INTRODUCTION

Given the annual task placed on me both by my publishers, Sweet & Maxwell, and by my Chambers colleagues to provide a coherent and reasonably comprehensive review of planning case law it should come as no real surprise that this year’s paper, again, draws attention to a number of diverse topics, reflecting the breadth of planning issues upon which the High Court and the Court of Appeal have had to consider. This year, my choices have been driven as much by the desire, as a planning practitioner, to highlight useful case examples as to identify those containing new or clarified principles of law. For ease of delivery, they are set out under subject headings in alphabetical order; though because of the sheer number as a result of this wider review I have had to limit my comments.

ADVERTISEMENT CONTROL

In the first of two cases involving the same company, *R (Clear Channel UK Limited) v Southwark LBC*, Clear Channel applied for judicial review of a decision by the council to issue notices pursuant to section 11 of the London Local Authorities Act 1995 requiring the removal of eight advertisement hoardings on the basis that they were displayed without express or deemed consent. Consent had originally been granted for a limited period for seven hoardings but, subsequently, eight had been created using the existing structure of the original hoardings. Later, substantial alterations were made to the hoardings, raising them higher which had had a marked effect on their prominence. Upholding HH Judge Gilbart QC’s refusal of the application¹, but for different reasons, the Court of Appeal² held that it was not permissible for the advertiser to revert as what was present at the end of the period was not the same as that which had been originally permitted.

The second case concerned an appeal to the Divisional Court by way of case stated. In *Wandsworth LBC v South Western Magistrates Court & Clear Channel UK Limited*³ the company had displayed a number of advertisements on a scrolling illuminated hoarding situated on a flank wall of a property. Beneath the display panel, it had erected a gantry with railings around it. The council had issued a notice under the London Local Authorities Act 1995, as a result of which the company had removed the display but had still been charged with the instant offences. On the same wall, there were also the faded remains of a painted advertisement dating back to 1920 or earlier. The painting advertised two newspapers, both of which had, however, ceased publication by 1921. The company’s case, which the district judge had accepted, was that its advertising display was not unlawful because it had the benefit of deemed consent under the 1992 Regulations. Allowing the council’s appeal, the Divisional Court held that words painted onto a brick wall were capable of being an advertisement within the definition in section 336(1) of the Town and Country Planning Act 1990. However, the words had also still to be "employed wholly or partly for the purposes of an advertisement". That was a question of fact. Here, it was relevant that the products had ceased to be available shortly after the painting, and that the

¹ [2006] EWHC 3325 (Admin)
² [2007] EWCA Civ 1328
³ [2007] EWHC 1079 (Admin)
condition of the painting had not been maintained, although neither of those factors, taken in isolation, prevented the sign from being an advertisement. All relevant factors had to be considered in the round. The principle of "once an advertisement, always an advertisement" was not acceptable. The case was remitted with a direction to convict the company.

ALTERNATIVE PROPOSALS

Last year, I drew attention to 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. 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. However, the judge found that the Secretary of State had missed the opportunity to consider the Sainsburys suggested alternatives to that promoted by the developer, West End Green (Properties) Limited; so his reasoning had failed to explain, adequately, why the disadvantages of the proposed buildings had to be accepted. That aspect has subsequently been the subject of a subsequent appeal by the defendants In First Secretary of State v Sainsburys Supermarkets Limited the Court of Appeal determined in their favour, holding there was no legal principle that permission must be refused if a different scheme could achieve similar benefits with a lesser degree of harmful benefits. Giving the lead judgment, Lord Justice Keene goes on to point out that in such a situation permission may be refused but it does not have to be refused. The decision-maker is entitled to weigh the benefits and disbenefits of the proposal before him and decide (if that is his planning judgment) that the proposal is acceptable, even if an improved balance of benefits and disbenefits could be achieved by a different scheme. On the facts, the First Secretary of State had adopted a lawful approach to the topic of an alternative scheme with a better design.

AMENITY CONSIDERATIONS

Attention is drawn to four cases which as well as raising some practical development control issues also reflect on the achievement of due process by local authorities. In the first, R (Technoprint plc & anor) v Leeds City Council the issue concerned the grant of retrospective consent to retain reverse jet filters installed at a paint manufacturing works. The first claimant occupied business premises located on another part of the same site and the second claimant, who owned the first claimant company, lived in a residential house that was also located on the site. They had objected to the grant principally on the ground that the jet filters created excessive noise. Having received heard evidence from experts and the council’s environmental health officers, its planning panel had been minded to refuse consent but had indicated that it was prepared to consider noise attenuation measures. At a further meeting the panel was minded to grant consent. However, the applicant had not provided any details of noise attenuation measures.

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4 [2007] EWHC 1 (Admin)
5 [2007] EWCA Civ 1083
6 @ para.38
7 [2007] EWHC 638 (Admin)
or how any such measures would be implemented. The panel delegated its powers to the chief planning officer, who granted consent subject to conditions as to operating hours, and to noise attenuation measures that were to be agreed and installed within three months of the grant. Noise attenuation measures were subsequently implemented but no details were provided beforehand. In judicial review proceedings the claimants contended that the decision to grant consent was irrational and perverse, and that there had been no evidence as to how the noise from the jet filters was to be attenuated such that the panel could properly have changed its earlier opinion. Allowing the application, HH Judge Hamilton QC agreed, finding that there had been no proper evidential basis for the panel's change of mind as there was no evidence of the noise attenuation measures before it and it had been misled about the applicant’s intention to implement noise attenuation measures as it had provided no details as to how those measures were to be implemented. The absence of those details made any enforcement of the conditions very difficult. Accordingly, it was appropriate to quash the decision and to remit the matter for fresh consideration.

In the second, *R (Jones) v Swansea City & County Council*[^8], the challenge was to the grant of consent for a neighbour’s first-floor front extension. The claimants, the sole objectors, argued that it would be intrusive and would contravene the minimum distance between windows as set out in the council’s authority's guidance notes. The council had noted the objection but had made no assessment as to whether the proposal contravened the guidelines for minimum distances between windows. Nevertheless, it had concluded that the proposal would not result in an unacceptable overbearing impact on the adjacent buildings and approved the application. The claimants had then applied for judicial review of the decision. However, the council chose to consider the application again. A second report was prepared and the committee viewed the building for themselves. It accepted that the distance between one of the windows was less than the recommended guideline but still confirmed its earlier decision to grant consent. The claimants contended that the second report failed to include material facts and observations, as the distance between the windows contravened the guidelines and no attempt was made to specify what the distances should have been and to compare that with the guidelines. Giving judgment, Mr Justice Wyn Williams held that it had been incumbent on the council to make an overall assessment that included an assessment as to whether or not the proposal contravened the guidelines for maximum distances between windows. Had this been done, a conclusion would have been reached that at least one of the proposed windows breached the guidelines by a considerable distance and there was a real possibility that the result might have been different, as committees often rejected proposals that were in breach of published guidelines even if an officer had recommended approval. However, it did not automatically follow that the grant should be quashed. Here, the evidence demonstrated that the council had embarked on its reconsideration with an open mind and had before them all that was relevant. It was never intended that the guidelines should be approached with mathematical precision and nothing in the approach of either the officer or the committee suggested that their approach to their own guidelines was unlawful. What was crucial was that the members of the committee decided to view the building for themselves and that re-appraisal was a compelling reason why relief should not be granted in the context of the instant case. Accordingly, he refused the application.

[^8]: [2007] EWHC 213 (Admin)
In *R (Orange Personal Communications Services Limited) v Birmingham City Council & Smalldene (Midlands) Limited* 9 Orange owned and operated a site that housed an important telecommunications switch which contained highly sensitive equipment, the privately maintained access road they shared with Smalldene, which owned an adjacent site. In 1999 Smalldene’s predecessors had been granted consent to use the land for storage and distribution of quarry products but that consent had never been implemented and had expired. In 2004 Smalldene applied to turn the site into a waste handling and storage development. Orange objected predominantly on the basis that dust could interfere with the operation of the switch, and submitted an environmental report on the effects of the proposed development. The application was subsequently withdrawn. Smalldene then applied for change of use from vacant industrial land to a vehicle depot for up to 14 lorries and six construction vehicles. Orange again objected and drew attention to the environmental report that had been prepared for the previous application. In the committee report the officer had attached no weight to Orange’s environmental report; and at the meeting the officer had erroneously informed the committee that the current lawful use of the site was for quarry products, as identified in the expired 1999 consent. Allowing Orange’s application for judicial review, Mr Justice Wilkie found that the effect of the officer wrongly informing the committee that there was an extant consent for a similar use, more severe in its potential impact than the one they were considering, identified a fall back position which obliged the decision maker to have regard to it although it was not a true fall-back. The officer had also acted in an irrational way in refusing to attach any weight to the assessment of harm contained in Orange’s environmental report merely as the character of the proposed development was different to that of a waste transfer station. Orange had been entitled, as was the committee, to have those objections evaluated and explained. It was plain from the way members of the committee were concerned with the issue of dust there was a real possibility they would have either refused the permission or deferred consideration until further information was available. It was an issue upon which the environmental report had a great deal of direct relevance. Therefore, the consent had to be quashed.

