received a favourable recommendation from an Inspector and the Assembly’s Committee was to debate the report the following day. Mr

⁹ [2006] EWHC 1373 (Admin); [2006] JPL 1695

¹⁰ [2006] EWCA Civ 1573
Jones was alleged to have said that he was “going to go with the Inspector’s Report”. The Committee then resolved that it was minded to grant the application and permission, the subject of the challenge, was formally issued in due course. Before the Court of Appeal, the view was taken that the attributed words went no further than indicating a predisposition to follow the inspector's report and not a closed mind. It did not matter how the person to whom those words were addressed had interpreted them. The question was whether the fears expressed by the complainant were objectively justified. Accordingly, the Court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision. There was a clear distinction between a legitimate predisposition towards a particular outcome and an illegitimate predetermination of the outcome. The wider context of a chance meeting and a casual remark was also important in assessing the significance of the words used. Having regard to the terms of the inspector's report, the fact that the members of the committee had relevant training and were subject to a code of conduct, and the nature of their discussions, which were unusually prolonged, a fair-minded and informed observer would not conclude that there was a real possibility that Mr Jones, himself, or the Committee as a whole was biased.

In Chichester District Council v First Secretary of State & Green\footnote{[2006] EWHC 1876 (Admin). This decision is to be contrasted with an earlier one by the same judge Winter v First Secretary of State [2006] EWHC 491 (Admin) where the Inspector’s unaccompanied and unannounced visit to view a proposal for an extension of an existing woodland track through an Ancient Wood to join a road was found to be acceptable.} the procedural consideration was a planning inspector’s failure not to make an accompanied site visit where the LPA had argued that a building purportedly designed as an agricultural workshop and feedstore was tantamount to a new dwelling. Before reaching his decision, in favour of the appellant, the inspector had made an unaccompanied visit which had prevented him from being able to view the interior of the building although he had been provide with photographs of the interior and a plan of the ground floor. In his decision letter, granting permission he had recorded his reservations about the functional design but also his acceptance that the building was needed and had been specifically designed for agricultural use; though he imposed a condition requiring that the building should be demolished if it was no longer so used. On the principal issue, the judge, Mr Andrew Nicol QC, concluded that had an accompanied visit taken place then the inspector
might have reached a different conclusion. In order for him to decide the validity of the LPA’s contentions the inspector would or might have been materially assisted by actually going inside the building and thereby getting a first-hand feel for it; and, that whilst plans and photographs could to some extent convey similar information, actually seeing a building could have a more powerful effect in forming a judgment on the issue.

Finally, in *R (Jeeves) v Gravesham Borough Council*\(^{12}\) it was held by Mr Justice Collins that the LPA had erred in law in deciding, under its power contained in section 70A of the 1990 Act, not to determine the claimant Romany gypsies application for planning permission for the use of a caravan on a green belt site. A previous owner had been granted temporary consent for the retention of two caravans on the site. When that consent had expired that owner had unsuccessfully applied for a renewal and had failed on appeal. The LPA had issued an enforcement notice. Thereafter the claimants had acquired ownership of the site and submitted their application. The LPA declined to determine on the basis that this latest application had been submitted within two years form the Secretary of State’s refusal of the previous owner’s appeal and that there had been no significant change since that decision. Granting the application, the judge held that the LPA had failed to take account of the advice in Circular 14/91, which stated that the purpose of section 70A was to prevent repetitive planning applications from being used to wear down the resistance of local communities and that local authorities should use the power only where they believed the applicant was intending to abuse planning procedure by submitting repeat similar applications. Whilst the circular could not override the Act its purpose was to ensure correct implementation. Accordingly, the circular was a material consideration which the LPA had failed properly to take into account and so had, breached the claimants’ legitimate expectation that it would do so.

**ENFORCEMENT**

In *R (O’Brien) & Others v Basildon District Council*\(^{13}\) the claimant gypsies successfully applied for judicial review to quash the LPA’s decisions to take direct action under section 178 of the 1990 Act to enter their plots to secure compliance with various enforcement notices

\(^{12}\) [2006] EWHC  1249 (Admin)
requiring the removal of caravans, ancillary vehicles and various materials from land within the green belt. At the hearing before Mr Justice Ouseley, the claimants’ appeals against refusals of planning permission had not been heard. The judge found that the LPA’s decision was not, in principle, disproportionate or unlawful to secure compliance. However, in so deciding the LPA had failed to have regard to a material consideration, namely, the claimants’ prospects of success on their planning appeals. That failure rendered its decision disproportionate and unlawful.