Finally, in *R (Norton) v Lambeth LBC* 10 the issue concerned the achievement of good daylight and sunlight. Planning permission had previously been refused at appeal on the ground that the neighbour’s extension it did not satisfy the 45-degree rule. Adjustments had been made to the proposal to address that concern and a fresh application had been made. Mr Norton, together with numerous other local residents, had made formal objections to the new proposal. They had initially been told that their objections would be heard before the committee given the numbers involved. However, it later transpired that the matter was to be decided by a delegated panel. In the event, the panel held that the alterations made had overcome the concerns that had formed the inspector's grounds for refusal and granted permission. Quashing the decision, Sir Michael Harrison found that on the evidence and in the circumstances of the case, it was plain that the 45-degree rule had not been applied correctly. Lambeth’s alternative submission that its misapplication would make no difference to the panel's conclusion was also found to be unsustainable as it was clear that the panel placed reliance on the 45-degree test as part of its reasoning that the inspector's initial grounds for refusal had been overcome. However, there had been no error of law regarding the council’s decision to delegate the matter, as opposed to hear

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9 [2007] EWHC 760 (Admin)
10 June 22, 2007; neutral citation awaited
it before a committee. Mr Norton had been informed of the decision and had had opportunities to make further representations. In those circumstances, the council was not bound by its initial statements.

DEVELOPMENT PLAN CHALLENGES

Surprisingly, following only a handful of reported cases on development plan challenges in the last few years there has been a swelling of the numbers in the last twelve months. Several have also been successful. Whilst each is fact sensitive and contains no new point of law they are instructive as to what arguments have found favour with the High Court as establishing errors of law. The first of these is *Camden Lock (London) Limited v Camden LBC*\(^1\). There, the challenge was upon the approach taken by the UDP Inspector to the future of Camden market, the plot of land on which it was situated being owned by the claimant. Various applications for mixed use development have been refused by the council over the years but finally in the Secretary of State had granted permission for a two-storey building for retail and restaurant use. The scheme was designed to house the market. The permission had been renewed but could not be implemented due to London Underground’s own redevelopment plans for its underground station, which would have removed the market. Following a combined Transport and Works Act and planning inquiry the Secretary of State had rejected LUL’s scheme and agreed with his Inspector that the impact on the vitality and viability of the town centre, as it would result in the loss of the market and would have a detrimental effect on the conservation area. Subsequently, the UDP Inspector’s report, also concluded that the market made a considerable contribution to the town and therefore "market use" should figure in the plan alongside the specified use. However, the UDP did not contain any explicit reference to market use. In its challenge the company submitted that the UDP inspector had failed to apply the earlier decisions and to explain why it was not appropriate to refer specifically to the market use in the UDP. Mr Justice Collins held that even if there was to be a development that required the temporary closing of the market, it was clear that the loss of the market would have a seriously detrimental effect on the town centre. The UDP inspector's failure to refer to that impact was an important omission. It was difficult to see that it was proper for him, in the absence of very convincing reasons, to fail to include the market use as a preferred use. Accordingly the inspector's decision was flawed and the relevant entry in the UDP was quashed. Given the binding nature of inspector’s reports since the 2004 Act reforms, this case is a reminder of the shortcomings of that new requirement to both local authority and objector alike.

In *George Wimpey UK Limited v Tewksbury Borough Council*\(^2\) there was also a partial success but not, perhaps, as Wimpey would have most desired. Following a local plan inquiry the inspector had recommended that Wimpey’s omission site should be included in a further assessment of potential new housing allocations and that other sites to which it had objected should be deleted. When the plan was eventually adopted some years later Wimpey’s site had been excluded and two sites to which it had objected had been included on the basis that they would be "phased to the latter part of the plan period". In its challenge, Wimpey submitted that at

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\(^1\) [2007] EWHC 495 (Admin)  
\(^2\) [2007] EWHC 628 (Admin)
the date of adoption of the plan there was no real possibility that the two sites to which it objected could be developed within the five-year period required by PPG3, that the council had failed to give adequate reasons as to why it had rejected the inspector's recommendation and why it had not included Wimpey’s site within the housing allocations. By way of parallel proceedings for judicial review it also contended that the council should have reopened the local plan inquiry. Giving judgment, Mr Justice Wyn Williams found that the council had failed to show that the sites to which Wimpey had objected would be granted permission in the near future or that the housing allocation on the sites would be implemented in the plan period. Therefore, the council’s judgment as to the implementation of the housing allocation on those sites was unreasonable or irrational in the Wednesbury sense. It had also failed to have regard to clear policy guidance that required the plan to include five years' supply of land that was then available for development. Even if that was wrong the reasons given for rejecting Wimpey’s objections were inadequate because there had been a complete failure to deal with the point that the housing allocation in question could not be implemented within the plan period. The parts of the plan that included those sites for housing development would be quashed. However, in relation to Wimpey’s own site the judge found that there had been no deficiency of reasoning. The council had followed the inspector's recommendation and had re-assessed that site for inclusion. However, it had concluded that the allocation of the site would constitute unsustainable leapfrogging of the green belt. It had held that view consistently and had given adequate reasons for it. Finally, the council had had regard to all material considerations when it had made its decision not to reopen the inquiry. Therefore, the application for judicial review was dismissed.

Ironically, Wimpey and the Council have now been taken to the Court of Appeal by another developer. In *MA Holdings Limited v George Wimpey UK Limited & Tewksbury Borough Council* 13 the owner of the land that had been allocated for residential development, and, the subject of that part of the successful Wimpey challenge, has successfully obtained permission to appeal upon the basis that its appeal did have a real prospect of success, even though it had not been a party in the proceedings at first instance.

In *David Wilson Estates Limited v Mid Bedfordshire District Council* 14 the issue was whether the LPA need to demonstrate exceptional circumstances (under PPG2, paras. 2.6 and 2.7) over the fixing of a Green Belt boundary. Under a previous local plan Wilson’s site had not been included within the Green Belt though it had been assigned interim Green Belt status. The council subsequently carried out a review of the Green Belt and included the Wilson site within it. However, although the local plan inspector recommended that the site should not be included as Green Belt status was unnecessary to protect it, the council rejected that recommendation. Before the High Court the council contended that consideration of the PPG2 test was not required, as the structure plan in force at the time of the local plan inquiry only required the general extent of the Green Belt to be defined and not for precise boundaries to be set, which was a matter for it when adopting the local plan. Mr Justice Collins agreed, holding that as the boundaries of the Green Belt had not been fixed by the previous local plan the council did not need to have regard to the PPG2 tests as no final decision had previously been reached.

13 [2008] EWCA Civ 12
14 [2007] EWHC 266 (Admin)
In *Ashwell Property Group plc v Cambridge City Council*\(^{15}\) the issue, once again, concerned the alteration of green belt boundaries and the need to demonstrate exceptional circumstances but, this time, on the part of the objector. The background was the publication of RPG6, which gave preference to the development of green field sites on the edge of the town over development in the outlying areas and the requirement for local development plans to review the extent of the green belt in order to deliver that approach. The Cambridgeshire Structure Plan EIP Panel’s report had rejected Ashwell’s previous submission that its site should be removed from the green belt as a result of which the revised draft version of City’s Local Plan had not allocated the area for development. Ashwell then put forward a smaller site for release. The subsequent local plan inspector’s recommendation, which was binding on the City, rejected the objection on the basis that there were no exceptional grounds for altering the green belt boundary in the location. In the high Court Ashwell contended that the City and the inspector had been obliged by RPG6 to consider a two stage test: first, whether the site could be released without causing significant detriment to green belt purposes; secondly, whether it was suitable for development against a range of other criteria. Therefore, the City had therefore misunderstood RPG6 and applied the wrong test for the release of the green belt land by applying an "exceptional grounds" as opposed to a "significant detriment" test. Rejecting this interpretation, Mr Justice Forbes held that the review required by RPG6 required the City only to undertake a single act of review. As it was not prescriptive as to how that review was to be undertaken it was neither irrational nor otherwise unlawful for the City and the inspector to have regarded the structure plan process as having discharged that requirement. Accordingly, any further alteration to the green belt beyond those provided for in the structure plan required the demonstration of exceptional circumstances in order to comply with PPG2. As the inspector was satisfied that the land should be kept open for green belt purposes and was unsustainable for development those reasons had properly addressed Ashwell's objections.

In contrast, in *Satnam Millenium Limited v Warrington MBC*\(^{16}\) the Council had wrongly relied on strategic policy rather than identified exceptional circumstances to justify its decision to include the subject site within the Green Belt in its Revised Deposit Draft UDP. The case is also of interest in the way in which Mr Justice Sullivan addresses the weight to be attached to a structure plan key diagram and the ability to identify the extent of Green Belt boundaries by reference to physical features, for example motorways, which may be so substantial and unambiguous that it is possible to identify the general extent of the Green Belt area. Permission to appeal has, however, been given to the Council.

At a more mundane level, in *Mawle v West Oxfordshire District Council*\(^{17}\), another reasons challenge, the council had initially published a draft plan that included land in Witney owned by a consortium of which Mr Mawle and his trustees were an owner which had raised several objections. Following a local plan inquiry, the council had partially rejected the inspector's first recommendation by accepting that the route of a new road should be downgraded from a proposal to a safeguarded possible route but had maintained that the new road was a viable implantable option that represented the best solution to the highway traffic problems in the area.

\(^{15}\) [2007] EWHC 1753 (Admin)
\(^{16}\) [2007] EWHC 2648 (Admin)
\(^{17}\) [2007] EWHC 1396 (Admin)
The inspector had also recommended that the council should carry out a review of the proposed housing development as he was of the opinion that alternative sites had to be reconsidered first, and that there was no real need to allocate the land in question for housing development. It had also partially accepted that recommendation in so far as it had accepted that the land should be a reserve housing site not to be released for housing until an overriding need housing allocation arose but had stopped short of placing an absolute embargo on development on the land on the grounds that a flexible dynamic approach to housing was required over a proposed new road and that it should carry out a review of the proposal as the use of other roads would have a lesser environmental impact and have similar highway benefit. The council subsequently adopted the plan with its proposed modifications. Finding in favour of the council, the Deputy Judge, Mr Rabinder Singh QC, found that the council had adequately explained its reasons for departing from the recommendations that had been made by the inspector. Further, the council had been under no obligation to conduct a review of the proposals in question in any particular form and it had had sufficient regard to the applicable policy guidance.

On the other hand, in *UK Coal Mining Limited v North Warwickshire Borough Council* 18 inadequate reasons were found but the judge, Mr Justice Wyn Williams, declined to quash the relevant part of the plan due to the lack of substantial prejudice to the claimant. Again, this was the type of scenario where the local plan inspector had found in favour of the claimant recommending, here, that its land should be allocated due to a lack of sufficient housing land supply; but the council had decided not to accept that recommendation by using a later start date for the relevant time period but failed to mention that there was still going to be a shortfall. Therefore, the council had not explained why it considered that shortfall to be insignificant. The judge then goes to explain that the most potent way of testing whether or not the claimant had been substantially prejudiced was to look at the relief it sought. The deletion of the words “within the development boundaries of which” from Core Policy 2(1) would achieve, in substance, nothing for the claimant, and, the same arguments about lack of adequate housing provision could, in reality, be made in support of any subsequent planning application. In refusing to exercise his discretion to quash, the judge also graphically illustrates the difficulties with the section 287 process. He remarks that the consequences of any quashing order would remove from the Core Policy the concept of development boundaries, and, at least the possibility, in its amended form, of encouraging widespread uncertainty as to what may or may not be permitted development not just in terms of housing but the forms specified in Core Policy 2. Furthermore, following a quashing order no further work would be possible on the Local Plan so that it would remain in its same form after quashing for the whole of the plan period. Therefore, the manner suggested would be a disproportionate consequence of such prejudice.

In *Ribble Industries Estates Limited v Burnley Borough Council* 19 a similar approach was adopted by Mr Justice Bean where the applicant applied for an order quashing an employment land chapter of a replacement local plan. It held an option over a greenfield site which had been identified as potential employment land. The inspector recognised that development depended on two companies agreeing to work being undertaken and recommended that the plan should be modified and that the council should carry out further consultation to determine the feasibility of the site being developed within the plan period. As no reason had been given in the council's

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18 [2008] EWHC 23 (Admin)
19 [2008] EWHC 178 (Admin)
response document for departing from the inspector's recommendation to carry out a feasibility study the judge accepted, to that extent, that there had been a breach of the Regulations.\(^{20}\) However, he considered that it was very significant that the council had stated that a feasibility study would have resulted in a delay to the adoption of the local plan of nine to twelve months. Accordingly, its reason given for departing from the recommendations in that one respect appeared to be entirely rational.

In *F.H. Cummings v Weymouth & Portland Borough Council*\(^ {21}\) an interesting natural justice point arose where an objector had been prevented from relying on an expert report at the local plan inquiry. Cummings owned an area of land which it wished to use for residential development. Following a local plan review part of its land was re-designated so fell outside the defined development boundary and within an important open gap or area of local landscape importance. At the time of lodging its evidence Cummings was mistakenly of the opinion that the only issue was one of landscape and that there was no issue in relation to drainage. When Cummings realised its mistake it instructed a drainage expert who prepared a report, which was given to the council and to the inspector on the day of the hearing. The inspector ruled that the report could not be relied upon. However, HH Judge Hickinbottom held that the inspector had failed to give Cummings an adequate opportunity to make its case and to respond to the LPA's case and in doing so had denied it the opportunity to rely on important evidence in relation to a crucial issue so had consequently been substantially and unfairly prejudiced in the hearing. It is to be hoped that similar common sense may yet prevail at the new LDD Examinations, if not, in the High Court?

Finally, last year I drew attention to the Court of Appeal’s confirmation that the appropriate procedural rules governing an application for an extension of time for an application under section 287 of the TCPA 1990 were those contained in CPR rule 3.12\(^ {22}\). However, the recent substantive hearing in *Corus UK Limited v Erewash Borough Council*\(^ {23}\) before Mr Justice Burton has led to the rejection of the challenge itself. Corus owned an industrial site which had featured in a joint structure plan as having potential as a site for housing development but, after an urban capacity study, the site had been removed from the plan. However, the local plan inspector had recommended that the site be reinstated but the council had rejected that recommendation by responding with updated housing figures which established there to be a borough-wide overprovision of housing which offset the under-provision of housing in the sub-area in which the site was located. Therefore, there was no need for any housing in that sub-area. Corus submitted that the inspector's report contained an unconditional recommendation that the brickworks site be included in the housing plan irrespective of the offset policy. However, the judge took the view that the inspector was, in fact, legitimising the offset policy, that he was not recommending an unconditional inclusion, and, that the council had acted in accordance with his recommendations when concluding that it would operate its offset policy!


\(^{21}\) [2007] EWHC 1601 (Admin)

\(^{22}\) [2006] EWCA Civ 1175

\(^{23}\) [2007] EWHC 2486 (Admin)
DUE PROCESS

The case of Neath Port Talbot County Borough Council v Ware\textsuperscript{24} is another interesting case on the operation of the determination process at council level. There, in connection with the plans of National Grid for a high pressure long-distance gas network, a local resident applied for judicial review of the council’s decisions to grant planning permission and a hazardous waste consent for an above ground installation or facility that allowed high-pressure gas to be reduced in pressure so as to be suitable for local gas supply. Four of the councillors who sat on the planning committee and who formed a non-politically aligned group had attended a meeting where opponents of the proposed development had discussed their objections. The councillors had not expressed any view as to the merits of the application and had later made a declaration to that effect. In advance of the committee meeting, a monitoring officer had advised that the individual members should make a site visit to the proposed development and that a failure do so, whilst not precluding a member from the decision-making process, might call into question the decision-making process and result in a challenge. Subsequently, at the committee meeting, following advice from a monitoring officer, the four councilors, had not participated further. The planning application was approved by 13 votes to 12. Granting the application to quash the consents, Mr Justice Collins had determined that the advice given to the councilors by the monitoring officer had been wrong in the impression that it gave and was intended to give, which had been tantamount to a suggestion that they had better not remain and take part in the decision-making process. On the evidence it was plain that the councillors had wanted to remain and take part in the process but for the advice that they received. They had not had the opportunity of independent advice and their absence might have affected the committee's vote and the decision reached. By the time the matter reached the Court of Appeal fresh consents had been granted for the National Grid development. Nevertheless, despite the respondent’s submissions that the appeal was academic the appellant council wished for the appeal to be determined as it would resolve issues of wider importance to the local government process concerning the extent of the ability of the court to intervene. However, leaving these points for another case, the sole substantive judgment, from Lord Justice Mummery, simply focuses on the shortcomings of the first instance judgment, holding, in particular, that the advice that the judge had held to be wrong was not the advice that had, in fact, been given! Therefore, there had been no procedural irregularity vitiating the grant of the consents. The instant case underlined the importance of the evidence and of the court identifying correctly, and, with precision, the advice that was in fact given to the councillors and the respects (if any) in which it was wrong.