In *Beronstone Limited v First Secretary of State* 14 the High Court (HH Judge Mole QC) rejected the notion that an inspector was under an obligation to define a threshold at which a conglomeration of stakes became a development. In the instant case, the inspector’s approach had been unassailable. The appeal site consisted of an area of grassland within the metropolitan greenbelt and an AONB. The LPA had issued an enforcement notice requiring the removal of 554 wooden posts laid out so as to define the boundaries of 40 plots of land and a network of accessways. Having taken account of the extent, visibility, grid-like patterns and degree of permanence of the posts, the inspector had found that they had a detrimental effect on the land and were of sufficient substance, scale and type to amount to development within the meaning of section 55 of the 1990 Act. The judge concluded that the inspector had been entitled to require removal of all the wooden posts placed by the appellant once he had decided that they were in breach of planning control.

In *Cardiff County Council v National Assembly for Wales & Malik* 15 Mr Justice Davies was asked to consider the inter-action between a completion notice and an enforcement notice. In 1993 Mr Malik had obtained consent for the erection of a garage to the rear of his home and had begun work on the development. That work had ceased in 1994. In 2001 the LPA had served a completion notice under section 94, following complaints from his neighbours. However, he failed to comply by the deadline so enforcement action was taken in 2004 alleging a breach of planning control and that the part-completed development was unsightly and detrimental to the visual amenity of the area. Mr Malik’s appeal was allowed by the Assembly, contrary to the recommendation of its inspector and the enforcement notice was quashed. Dismissing the

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13 [2006] EWHC 1346 (Admin)
14 [2006] EWHC 2391 (Admin)
LPA’s appeal under section 289, the judge found that the works carried out prior to the expiry of the completion notice remained development authorized by the planning permission in the light of the exception provided by section 95(4) for building works carried out under the relevant permission. Since those works carried out by Mr Malik had been done under the 1993 consent they were lawful. However, the judge went on to point out there remained a significant sanction in the loss of the benefit for the future of the original consent. He also noted that the LPA could, in its discretion, issue an enforcement notice as to part only of the development concerned.

In *Jefferey v First Secretary of State*[^16^] the issue was whether it was expedient (in the interests of the proper planning of the area) for a discontinuance notice to be confirmed the Secretary of State under section 103 of the 1990 Act, common ground having been reached between the parties that there was no justification for the Secretary of State to apply a more stringent threshold of “necessity” or “sufficient justification”.[^17^] The challenge arose from an inadvertent grant of planning permission in 1999 for the permanent siting touring caravans and tents within the coastal preservation area of Dawlish, Devon rather than a temporary grant to house the large number of visitors expected with the solar eclipse. In 2003, the landowner implemented the 1999 consent and also applied for the erection of a permanent toilet and shower block to replace the existing portable structures. In the event, the council not only refused that application but also made a discontinuance order and served an enforcement notice. An inspector recommended quashing the enforcement notice but that the discontinuance order should be confirmed. The judgment of Mr Justice Sullivan is of particular interest in his analysis of the expediency test (under section 102(1)) though his conclusion that the application should be dismissed, unsurprising, in the particular circumstances!

The case of *Smith (Louisa) v First Secretary of State*[^18^] is also of note as the court, there, had to consider functional need as well as human rights in the context of appeals arising out of a retrospective planning application and enforcement action in respect of the stationing of residential caravans and the storage of containers, associated groundworks and a track to serve a

[^15^]: [2006] EWHC 1412 (Admin)
[^16^]: [2006] EWHC 2920 (Admin)
[^17^]: See *Chant v First Secretary of State* [2002] EWHC 1140 (Admin)
[^18^]: [2006] EWHC 3016 (Admin)
“woodland project” within the North Yorks National Park. Applying, in particular, the advice in Annex A to PPS7 the Inspector had found that that an on-site residential presence was not essential for the proper functioning of the project, the aim of which was to turn a neglected area of private woodland into a useful environmental and community resource. Whilst there would be an interference with the appellant’s Article 8 rights that interference was legitimate and proportional as it was necessary to safeguard and protect the character of the national park. In his judgment Sir Michael Harrison re-emphasizes the PPS7 test of very strong or compelling need to live on site for it to be said that it was essential for there to be a residential presence, and, that there were no reasons to interfere with the Inspector’s conclusions on the proportionality of the human rights interference.