In \textit{R (Carroll) v South Somerset District Council} \textsuperscript{25}, “a slightly unusual claim for judicial review” came before the court, as Mr Justice Collins remarks at the outset of his judgment. There, the claimant was the council leader seeking to quash a grant of planning permission due to the issuing of the consent prematurely without the necessary section 106 agreement being in place. The development itself was a substantial housing scheme on a greenfield site on the outskirts of Wincanton with affordable housing, education contribution and highway improvements forming the bulk of the section 106 requirements. The battle in court was between the council, acting through the claimant, and the landowner, Hopkins Developments Limited, as

\textsuperscript{24} [2007] EWCA Civ 1359 on appeal from [2007] EWHC 913 (Admin)

\textsuperscript{25} [2008] EWHC 104 (Admin)
second interested party seeking to preserve the consent but having already sold the land to Wimpey to take the land. Holding that Hopkins remained an interested party, it was argued on its behalf, amongst other matters, that there had been nothing in the committee resolution which had indicated that the section 106 agreement had to be put into effect before planning permission was granted. The judge, having remarked about the ability of a council to revoke and to pay compensation, finds that the only sensible construction is that the 106 agreement must be in place before the permission is granted. On the issue of the judge’s discretion not to quash, the judgment is also of interest as the judge remarks that although Hopkins had indicated its willingness to enter into a subsequent section 106 agreement the Council would have been at a disadvantage because they would have been negotiating from a position of weakness having already granted planning permission.

An interesting Court of Appeal decision which has potentially wide implications is *R (Baker) v. Secretary of State for Communities and Local Government*\(^{26}\) concerning the application of the Race Relations Act 1976. A planning inspector had considered an appeal against refusal of permission for a gypsy caravan site in the green belt and had concluded that the need for the appellant to live there did not outweigh the harm to the green belt. It was argued the inspector had acted in breach of section 71(1)(b) by failing to have due regard to the need to promote racial equality of opportunity. It was held that the duty arose whether or not the point was raised by any of the parties to the appeal. However, the duty was not to achieve a result, namely, to eliminate unlawful racial discrimination or promote equality of opportunity and good relations between persons of different racial groups. Rather, it was a duty to have due regard to the need to achieve those goals. Here, the inspector had been alive to the inequality of educational opportunity between the gypsy community and the general community and had taken this into account; and her failure to mention section 71 in her decision letter had not been indicative of a failure in that regard; but the Court felt it would be good practice to make reference to it in all cases where it was in play.

**ENFORCEMENT**

Attention is drawn to a number of cases. In the first, *Romer v Haringey LBC*\(^{27}\) the issue concerned the correction, and its timing, of a clerical error in the enforcement notice. The appellant owned two adjacent properties and had converted a garage at one of them into a dwelling without consent. The council had served an enforcement notice on the wrong property. Realising its mistake, it had then served another notice on the correct property. Before the inspector, the appellant had contended that as the council’s second notice had been more than four years after the change of use, then under section 174(2) of the TCPA 1990 no enforcement action could be taken. However, the inspector had determined that since the second notice had been less than fours years after the first, then enforcement action could be taken under section 171B(4)(b). In the High Court it was contended that the notices did not relate to the same breach of development control and so section. 171B(4)(b) did not apply. However, HH Judge Gilbart took the view that whilst section 171B(4)(b) could not be used to cover two different physical

\(^{26}\) [2008] EWCA Civ 141  
\(^{27}\) [2006] EWHC 3480 (Admin)
developments or two different changes of use, it could be used to cover the same actual breach of development control which had been described in different ways. Moreover, section 171B(4)(b) still applied where the same development which was being described was on a different site.

In the second, *First Secretary of State v Tapecrown Limited*\(^\text{28}\) the Court of Appeal considered the duties on an inspector in a ground (f) appeal under section 174(2) of the TCPA 1990. The enforcement notice had required the removal of an agricultural 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. Although a useful case, if only for Lord Justice Carnwarth’s remark about the remedial nature of the enforcement procedure, the application of the wider principle of the pro-active inspector should be viewed very much in the context of the limitations of the written representations procedure.

In the third, *R (Wilson) v Wychavon District Council & Secretary of State for Communities and Local Government*\(^\text{29}\) the issue before the Court of Appeal was whether the exception under section 183(4) of the TCPA 1990, that a stop notice cannot be served in respect of a dwelling-house but can against residential caravans was discriminatory and in breach of Article 14 of the ECHR against Romany Gypsies and Irish travellers. The Secretary of State had conceded that Article 14 was engaged and that s.183(4) was indirectly discriminatory in its effect, in consequence of which the question was whether the provision was justified. Here, the aim was the protection of the environment, more particularly the protection of the public against serious harm to amenity, and was an aim on which reliance could properly be placed even in the context of the special consideration to be given to gypsies and travelers. There were clear differences between the positions of dwelling houses and residential caravans, both in respect of the harm that they were in general likely to cause and the effect of a stop notice on the ability of the occupiers to remain in their home. There were also material differences between the ordinary stop notice regime and temporary stop notices, where a qualified exemption was given to residential caravans as such notices could only be used against them where a compelling public interest called for immediate action. On a discrete point, whilst it was permissible to refer to Hansard to cast light on what had been Parliament’s aim when it had passed the provision in question, reference could not be made to Parliamentary debates for the purpose of an argument based of absence of any express consideration.

\(^{28}\) [2006] EWCA Civ 1744

\(^{29}\) [2007] EWCA Civ 52
In the fourth, *R (East Hertfordshire District Council) v First Secretary of State*\(^{30}\) the issue concerned cause of action estoppel. The council had issued an enforcement notice following the failure of the interested party to implement, in accordance with the approved plans, the redevelopment of a barn to form bed and breakfast lettings. Due to an administrative error on its part, the council had failed to submit any written representations or statement of case in respect of the subsequent appeal. The inspector found that the lack of factual information from the authority was so fundamental that he had no alternative but to allow the appeal and quash the notice, although he considered that that course would not prejudice the authority under section 171B(4) of the TCPA 1990 to issue a further notice. The council did so but a second inspector found that where as the first appeal had succeeded under s.174(2)(c), it meant that those matters had been found not to constitute a breach of planning control. The inevitable consequence of such a finding therefore had to be that the provisions of s.171B(4) could not apply, there being no breach of planning control against which the council could make a second attempt. Accordingly, he quashed the second enforcement notice as a nullity. In judicial review proceedings against the second inspector’s decision, Mr Justice Sullivan held that it was implicit in the concept of cause of action estoppel that a matter had to have been adjudicated not that the court or tribunal had been unable to adjudicate upon an issue because of a complete lack of information, as had been the position in the instant case where the inspector had not decided the point that was vital to the appeal under section 174(2)(c), namely, whether the barn as erected was a substantial departure from the approved plan. The judge accepted that although cause of action estoppel, in the context of enforcement appeals, has survived the decision of the House of Lords in *Reprotech*\(^{31}\), special circumstances might justify a departure. A relevant factor was the question of fairness to the public interest, in respect of the necessity for planning control. Here, no injustice would be caused because the interested party would be able to present the evidence, if it existed, which demonstrated that no breach of control had taken place. The second inspector’s decision was accordingly quashed.

In the fifth, *Jeffery v First Secretary of State*\(^{32}\) 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”\(^{33}\). 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. Although the 1999 permission was never implemented, in 2003, the landowner 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 had recommended quashing the enforcement notice but that the discontinuance order should be confirmed with which the Secretary of State had agreed. Before the Court of Appeal, as before Mr Justice Sullivan, a first ground was rejected that the inspector had failed to apply the statutory test of asking whether it was "expedient" in the interests of the proper

\(^{30}\)[2007] EWHC 834 (Admin)

\(^{31}\)[2002] UKHL 8

\(^{32}\)[2007] EWCA Civ 584 appealing [2006] EWHC 2920 (Admin)

\(^{33}\)See *Chant v First Secretary of State* [2002] EWHC 1140 (Admin)
planning of the area to confirm the order, and that he had erred by dealing with the planning merits of the order and the enforcement notice together, and so treating the order as an application for planning permission. Likewise, the Court also rejected the argument that the council’s resolution to make the discontinuance order had not authorised the making of an order applying to caravan use. The case is, perhaps, of wider interest in respect of the third ground, namely, that the council had not properly considered the matters relevant to making an order covering caravan use, with the effect that there had been no valid order for the Secretary of State to confirm, and that there was no bar to such a challenge in the instant proceedings even though the point had not been raised with the inspector. On this point, the Court held that a challenge to the validity of a confirmed discontinuance order on the ground that there was some defect in the way in which the local planning authority had handled the original making of the order should only be entertained where there was clear-cut evidence that the order was *ultra vires* as a result. If the order appeared to be good, there would need to be convincing evidence that the order was nonetheless defective; and if the alleged defect had not been ventilated at the public inquiry the court would normally require some good reason for that omission, such as the unavailability of the relevant evidence at that stage. Here, as a result of the validity argument not being raised before the inspector and Secretary of State, the Court had insufficient evidence available to it to demonstrate that the council had failed in their approach to the making of the order, and, no good reason had been given for the failure to raise the point earlier. Accordingly, on the evidence there had been a failure to prove that the order was *ultra vires*.

In the sixth, *R (JRP Holdings Limited) v Spelthorne Borough Council* 34 a judicial review challenge had been brought against the Council’s decision to issue enforcement and stop notices. Unremarkably, the Court of Appeal refused permission upon the basis that there was a statutory right of appeal under section 174(1) of the 1990 Act as well as the related preclusive provision under section 285(1). In respect of the stop notices, it was held that the proper place to challenge was in a prosecution in the magistrates’ court where evidence could be called, for example, to demonstrate that the use had been carried out for a period in excess of four years, it being inappropriate to test such evidence in the Administrative Court.

In the seventh, *R (Alpha Plus Group Limited) v Kensington & Chelsea RBC* 35 the challenge was in respect of a breach of condition notice. Concerning the use of outside areas by a limited numbers of school pupils. On the facts, although the condition had breached an earlier planning permission for a nursery use to which the condition had been attached had lapsed. In consequence, an existing permitted use of the area of an educational establishment prevailed. The case is of interest, albeit on its facts, of the judicial confirmation that the grant of an unnecessary planning permission does not have the consequence of destroying existing use rights.

In the eighth, *Clee v First Secretary of State* 36 a gypsy case, Mr Justice Wyn Williams draws attention to the fact that Circular 01/2006 does not lay down any “tests”, as lawyers would usually use the word as to when a temporary planning permission should be granted. Rather, the Circular obliges a decision maker, when faced with an application for planning permission for a caravan site for gypsies, and where there is a demonstrable unmet need for such a site but no

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34 [2007] EWCA Civ 1122
35 [2007] EWHC 2840 (Admin)
36 [2008] EWHC 117 (Admin)
readily available alternative to the application site, to “give consideration” to granting temporary permission”. This simply meant that a decision maker had to consider such a grant but was not required to grant permission even in circumstances where there was a demonstrable need and no alternative was available.

Lastly, attention is drawn to three further cases which are addressed in greater detail below. In the first, Staffordshire County Council v Challinor [37], the Court of Appeal expressed the view that it was an oversimplification and a misinterpretation of the authorities to contend that an enforcement notice could not take away lawful use rights. In the second, Oxford City Council v Secretary of State for Communities and Local Government and One Folly Bridge Limited [38] further confirmation was provided by the High Court that if it is unclear whether to challenge under s.288 or s.289 of the TCPA 1990, the correct approach is to challenge under both provisions. Thirdly, in Hillingdon LBC v Secretary of State for Communities and Local Government & Autodex Limited [39] the Court considered the application of section 57(4) of the TCPA 1990 in the context of concurrent lawful development certificate and enforcement appeals.

ENVIRONMENTAL ASSESSMENT

This topic is dealt with separately, and, at greater length in the accompanying paper. Accordingly, I do no more, than to draw attention to the comments of Court of Appeal in Catt [40] on screening opinions and the effects of mitigation measures as well as confirmation that time for judicial review runs from the grant of the planning consent and not from the date of the screening opinion, In Dicken [41], in refusing permission to appeal, the Court of Appeal has also reaffirmed that in matters of screening, the test is irrationality in the context of a procedure that is, in essence, a relatively straightforward matter; for provided the LPA asks itself the right question and arrives at a conclusion within the bounds of reason and the four corners of the evidence before it, the decision cannot be categorized as unlawful. The issue is whether there is anything of substance which requires debate through the democratic EIA process. In considering that question it is permissible for the LPA to have regard to plainly effective remedial measures proposed, whether these are included as part and parcel of the development itself (as in that case) or as mitigating measures. The case is also is useful in confirming that potential impacts on property values are not, as such, environmental impacts within the EIA system, despite the reference to “material assets” in the Directive. The ongoing case of Horner [42] deals with the equally tricky question of floor space and building thresholds under the 1999 EIA Regulations.

In respect of the 1999 EIA (Forestry) Regulations the High Court (Mr Justice Collins) in R (Tree and Wildlife Action Committee Ltd) v Forestry Commissioners [43] has provided guidance on their

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37 [2007] EWCA Civ 864
38 [2007] EWHC 769 (Admin)
39 [2008] EWHC 198 (Admin)
40 R (Catt) v Brighton & Hove City Council and Brighton & Hove Albion Football Club [2007] EWCA Civ 298
41 R (Dicken) v Aylesbury Vale District Council [2007] EWCA Civ 851
42 R (Horner) v Lancashire County Council & Castle Cement Ltd [2007] EWCA Civ 784
43 [2007] EWHC 1623 (Admin)
application to the whole project which, there was not just deforestation but the proposed
redevelopment for football pitches to see whether cumulatively or together EIA was required.

In terms of “pipeline cases” the requirement to give reasons where a screening decision is made
not to require EIA has recently been referred to the ECJ by the Court of Appeal in R (Mellor) v.
Secretary of State for Communities and Local Government on January 21, 2008. In respect of
the SEA Directive (2001/42/EC), following the Northern Ireland decision, last September, in the
successful challenge by Seaport Investments Limited, an unsuccessful challenge was mounted in
R (Howsmoor Developments Ltd) v South Gloucester District Council on a judicial review
by five developers of the South Gloucestershire Council’s SPD Development Brief for the
Emersons Green East site that the environmental report was not sufficiently robust to meet SEA
requirements. The Brief provided an indicative framework as to how the local plan policy would
be carried forward but did not itself make an allocation. Whilst the local plan had been adopted
before the SEA Directive came into force, the Planning and Compulsory Purchase Act 2004
made it mandatory for supplementary planning documents, such as the Brief, to be subject to an
sustainability assessment and also SEA was required. It was possible in principle to satisfy both
requirements through a single document. It was argued that under articles 5 and 13 of the SEA
Directive, that the LPA had been required to subject each policy of the local plan to SEA. This
submission was summarily rejected as amounting to an attempt to give the Directive
retrospective effect by submitting policies adopted before the relevant date to the new regime.
There being a lawful local plan, the strategic development with which the Brief was concerned
was related simply to indicative proposals for siting a multi-modal interchange and bridge.
There was no obligation to assess the rationale for and alternatives to development overall, or the
environmental considerations of the allocation that had been made by the local plan, or to justify
the overall mix of development, or the general infrastructure requirements.

GREEN BELT

Attention has already been drawn, above, to the unsuccessful challenges in the David Wilson and
Ashwell cases on the issue of exceptional circumstances and the fixing of Green Belt boundaries.
In R (Heath & Hampstead Society) v Camden LBC the substantive legal issue was whether a
replacement building was "materially larger" so not appropriate development. The existing house
on Hampstead Heath had a floor space, arranged on two floors, of 146 square metres or 186
square metres if a garden shed was included. The floor space of the proposed new building was

44 [2008] EWCA Civ 213
45 2007] NIQB 62, where Mr Justice Wetherup held that the procedures used in respect of draft plans had failed to
comply with the Directive in various respects, including the lack in the Northern Irish system of an independent
consultation body as required by Article 6.2. Another issue was the failure of the domestic legislation to set
sufficiently precise timeframes for consultation, so as to infringe the principle of legal certainty. It was also held
that there had been inadequacies in the environmental reports in various respects and that there had not been
substantial compliance with the requirements of the Directive. Emphasis was also placed in the judgment on the
need for the environmental report and draft plan to keep in step so that the report could properly influence the plan,
which would not be the case if the plan became largely settled, even as a draft, before publication of the
environmental report.