In First Secretary of State v Arun District Council & Brown the Court of Appeal held that the time limit for enforcement action in respect of the change of use of any building to use as a single dwelling house is four years under section 171B(2) of the 1990 Act, whether the breach of planning control consisted of development without permission or breach of a condition. There, the LPA had granted planning permission in 1988 for a house extension subject to the conditions that it should only be occupied by her dependent relative and thereafter should be used as an extension of the main house and not as separate residential accommodation. The extension had been built but not occupied and had been used as part of the second respondent’s house until 1996 when she had let it to students who had occupied it as separate living accommodation. The LPA had issued an enforcement notice in 2004 alleging breach of condition. At first instance, the judge (HH Judge Mole QC) upheld the inspector’s decision that the breach had occurred in 1996 in consequence of which the enforcement notice had been out of time as it had been against a breach of condition and not a change of use. In giving his supporting judgment, Lord Justice Carnwath pointed out that the clear legislative intention was that, unlike other changes of use, householders should only be vulnerable to enforcement action if it was instituted within four years. Given such intent it would be illogical for there to be a different period for enforcement depending on whether the breach of planning control involved a failure to comply with a condition as well as or instead of development without the required

19 [2006] EWCA Civ 1172
20 [2005] EWHC 2520 (Admin)
planning permission. Similarly, it would be illogical for the time limit to depend upon whether
the LPA formulated its enforcement notice on the basis of a breach of planning control
consisting of development without permission or as a breach of condition.

In First Secretary of State v Tapecrown Limited 21 the Court of Appeal agreed that, having
identified a breach of planning control concerning the construction of a building on agricultural
land, the inspector should have also considered whether the building could be made acceptable
in terms of both planning policy and amenity by any proposed modifications. The enforcement
notice had required the removal of a building and hardstanding on the ground that the total
development, including the hardstanding, exceeded the permitted limits under Class A of the
General Permitted Development Order 1995. Determining the appeal through the written
representations procedure, the Inspector had rejected arguments that the hardstanding was
temporary (so could be removed) and the possibility of alterations including the blocking of door
and window openings. However, in respect of the company’s ground (f) appeal, he had failed to
consider whether it was at least arguable that appropriate modifications could give the building a
more agricultural and less industrial character. While it was not the duty of an inspector to make
a developer’s case for him the inspector should have borne in mind that the enforcement
procedure was intended to be remedial rather than punitive. If on his consideration of the
submissions and in the light of the site view, it appeared to him that there is an obvious
alternative which would overcome the planning difficulties, at less cost and disruption than total
removal, he should feel free to consider it; though fairness may require him to give notice to the
parties enabling them to comment on it.

ENVIRONMENTAL IMPACT ASSESSMENT

As matters stand, at present, the effect of the respective judgments of the European Court of
Justice (ECJ) in the Commission v United Kingdom22 and Barker23 is that the UK is in breach of
EC law, the ECJ having held that outline planning permission and the decision approving

21 [2006] EWCA Civ 1744
22 C-508/03; [2006] JPL 1673 (the infraction proceedings)
23 R (Barker) v Bromley LBC and the FSS; C-290/03; [2006] JPL 1688 (the House of Lords reference for a
preliminary ruling under Art. 243 EC)
reserved matters together constitute a multi-stage development consent. This is because under UK law, until a developer has reserved matters approval his project is not entirely authorised.

The domestic challenge in *Barker* returned to the House of Lords in November with speeches delivered before the close of the year\(^\text{24}\), the preliminary reference having been made by their Lordships in June 2004! Unsurprisingly, in the circumstances then pertaining, Lord Hope of Craighead, with whom the other Law Lords agreed, was clear that any grant of planning permission which contains a condition requiring details of siting, design, appearance, etc, to be submitted and approved before development is commenced must be regarded as a multi-stage development consent for the purposes of the Directive. He went on to make the following points:

(i) **It does not follow, however, that consideration must be given to the need for an EIA at each stage.** The decision should be made at the outset – an application for outline planning permission should be accompanied by sufficient information to enable that question to enable the question of whether EIA is required to be answered. The authority must refuse permission if it is of the opinion that it does not have sufficient information to come to a decision at that stage.

(ii) **If sufficient information is given at the outset it ought to be possible to determine whether the EIA which is obtained at that stage will take account of all the potential effects likely to follow as the multi-stage process progresses.** Appropriate conditions to ensure the project remains strictly within the scope of the original assessment will normally make it possible for the authority to treat the EIA at outline stage as sufficient.

(iii) **However, there may be cases where the authority is required to carry out an EIA after outline permission has been granted.** Examples are where the need for an EIA was overlooked at the outline stage, or where the increased level of detail at reserved matters stage reveals that the development may have significant effects that were not anticipated earlier.

\(^{24}\) [2006] UKHL 52
(iv) In that event account will have to be taken of “all the aspects of the project that which have not yet been assessed or which have been identified for the first time as requiring assessment”.

Accordingly, if it is likely that there will be significant effects on the environment which have not previously been identified, an EIA must be carried out at the reserved matters stage before consent is given for the development. Thus, Bromley misdirected itself when it decided it had no power to require an EIA to be carried out in accordance with the requirements of the Directive at that stage.

So far as other domestic decisions are concerned, two are of particular interest. The first, *R (Catt) v Brighton & Hove City Council and Brighton & Hove Albion Football Club* 25 was a challenge to a screening opinion. The Football Club had obtained temporary consent to continue use of its stadium, within an established residential area, whilst it searched for an alternative site but which it had been unable to find. Following the conclusion of a section 106 agreement the Club was also allowed to increase seats, extend existing stands and construct new stands and changing rooms. It was contended on behalf of Mr Catt, who lived next to the stadium, that the author of the screening opinion should, amongst other matters, have considered the effect of the use as a football stadium and not merely the proposals for additional seating and works. Mr Justice Collins acknowledged that because an extension or change could only come within Schedule 2/Annex II if it met the relevant criteria so that it would affect the existing development in a significant way, the whole of the existing and amended development had to be considered in determining whether an EIA was required, rather than just the amendments in isolation. In the present case, the permission was also for the extension of permitted use as a football stadium, so that use would have to be considered in any event. However, the LPA’s officer had considered the effects of the whole development in making the screening opinion, even if he might have considered that he was only obliged to consider those from the proposed changes. The opinion had properly taken account of the overall effect of what was proposed and the use of the stadium generally and the exercise of judgment could not be regarded as tainted so

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25 [2006] EWHC 1337 (Admin)
as to be unlawful. As to the taking of mitigating measures into account in considering impacts, although the traffic measures put in place previously had not been entirely successful, the likelihood of these achieving the desired results would have to be considered by the decision-maker. The LPA had had experience of how the measures had worked in practice and that experience could properly be relied on in assessing whether the environmental effect was significant enough to require an environmental statement. Overall, there had been no error in the conclusion that the development had not been EIA development. Finally, on a delay point, the judge also rejected arguments that time should not have started to run for bringing a claim related to a screening opinion until the actual grant of permission. Whether or not it could be changed, the decision that it was not EIA development was one which had effect from the moment it was made. Many decisions of public authorities could be changed, but it was not consistent with good administration to permit time to run afresh if an application to review or change the decision was rejected. In the present case, the challenge to the opinion should have been made before the grant of permission was considered. Here, it had been obvious that the prejudice to the Football Club could have been avoided if the claim had been lodged timeously.

In the second case, Atkinson v Secretary of State for Transport\textsuperscript{26}, the EIA point arose in the context of an application under section 22 of the Transport and Works Act 1992 to quash the River Tyne (Tunnels) Order 2005. The Order had been made to authorise the construction and operation of a new road tunnel under the River Tyne. The project was the subject of a public inquiry following the submission of an Environmental Statement, which was criticised as inadequate in relation to the issues of waste arisings and disposal. Further information was provided on these issues before the Inquiry and the Environment Agency withdrew its objection. The Inspector noted his residual concerns on the matter and recommended that the Secretary of State undertake further consultation. Following this consultation, the Secretary of State made with the Order, with a substantial body of conditions. These included the submission for approval by the local planning authority of a Code of Construction Practice and Environmental Management Plans prior to the commencement of development. The claim was brought on the basis that the Secretary of State had no power to make the Order in the absence of an Environmental Statement that complied with the requirements of the EIA Directive and

\textsuperscript{26} [2006] EWHC 995 (Admin).
Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2000. Specifically, it was claimed that the ES had been deficient in that it kept open the options for the disposal of waste, leaving to subsequent procedures the determination of where the waste should be disposed of and by what routes it should be taken to the disposal sites; and that it failed to give the requisite information to enable the evaluation of the effects of disposal and the traffic that would be generated. The claimant submitted that the deficiency of the ES could not be remedied by the later provision of further information.