46 [2008] EWHC 262 (Admin); Sir George Newman
47 [2008] EWCA Civ 193
626 square metres over three floors. The Camden officer had recommended that permission be granted and had taken into account a number of qualitative factors such as visual intrusion and the effect on the character and setting of the Metropolitan Open Land, and concluded that the proposed development was appropriate development that was capable of maintaining the openness of the Metropolitan Open Land. Upholding the judgment of Mr Justice Sullivan that the wrong test had been applied by Camden and that the permission had to be quashed, the Court of Appeal held that even a small increase in floor space in absolute terms could be judged material in planning terms, because of the design of the building and its position on the site. The test was whether the replacement was "materially larger". Had it been intended to make appropriateness dependent on a broad "no greater impact" test, those words could have been used. Instead the emphasis was on relative size, not relative visual impact. PPG2, paragraph 3.6 as a whole was dealing with size. The words "replacement" and "not materially larger" read together and in context indicated that size was the primary test. The use of the word "materially", notwithstanding its use in planning law more generally, did not import a broader planning judgment as to whether the new building would have a materially greater impact than the existing building on the interests which the policy was designed to protect. The general intention was that the new building should be similar in scale to that which it replaced. Had the LPA properly understood the policy, it could not reasonably have concluded that a building more than twice as large as the original in terms of floor space, volume and footprint was not "materially larger".

HERITAGE ISSUES

Attention is drawn to four cases. The first, R (Save Britain’s Heritage v Westminster City Council & Secretary of State for Communities and Local Government) concerned the grant of listed building consent for the internal refurbishment works of the former Middlesex Guildhall in Parliament Square to house to house the new United Kingdom Supreme Court. Westminster had considered that the degree of change required was balanced by the importance of accommodating the Supreme Court in that building in that location. However, SAVE contended that the decision was flawed in that it had failed to pay proper regard to PPG15 and that, even if it had applied the guidance within that policy, the form and substance of PPG15 should have been properly dealt with. It also argued that Westminster had approached its decision in the wrong way in making an initial finding that the Guildhall was the appropriate venue for the new Supreme Court, and that it ought first to have considered whether the proposed works were so damaging that planning permission should not be granted. Mr Justice Collins disagreed. The committee had been aware of and had correctly applied the guidance in PPG15. It had also adopted the right approach in deciding first whether the Guildhall was the right site without which the application for planning permission would have been bound to fail in any event. On the material before it, the committee had been entitled to conclude that this was in the national interest and therefore desirable and necessary under PPG15 for the proposals to go ahead.

In the second, R (Sinan Bayraktaroglu) v South Cambridgeshire District Council the challenge arose out of the council’s decision to grant planning permission and listed building consent for

48 [2007] EWHC 977 (Admin)
49 [2007] EWHC 807 (Admin)
the restoration, refurbishment and change of use of premises from a language school to a hotel. The claimant’s objections to the proposals had included highway safety based on a consultant’s report. The highway authority had advised the council that it was not possible to provide the level of visibility that the applicant had indicated as being available at a junction on the site, and that the proposals were therefore unacceptable. Nevertheless, the council indicated that it was minded to approve the application subject to further approval. The Claimant then threatened proceedings and sent a copy of a report from his chartered accountants casting doubt on the applicant’s business plan and a viability report from a firm of chartered surveyors. The council considered the application afresh with the assistance of a second substantial report from its officers, who supported the measurements of visibility found by the highway authority. In his judicial review proceedings the claimant submitted that the council had had no rational basis for rejecting the objection of the highway authority, so the decision to grant was fundamentally flawed. Secondly, the council’s failure to establish that the proposals as a whole were viable breached PPG15 guidance and a policy statement that required that it grant the applications only if, upon taking into account financial viability, the development brought public benefits that clearly outweighed the harm that would be caused. Surprisingly, perhaps, these submissions did not find favour with Mr Justice Wyn Williams. As part of its consideration of the factors in favour of granting permission and those against it had been open to the council members, having undertaken two inspections of the site, to reach a different view from the highway authority as to the significance of the visibility concerns, Thus, the view of the highway authority (and the consultant) upon one aspect of a proposal was a material consideration, but no more and no less than that. In respect of the second ground, viability, while it had been incumbent upon the council to consider that issue the evidence indicated that the issue had been discussed and addressed. It was permissible and lawful for the council to reach a conclusion for itself about whether viability had been demonstrated.

The last two decisions are perhaps of greater jurisprudential significance. In *Chandler v Secretary of State for Communities and Local Government & Moore* 50 the issue concerned the test in section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 regarding the need for new development to preserve or enhance the character or appearance of the conservation area in question. The Chandlers and the Moores lived on opposite sides of the road within the Wray Common Conservation Area, Reigate, Surrey. The Chandlers lived in a Grade II 17th century listed building whilst the Moores’ property was a modest bungalow of no architectural interest. The Moores applied for permission to build a modest extension to their bungalow which was allowed, on appeal, the inspector having found that the proposed development would preserve the character and appearance of the conservation area and that it would therefore not conflict with policies in the Surrey Structure Plan and the Reigate & Banstead Local Plan. The Structure Plan required that Surrey’s cultural heritage should be conserved and enhanced. The Local Plan required that development be controlled to complement and enhance the character of the area. In the High Court it was submitted that the inspector had applied the wrong test as he needed to be satisfied that the development would enhance, rather than merely preserve, the character or appearance of the conservation area, or if they would not be enhanced, that there was a particular reason why such a lesser test should be applied. Dismissing the challenge, Mr Justice Keith held that the development plan could not be said to require a more stringent approach than that required under section 72(1) of the 1990 Act. The

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50 [2007] EWHC 1000 (Admin)
Act required the inspector to pay special attention. He had not merely stated in his decision letter needed to be paid to that desirability but had expressly concluded that the proposed development would preserve the character and appearance of the area. The case usefully confirms a point previously made in the *Hetherington* case that the statutory presumption in favour of development plan policies does not override the statutory duties under the PLBCCA 1990.

In *R (Sumption) v Greenwich LBC* the issue concerned the extent of the curtilage of a listed building in the context of an application to quash a lawful development certificate authorizing the proposed erection of a boundary wall and gates under 1 metre in height as conforming with the criteria of the General Permitted Development Order, Part 2, Minor Operations, Class A. The wall was intended to replace existing timber chestnut fencing. In his judgment Mr Justice Collins has to grapple with the fact that such development is not permitted by para. A.1(d) if it would involve development within the curtilage of, or to a gate, fence, wall or other means of enclosure surrounding, a listed building. Furthermore, the removal of the fence and its replacement with a wall would constitute development, within the meaning of section 55 to the Act. Accordingly, the certificate was not lawful and had to be quashed, leaving the interested party having to apply to enable him to construct a means of enclosure which did not adversely affect the setting of the Grade II listed house.

**LAWFUL DEVELOPMENT CERTIFICATES**

Once again, some useful decisions have emerged on the scope of LDCs. In *Miles v National Assembly for Wales* the subject matter was the use of land for recreational motorcycling activities and farming. An appeal inspector had dismissed the appeal on the ground that Mr Miles had not used the land for more than 14 days each year, and, because the land had not been used for motorcycle activities for approximately 18 months when foot and mouth disease had broken out. In the High Court, Mr Miles contended that the inspector had failed to have regard to all the evidence of the recreational motorcycling activities and in concluding that the only event-related practices were on the same day as events. He also contended that enforcement action could have been taken during the 18-month period of the foot and mouth outbreak and accordingly that period should count towards the period necessary for the accrual of immunity despite the fact that no motorcycling activities took place. Mr Justice Lloyd Jones, in dismissing the section 288 challenge, pointed out that Class B2 of the 1995 GPDO distinguished between individual use and motorcycle racing and practising. The latter category was specifically related to a particular event. It was not permissible to aggregate individual use to event-based use for the purposes of establishing that the limitations on permitted temporary events use had been exceeded so as to establish immunity. It was also not apparent that the practising was specifically related to events and therefore the only evidence that could be considered was that which confirmed that specific practice took place on the same day as the event to which it was related. The number of days

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51 *Hetherington (UK) Ltd v Secretary of State for the Environment* (1994) 2 PLR 9 (Mr David Keane QC sitting as a Deputy High Court Judge)
52 Previously section 54A of the TCPA 1990, now section 38A of the PCPA 2004
53 I.e. section 66(1) in respect of listed buildings and section 72(1) concerning conservation area development.
54 [2007] EWHC 2776 (Admin)
55 [2007] EWHC 10 (Admin)
devoted to event-based use was therefore the same as those on which events took place. Accordingly, the inspector had been entitled to conclude that there had not been an accrual of 10 years of events-based use in excess of the limits allowed. On the second ground, although section 171B(3) of the TCPA 1990 did not expressly require that the unlawful use should have been continuous that was the clear intention of the provision. Here, during the period of the foot and mouth outbreak there could have been no question of enforcement action so that period could not count towards the 10-year period.