Mr George Bartlett Q.C. sitting as a Deputy High Court Judge found that whilst there was no equivalent provision in the 2000 Rules to that in the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 which provided specifically for the taking into account of subsequent information, it was implicit that information provided in objections and representations about the ES had to be taken into account. The Environment Agency had also been clear that concerns regarding the adequacy of the original ES had been addressed by that further information. The Inspector’s concern had been the lack of information about whether the Agency would treat excavation and remediation as a contaminated land operation or whether only the plant would require a permit, which the Agency had cleared up in its response. The reliance on subsequent licensing procedures was argued by the claimant to be open to the same objection as leaving significant matters for decision at a detailed planning stage. The judge found that the decision maker had to make his decision in the light of an ES that described the likely significant effects of the project and the measures to be taken to avoid, reduce or remedy any significant adverse effects. Whilst not entitled, in relation to a particular area of potential impact, to take the view that, simply because subsequent consent from some other responsible body would be required, no consideration needed to be given as to whether there were likely to be significant effects in that area, what those would be, or what mitigation measures were needed, the decision-maker was entitled to reach the conclusion, on the basis of such information as he had, and in the light of the need for subsequent consent from the other responsible body, that the effects in that area were unlikely to be significant, or that appropriate mitigation measures would be taken. For the Secretary of State to have relied as he did on the need for subsequent approvals to be obtained would only have been unlawful if he had had no information before him that, when coupled with the need for such approvals, was capable of enabling him to reach the
decision that he did. Thus, the question was the adequacy of the information provided, which was a matter for the Secretary of State, subject only to *Wednesbury* unreasonableness. Article 3 of the EIA Directive required the direct and indirect effects of a project on the specified factors to be assessed. What effects were significant and what were the main effects were essentially matters of judgment, and this question, as well as the question whether the ES adequately provided the information in relation to them, was for the Secretary of State. In making the judgment required in determining the adequacy of the environmental information, the decision maker had to be entitled to have regard to a range of considerations. These would include how far down the chain of causation a possible impact might occur; the probable level of impact; and any relevant regulatory regime. All these matters could properly be taken into account by the decision maker in forming a view as to the adequacy of the environmental information. Whilst the ES and the Inquiry had treated sea disposal of waste as an option, the Passenger Transport Authority had stated that this was not part of its proposals, which had been made clear in the Inspector’s Report, and the Secretary of State had not been in error in not seeking an evaluation of the sea disposal option, which would have to be the subject of a separate appraisal if raised. The Secretary of State had not been *Wednesbury* unreasonable in relation to any other aspects of the adequacy of the information before him.

**INTERPRETATION ISSUES**

The decision of the Court of Appeal in *Castlebay Limited v Asquith Properties Limited*,27 a dispute over an option to purchase agreement, is instructive on the interpretation of the unqualified expression “a planning application”. The option had been exercisable within a defined period but with the opportunity to extend if certain circumstances arose, including where a “decision ‘[was] awaited in respect of a planning application’”. The Court found that as the agreement had clearly been put together with planning legislation in mind, regard had to be given to the common distinction between an application for planning permission and an application for approval of reserved matters throughout planning legislation. Although there was no statutory definition of “planning application” the term must be taken to refer to an application

27 [2005] EWCA Civ.1734
under section 58(1) of the 1990 Act and not to one for reserved matters under section 92(2)(a). Article 1 of the General Development Procedure Order 1995 also defined “outline planning permission” and “reserved matters” as distinct. If the parties had intended the terms of the agreement to have a wider meaning than merely what the legislation afforded they would have made it clear so had not. In consequence, the approach of the trial judge had been correct in upholding the original expiry date as no decision in respect of a planning application had, factually, been awaited.

In Grendon v First Secretary of State & Cotswold District Council\textsuperscript{28}, in the context of a lawful development certificate appeal, the inspector had concluded that the structure occupied by Mr Grendon, a small one-room building in woodland with no running water or toilet, was not a “dwelling-house” within the meaning of section 171B(2) of the 1990 Act. It was contended before Mr Justice McCombe that the inspector had reached his decision simply by reference to the physical attributes of the building without any adequate regard to the use made of the building. Both contentions were rejected. In the judge’s opinion, the inspector had visited the site and had taken into consideration the relevant factors relating to use, he had correctly contrasted those factors with the physical state of the premises but had been unable to find as a matter of fact that they constituted a “dwelling-house” nor could be turned into one by the mere fact that Mr Grendon lived there.

**LAWFUL DEVELOPMENT CERTIFICATES**

In First Secretary of State v James Hay Pension Trustees Limited\textsuperscript{29} the Court of Appeal was asked by the appellant Secretary of State to rule on the form in which an LDC should take. The site has had a complicated planning history since its closure as a station. In 1965 planning permission had been granted to the Bristol Avon River Board for the change of use “of railway booking office and yard to garage and store for the Bristol Avon River Board”, subject to two conditions, the material one of which stated that the building should not be used for any purpose within Class X of the Town and Country Planning Act 1963. There was some evidence to

\textsuperscript{28} [2006] EWHC 1711 (Admin)
\textsuperscript{29} [2006] EWCA Civ 1387
suggest that the site was not used for most of the period from 1987 to 2000. It seems however that in 2000 the site began to be used to carry out repairs to and servicing of motor vehicles and a number of cars and vans awaiting repair or servicing were parked in the yard. Part of the site was also used as a builder’s yard. Following complaints about the use of the site, the LPA served an enforcement notice in March 2001. Subsequently, the LPA issued a document stating that an original grant of planning permission had not been personal to the then occupier and that the store and Class X related use (as a wholesale warehouse or repository for any purpose) was now covered by reference to storage in the current Use Class B8. The respondent had argued that the document was “substantially to the like effect” as a certificate of lawful use under section 192 of the 1990 Act (CLOPUD). A planning inspector had disagreed, holding that the document merely responded to specific questions and so was not a CLOPUD. Mr Justice Wilkie had overturned that decision, seeking to salvage the muddle into which the LPA had fallen by a resort to a line of authority on the construction of documents. The Court of Appeal disagreed, holding that the terms of section 192 were mandatory. As the document was not in the prescribed form required by Schedule 4 of the General Development Procedure Order 1995 (GDPO), and, did not on its face purport to certify that any and if so what use was lawful it was not a CLOPUD within the terms of section 192. As it did not contain the essential information required by the GDPO it could not be “substantially to the like effect”. It was a public document in which the rights and interests of the public had to be taken into account.

Another interesting point has subsequently arisen in M&M (Land) Limited v Secretary of State for Communities and Local Government. There, a lawful development certificate (LDC) had been obtained for use of a site as a scrap yard. For a number of years it had been used on a “low key” basis but had been unused approximately 10 years before the inquiry following a fire. The inspector, considering an appealed application for use of the site as a scrap yard, concluded that the use had been abandoned and that the new proposal would be contrary to policy. Before the High Court it was specifically contended that it was not possible in law, pursuant to section 191 of the 1990 Act, to abandon the use of land which had received a LDC. However, the view taken by HH Judge Mole QC was that a use dignified by a LDC was in no stronger position than one conferred by a grant of planning permission. Section 196(6) did no more than, at a particular
point in time, declare that the use referred to in the certificate was lawful. Therefore, abandonment could take place.

PERMITTED DEVELOPMENT RIGHTS

In *R (Orange PCS Limited & Ors) v Islington London Borough Council* 31, the council had issued notice that prior approval was not required by Orange for the siting and appearance of an installation. It was then constructed. Subsequently, the site was included within a conservation area designation. Orange and other operators then installed further equipment that had not been included in the originally submitted plans. The council had issued an initial enforcement notice requiring the installation to be brought into line with the plans but, before the work was completed, the council withdrew that notice and issued a fresh one requiring the removal of the entire installation upon the basis that the conservation area designation removed the permitted development rights. Allowing the claimants’ judicial review, Mr Justice Crane found that the acquired rights had accrued once prior approval had been given for the submitted plans, and thus the extent and nature of the permission was thus crystallised and defined. As the legislation did not sufficiently indicate that conservation area designation took away rights that had previously been crystallised and defined it was appropriate for the court to grant a remedy on the particular facts. The judge also drew attention to the power which the council could have exercised under Article 4 to the GPDO requiring a specific application for planning permission. The matter was then the subject of consideration by the Court of Appeal which, on 19th January 2006, gave judgment 32 dismissing the Council’s appeal, the arguments centering around the permitted development issue. On this point, the Court held that the GPDO had to be read as a whole. In a case that involved prior approval, once the work had started, the conservation area status could not make the development unlawful. As planning permission accrued or crystallized on approval of the application by the LPA the judge had been right to reach the conclusion he had.