A novel point arose in *M&M (Land) Limited v Secretary of State for Communities and Local Government* on the issue of abandonment. There, a 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) of the TCPA 1990 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.

Endorsement of the *M&M* decision by the Court of Appeal followed later in the year the case of *Staffordshire County Council v Challinor* in the context of an appeal by Staffordshire against the dismissal of its claims for a planning injunction and recovery of its expenses in itself remedying the breach. The land was about two hectares in a rural area, within which was smaller area of about half a hectare for which a certificate of lawful use had been issued permitting use as a plant hire contractor's yard and for storage of materials recovered from demolition and construction sites for recycling. Staffordshire had refused an LDC application for a substantial part of the site for the importation, storage and reclamation of demolition and construction materials and had issued an enforcement notice to prevent an alleged change of use. The notice required the importation of all waste on to the land and the handling, sorting and disposal of waste to cease. An inspector had upheld the notice on appeal. Allowing Staffordshire’s appeal in respect of the subsequent civil proceedings, the Court expressed the view that it was an oversimplification and a misinterpretation of the authorities to contend that an enforcement notice could not take away lawful use rights. It had long been established that such lawful rights would be lost if an enforcement notice was served and the rights were not then raised as a ground of appeal. Whilst an enforcement notice should be interpreted so as not to interfere with permitted development rights or with rights to use land for a purpose ancillary to a principal use which was itself not being enforced against, there was no general right to assert existing use rights at a time when the enforcement notice had come into effect after an unsuccessful appeal or in the absence of an appeal. It did not make any difference that existing rights had been the subject of an LDC, which only certified that the use was lawful at a particular point in time. A certified use could also be abandoned. Here, the judge had erred in regarding the activities

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56 (2007) EWHC 489 (Admin)  
57 [2007] EWCA Civ 864
covered by the LDC as exempt from the enforcement notice in so far as they took place on the smaller area covered by the certificate. The enforcement notice would prevail if there were any conflict between the two. As the inspector had expressly declined to vary the notice because he saw no conflict and that decision was no longer open to challenge there was a clear basis for enforcement. As there had been a flagrant non-compliance with the enforcement notice until the imposition of an interim injunction and there had been significant if lesser non-compliance since then Staffordshire was entitled to a permanent injunction as well as recovery of the remediation expenses.

In *Winchester City Council v Secretary of State for Communities and Local Government & Wickham Laboratories Limited*58, another decision of Judge Mole QC, the issue concerned the classification of a site for "industrial use" (under the Use Classes Order 1997) for the purposes of an LDC. Wickham had identified a need for disease-free eggs to be used in the production of human and animal live viral vaccines so it had converted a conventional poultry and egg producing agricultural unit into isolated units for the production of specific pathogen free eggs. Having continued that use for over ten years Wickham had applied for an LDC on the basis that the activity fell within Use Class B1(c), with which the City Council disagreed. An appeal inspector had found that the specific pathogen free eggs were produced for, and were thus incidental to, vaccine production taking place elsewhere, that the production of a vaccine was an industrial purpose, and that the Use Classes Order imposed no geographical limit on where the process took place. Judge Mole determined that in classifying the use of a site, the appropriate exercise was simply to look at the planning unit and to ask the question whether its use was for or incidental to the making of an article. The answer had to involve the normal English meaning of the words "incidental to" and an assessment of fact and degree of the whole use of the planning unit. If the answer was in the affirmative, then what happened on the unit was a process for or incidental to the making of an article. It did not matter that the site to which the land in question was incidental to was distant or that there was more than one such site. The inspector had applied the correct and normal construction of words and looked at the circumstances as a matter of fact and degree, and there could be no valid criticism of his decision.

The third case is *Hillingdon LBC v Secretary of State for Communities and Local Government & Autodex Limited*59. There, the Council challenged an LDC permitting storage use, upon the basis that the Inspector had failed to define, with sufficient particularity, what level storage she had found to have been established use, the location of the primary and ancillary uses within the site and what she meant by “ancillary purposes”. The judge, Michael Supperstone QC, finds that that it would have been unnecessary and unrealistic for the LDC to have sought to provide such descriptions. The other issue is whether section 57(4) of the TCPA 1990 allows reversion to a use that has become lawful because of the passage of time and the operations of sections 171B and 191(2) of the Act. In the judge’s view the effect of section 191(2) is to make certain uses “lawful” for the entirety of the Act. In consequence, the Inspector had not erred in not excluding a separate part of the appeal site, the subject of an enforcement notice and a concurrent but dismissed appeal, from the scope of the LDC, the enforced use being for skip hire which the Inspector finds to be “sui generis” rather than a Class B8 use.

58 [2007] EWHC 2303 (Admin)  
59 [2008] EWHC 198 (Admin)
NEED

Two cases on the issue of the need in the context of affordable housing provision are also of interest. In *Vicarage Gate Limited v First Secretary of State for Communities and Local Government & Kensington & Chelsea RBC* 60 the challenge concerned the competing merits of retaining a nursing home and its replacement with residential apartments and the provision of off-site affordable housing either by way of a commuted sum (£4 million) for providing affordable Elderly Persons Accommodation or the provision of 20 affordable housing units elsewhere within the Borough, an arrangement by no means unusual in the Royal Borough, as HH Judge Gilbart QC remarked. There were 14 grounds of challenge, on which VGL succeeded on six, leading to the quashing of the Decision Letter. Ground 7 complained that the Inspector had failed to weigh the gain in affordable housing (of double the requirement under RBKC policy) against the loss of luxury sector nursing home provision. That required him to consider and address the merits of the two in a proper manner and had only considered demand issues. As Judge Gilbart remarks 61:

33. …. Firstly “demand” is not a synonym for “need”, nor necessarily a proxy for it, although very often in planning appeals and decisions there is elision to a greater or lesser extent between the two concepts in their treatment in evidence at inquiries and in decision letters. “Need” is a term which can cause difficulty if not used carefully, and problems can and do occur when definitions are extracted from dictionaries and applied in a way which is inappropriate to a planning decision. As an example, if a retail planning survey concludes that a town should have another supermarket, it is said to be “needed” just as the results of demographic projections and housing land availability studies are said to produce a “need” for some particular level of housing provision. The true position is that “need” is properly used in the planning context to express a strong planning case being made for provision of some type of development. Thus for example, if a planning policy in national planning guidance or in a statutory Development Plan looks to meet an identified demand for a type of use or development, and does so in a way which expresses a strong planning case for its being met, then there will be a “need” in planning terms to meet that demand.

The Judge then goes on to point out that the existing premises could not be reused as a care home and would require rebuilding for that purpose. The Inspector had given no basis for holding that retention of an existing use, or its resumption in a new building, was of itself advantageous, let alone why it was more advantageous than the provision of affordable housing.

In *North Wiltshire District Council v Secretary of State for Communities and Local Government & Chippenham Motors Limited* 62, another decision of HH Judge Gilbart, the issue concerned the location of a site in the open countryside for use as affordable housing. The Council contended, amongst other matters, that the Inspector had wrongly relied on need for housing as a material consideration which could outweigh conflict with the development plan, suggesting that the issue of need had been addressed through the development plan, which had determined the

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60 [2007] EWHC 768 (Admin)
61 @ para. 33
62 [2007] EWHC 886 (Admin)
locations outside settlements that should be avoided. Reminding that the High Court is not a
court of merits, Judge Gilbart disagreed. Although the Inspector’s reasoning, although it could
have been better phrased, did not disclose an error of law. Whilst it may have been previously
investigated in the development plan process might be a powerful argument on the weight which
such a case in need should attract it did not deprive it of materiality The need for affordable
housing was patently a material consideration in its own, in consequence of which the case for
development outweighed the development plan case against it.

PLANNING APPLICATIONS

In *R (Park Pharmacy Trust) v Plymouth City Council* 63 an interesting point was considered by
Mr Justice Sullivan concerning the misidentification of the applicant on the prescribed form.
The application form had identified the applicant as being "Emeris Coolart Ltd". In reality, it
consisted of two individual companies, "Emeris Ltd" and "Coolart Ltd", acting in a joint venture
for the purpose of the housing development. The claimant objected to the application on the
basis that the development was inappropriate for a conservation area. In dismissing the claim for
judicial review, the judge held that although it was important that an application for planning
permission correctly identified the applicant so that the LPA knew with whom it had to deal,
primarily for purely practical matters such as being able to communicate with an applicant
through correspondence. However, save in the exceptional case, for example, of a personal
planning permission, as a matter of principle, the identification of an applicant for planning
permission could be regarded as irrelevant; for in reality the task of the LPA was to consider the
merits of the planning application before it. In the instant case, no issue in relation to the identity
of the applicant for planning permission had arisen. The form had clearly identified the
interested party's agent who could have clarified any uncertainties that arose. Further the local
authority had considered the merits of the application. Nobody had been misled and nobody had
been prejudiced by the name that had been stated on the application form.