30 Judgment February 5, 2007 (neutral citation awaited)
31 [2005] EWHC 963 (Admin)
32 [2006] EWCA Civ 157
Late in the year, on 15th December 2006, the legitimacy of polytunnels, so much a feature of the English farming landscape, was the subject of judicial consideration in *Hall Hunter Partnership v First Secretary of State*[^33]. The point arose from enforcement action taken against a strawberry farm in Surrey, within both the green belt and substantially within an area of great landscape value and of outstanding natural beauty. The LPA, Waverley Borough Council, had issued two enforcement notices. The first related to a change of use from agriculture to the stationing of 45 caravans for the accommodation of seasonal workers. The second concerned the erection, for nine months of the year, over 34 to 45 hectares of large plastic walk-in polytunnels for growing soft fruit including linked blocks of up to 24 tunnels. An inspector had dismissed both appeals subject to a time extension for removal. Before the High Court it was contended that the tunnels were not “development” within the meaning of section 55(1) of the 1990 Act, that if they were “development” then the inspector had erred in concluding that they were not “farming operations” and so permitted development, as was the stationing of the caravans. However, Mr Justice Sullivan took the view that the inspector, having considered all the circumstances, particularly the tunnels’ size, degree of physical attachment and permanence, his conclusions were not unreasonable nor revealed any conceivable error of law. The inspector had also been right to characterize the activities as the use of land and not operations. He had also been correct in his view that the land remained designed and fitted out for use as a caravan site would not lose such a character (as a caravan site) merely by the units being removed for a period.

**PLANNING AND POLLUTION CONTROL**

This thorny perennial was revisited in *Hopkins Developments Ltd v First Secretary of State*[^34] where the High Court found that an inspector had been entitled to conclude that, despite pollution control measures, it was inappropriate to grant planning permission for the development of a site as a concrete plant due to the impact of dust. Planning guidance clearly stated that he should focus on whether the development itself was an acceptable use of the land and the impacts that it would have, rather than on the control of the processes or emissions of the development. The point arose in the context of an application to erect a concrete plant and

[^33]: [2006] EWHC 3482 (Admin)
[^34]: [2006] EWHC 2823 (Admin)
industrial unit on a site located in an industrial estate. The LPA had opposed the development on the ground that it would have a serious effect on the amenities of the area contrary to planning policy and guidance. The inspector had concluded that, despite the application of pollution control measures, the proposed development would have a detrimental effect on local residences and businesses due to a significant increase in dust and that a building intended as a noise screen would have a significantly adverse impact on the amenities of the occupants of neighbouring residences The judge, Mr George Bartlett QC, held that the authorities established the proposition that the impact of air emissions from a proposed development was capable of being a material planning consideration, but in considering that issue the planning authority was entitled to take into account the pollution control regime. Accordingly, in appropriate cases planning authorities could leave pollution control to pollution control authorities, but they were not obliged as a matter of law so to do. The inspector could assume, and had, that there were mitigation measures in place that would be applied under the pollution control regime. The inspector did what the relevant planning guidance clearly stated he should do, namely he focused on whether the development itself was an acceptable use of the land and the impacts that it would have, rather than on the control of the processes or emissions of the development. The relevant planning policy also explicitly stated that height was a design consideration. Accordingly, the inspector was fully entitled to reach the conclusion on the visual impact of the development that he did.

RANSOM VALUE

The issue as to whether a planning decision should maximise or preserve any ransom value that existed was considered and rejected in a joint challenge brought by a private company and Sainsburys Supermarkets, MR Dean (Edgware) Limited v First Secretary of State. The adjoining sites in question lay on the west side of Edgware Road, London a short distance north of the A40 flyover. The development involved buildings of between 6 and 22 storeys, including a retail supermarket, 307 residential units, 156 holiday let units and associated car parking and landscaping. Following an inquiry, the inspector had recommended that permission be refused.