PREVIOUS APPEAL DECISIONS

The Court of Appeal decision in *Dunster Properties Ltd v First Secretary of State* 64, following
the leading authority *North Wiltshire DC v Secretary for the Environment* 65 draws attention,
again, to the need for consistency in decision making as a highly material consideration. In
*Dunster* the company had been refused planning permission to build a first floor extension at a
property situated in a conservation area. The first inspector had dismissed Dunster's subsequent
appeal on the particular design rather than in principle, commenting that an extension of a
sympathetic appearance, scale and siting at first floor level would not necessarily erode the
contribution of a neighbouring terrace to the character and appearance of the conservation area.
Accordingly, Dunster produced a revised proposal which was again refused. A second inspector
also dismissed Dunster's appeal on the ground that the extension would obscure the view of
certain features of the area and would adversely affect the ambience of the street. However, the
second inspector had not given reasons as to why his view as to the principle of building an

63 [2008] EWHC 445 (Admin)
64 [2007] EWCA Civ 236
extension differed from that of the first inspector, save to say that each case had to be judged on its own merits. Mr Justice Burton had dismissed Dunster's challenge, holding that the second inspector, albeit in an awkward way, had said that he disagreed with the conclusion of the first inspector and that was sufficient. Before the Court of Appeal Dunster submitted that the second inspector had not complied with his obligation to give sufficient reasons, particularly as the two applications were so similar that the first decision was material to the outcome of the second and it was therefore incumbent upon the second inspector to take it into consideration. Agreeing, the Court held that, by declining to comment, the second inspector had appeared not to have faced up to the duty upon him to refer to the earlier decision as a material consideration. Further, the judge had been wrong to hold that it was sufficient for the second inspector merely to say that he disagreed with the original decision. The unarticulated disagreement with the reasoning of the first inspector caused Dunster a significant degree of prejudice by impairing its ability to consider whether a yet further application would have a reasonable prospect of being approved.

In the subsequent case of Oxford City Council v Secretary of State for Communities and Local Government and One Folly Bridge Limited the context was the enforcement of an opening hours condition. The company had been granted planning permission to use the ground floor of a building situated on an island as a restaurant. Adjacent to the building was a pontoon that had used as an extension of the restaurant and for which a temporary consent had been granted for a trial run of six months. However, the company had failed to comply with the conditions, in particular that pontoon restaurant use had to cease by the mid evening. Following refusal of the company’s application for further use of the pontoon the first inspector had upheld it, stating that the pontoon use could not be satisfactorily controlled and managed in such a way as not to cause nighttime nuisance to local residents. The council then served an enforcement notice which led to an appeal before a second inspector seeking retrospective permission under ground (a). Noting that a new operator was now involved which was willing to accept a mid evening cessation of restaurant use of the pontoon, the second inspector held that there had been highly material changes in circumstances and that any harm to local residents could be sufficiently overcome through the imposition of conditions. Two separate issues arise from the judgment of Mr George Bartlett QC. The first, procedural matter concerned the fact that the council’s challenge had only been brought under section 288 of the TCPA 1990. On that point, the judge held the council’s failure to apply for permission to appeal under s.289 did not render its application under s.288 invalid or an abuse of process. If it was unclear whether to challenge under s.288 or s.289, the correct approach was to challenge under both. Secondly, on the decision letter itself, the second inspector had not taken into account immaterial considerations and had given intelligible reasons for his decision. The advent of the new operator was a material consideration as it removed the inhibition to imposing a time condition because the operator was agreeable to one being imposed and, as an experienced restaurateur; he was of the opinion that such a condition was workable. The second inspector had been entitled to take those matters into account; and in reaching his decision he had made it sufficiently clear why he disagreed with the decision of the first inspector.
REASONS

Finally, I draw attention to two challenges which raised, again, the procedural extent of the requirement to provide summary reasons for the grant of planning permission under article 22(1) of the General Development Procedure Order 1995. Co-incidentally, both were determined by Mr Justice Collins. In the first, \textit{R (Tratt) v Horsham District Council} 68 Ms Tratt had applied for judicial review of Horsham’s decision to grant permission for the erection of a 25 metre high mast some 130 metres from her house. In the decision notice Horsham had given as its reason that the proposal was consistent with the provisions of the development plan. On that particular point, the judge held that Horsham had failed to give appropriate summary reasons, which ought at least to have stated why the issues had been decided in favour of the applicant, Hutchinson Telecom. These should have dealt, in summary form, with the substantial issues that had formed part of the consideration of the planning application. On the issue of prejudice the judge expressed the view that as Horsham had not dealt adequately with the issue of Ms Trant's offer to pay for access for the mast if it were sited further into a nearby copse there was some possibility of a different decision being reached if it had been so considered. In consequence, he was prepared to exercise his discretion and to quash the permission.

In the subsequent case of \textit{R (Midcounties Co-operative Limited) v Forest of Dean District Council & Santon Group Development Limited} 69 a fuller exposition is given by Mr Justice Collins. The development under challenge was Santon’s permissions to construct a superstore on a rugby ground in Cinderford and the construction of a new clubhouse, pitches and associated facilities on an open field. Adjacent to the sports ground was a supermarket owned by the Co-op. It challenged the relevant permissions, amongst other grounds, on the basis that there were no summaries of reasons satisfying the requirements of article 22 as the decision notices did no more than list applicable policies and did not refer to material structure plan policy on which the county council had objected. The council and 11 interested parties were content to accept a consent order quashing the permissions but Santon maintained that the claim should fail as the Co-op was aware of the officer’s reports and so would know why the decisions to grant had been reached. Allowing the application, Mr Justice Collins remarks that the obligation to give summary reasons is based on the same considerations that apply to the obligation to give full reasons. They are needed to enable any interested person, whether applicant or objector, to see whether there might be grounds to challenge the decision. Therefore, the summary reasons should cover the main issues that formed part of the consideration of the application for permission. Accordingly, the purpose of giving reasons was the same whether they were full or summary. Where there were no objections to an application, that could be stated in the notice of a decision and it would suffice in such circumstances to say no more than that the application accorded with the relevant policies. Here, where there were objections, there had not only been a failure to refer to all the relevant policies but also a failure to provide a summary of the policies

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66 [2007] EWHC 769 (Admin)
67 See previously the decision of Sullivan J. in \textit{R (Wall) v Brighton and Hove City Council} (2004) EWHC 2582 (Admin),
68 [2007] EWHC 1485 (Admin)
69 [2007] EWHC 1714 (Admin)
themselves to enable the reader to see the relevance of the policy. The judge concludes that this is not a case where he should exercise discretion to refuse relief.

**TREES**

Lastly, in *Northampton Borough Council v Perrin*\(^{70}\) the Court of Appeal has considered the application of section 198(6)(b) of the 1990 Act, which permits TPO’s trees to be cut down, uprooted, topped or lopped so far as may be necessary for the prevention or abatement of a nuisance. The point had arisen from the trial of this preliminary issue before Judge Peter Coulson QC. In the Court of Appeal the view was expressed that as the underlying purpose of the legislation was to preserve trees that were the subject of tree preservation order it would be wrong to ignore what steps might be taken other than to the tree itself. The expression "so far as may be necessary for the prevention or abatement of a nuisance" meant "if and so far as may be necessary for the prevention or abatement of a nuisance". The statutory test required that whatever was done to the tree itself was necessary. It was not enough that whatever was done was sufficient. Whilst the judge had been correct to hold that the word "necessary" in s.198(6)(b) provided a link between a range of possible works to the tree itself and the prevention or abatement of a nuisance, and, that the test was "necessary" and not "reasonably necessary" he had been wrong to find that s.198(6)(b) was concerned only with allowing such cutting down or lopping works as may be necessary to prevent or abate an actionable nuisance. In the circumstances, his reasoning was flawed. Alternative engineering solutions were relevant to the determination of the question whether the cutting down, uprooting, topping or lopping of a tree was necessary for the prevention or abatement of a nuisance.

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\(^{70}\) [2007] EWCA Civ 1353 on appeal from [2006] EWHC 2331 (TCC)