However, the Secretary of State had disagreed and granted planning permission. Dean, supported by Sainsbury, submit that in granting permission the Secretary of State had acted unlawfully in depriving Dean of the value, or part of the value, of its property, No.283 Edgware Road which was, effectively, a “ransom strip”. Sainsbury also submitted, with support from Dean, that in any event the Secretary of State had erred in deciding that permission should be granted despite the continuing presence of No.283. In his judgment Mr Justice Crane observed that while planning decisions commonly affected the value of adjacent land that, in itself, was not a relevant consideration, although loss of amenity might be. Planning decisions did not have to maximise or preserve any ransom value that existed. Although ransom value may be relevant for valuation purposes, no authority had been cited to support the proposition that planning powers must not be exercised in a way that removes or diminishes any ransom value. The judge also remarked in relation to article 1 rights that, again, no authority had been cited to him to establish that the article was engaged by a decision that affected the value of property. Any loss of value did not affect Dean’s peaceful enjoyment of No. 283. Here, in granting permission the Secretary of State had reached two conclusions in respect of No.283: first, that if permission was granted the property was likely to be acquired and demolished in the near future; second, that the property could be tolerated in those circumstances. The first conclusion was one which the Secretary of State had been entitled to reach. It was a question of fact, albeit in the form of a prediction, which had not been unreasonable. The second conclusion had clearly been a planning judgment and clear reasons had been given for that decision. However, the Secretary of State had missed the opportunity to consider Sainsbury’s suggested alternatives so his reasoning had failed to explain, adequately, why the disadvantages of the proposed buildings had to be accepted; so, in the event, the application succeeded on that basis.

**TREES**

In *Hobbs v Horsham District Council* the principal issue before the Court was whether a planning committee considering whether or not to confirm a tree preservation order (TPO) in
respect of eight oaks to the north of two derelict farm cottages, could lawfully so do upon the basis of a report that summarized the objections made by the landowner pursuant to the Town and Country Planning (Trees) Regulations 1999. The Parish Council had objected to the grant of planning permission on the basis of possible harm to the trees if two replacement dwellings were constructed. Mr Justice Sullivan found that the report did accurately summarize the points made in the objections and had sufficiently engaged with her procedural objections, including advice from the LPA’s solicitor that any procedural errors had not prejudiced the landowner or adversely affected the validity of the order. Potentially of greater interest, and concern were the judge’s endorsements, albeit on the facts, that the strength of opposition demonstrated the need for a TPO, since in her opposition the landowner had nowhere indicate that if the TPO was not made the trees would be safe, and, that the LPA had also been entitled to conclude that the close proximity of the new dwellings to the trees might lead to pressure for injudicious heavy pruning or even removal.

Lastly, in Perrin & Ramage v Northampton Borough Council & Shephard[40] the meaning of the word “necessary” in section 198(6)(b) of the 1990 Act was the subject of a trial on a preliminary issue before Judge Peter Coulson QC. He determined that the word “necessary” provided a simple link between a range of possible works to the tree itself and the prevention or abatement of a nuisance. If lopping or felling works were necessary to prevent or abate an actionable nuisance then such works were permissible. The section did not say that cutting down or lopping had to be “reasonably necessary in all the circumstances” or that lopping or felling had to be necessary having regard to other available methods of preventing or abating the nuisance. The section would be unworkable if alternative engineering schemes and the financial resources of the parties had to be taken into account. Accordingly, the question whether the lopping of felling of a tree was necessary to abate a nuisance was a question of fact to be decided on the everyday sensible approach of a prudent citizen looking at the tree in question and deciding in his own mind whether such actions were so necessary.

[39] [2006] EWHC 1605 (Admin)
[40] [2006] EWHC 2331 (TCC)
CONCLUDING REMARKS

Given the self-imposed task placed on me annually both by my publishers, Sweet & Maxwell, and then by my Chambers colleagues, to provide a coherent and reasonably comprehensive review of planning case law, should one be encouraged by the disparate nature of the decisions that have been given over the last twelve months or so? Have the Labour Government’s “reforms” of the planning system so wearied planning practitioners and their clients that they no longer, save as a course of final resort, forced “to law”? Indeed, it is noticeable, if a trend can be detected, that there has been a marked drop in third party challenges over the last twelve months. Maybe, even they are feeling planning “fatigue” at present? Let’s see what emerges over the next twelve months, post Barker?