Planning Law Update

a presentation by

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Tuesday 1st March 2005
OVERVIEW

This paper looks at some current trends in the case law affecting land-use planning broadly over the last twelve months. Particularly in the field of environmental regulation the likely effects on English case law have not yet emerged but one is conscious that that there is, in train, a quiet revolution; and it is not just the planning system that is undergoing a radical change through the new procedures and terminology ushered in under the umbrella of the Planning and Compulsory Purchase Act 2004. Increasingly, the very mechanisms by which the system has operated since 1948 are having to be re-visited; for as this country becomes more harmonized with Europe\(^1\), even without the adoption of a single currency, so our land-use planning system must adapt. In terms of current and emerging case law principles no more has the influence of the Commission and the European Court of Justice (“ECJ”) been seen, and will be increasingly felt, than in the area of Environmental Impact Assessment (“EIA”), to which subject a fair proportion of this paper will refer. We also look at the continuing judicial containment, save in the case of gypsies, of the impact of the Human Rights Act 1998, the Courts’ consideration of Crown exemption from planning control, the need for “due process” by local planning authorities (“LPAs”) in their administration of the planning process, some cases on enforcement issues and, finally, some guidance on the interpretation of section 106 agreements.

ENVIRONMENTAL IMPACT ASSESSMENT

In *Wells*\(^2\) the ECJ, in the context of the statutory review of old mining permissions introduced by the Planning and Compensation Act 1991\(^3\), has taken a wide view of what constitutes a “development consent”, and, that where EIA has not been undertaken at the initial stage the relevant consent should be revoked or modified; for it has held that it would undermine the effectiveness of the Directive to treat this process as mere modification of an existing consent. More generally, it has stated that where national law provides for a consent process in stages, EIA should take place at the stage of the principal decision, unless the effects are not identifiable until

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1. One need look no further than the introduction of Regional Assemblies under the Regional Assemblies (Preparations) Act 2003 on the one hand and the outcome of the vote for the North East Assembly on the other!
2. Case C-201/02: *R (Wells) v. Secretary of State for Transport, Local Government and the Regions:* 7 January 2004
3. The approval of a new set of conditions on an existing grant of a mining permissions.
the later implementing decision, in which case EIA should take place at that stage. Perhaps most significantly, it has highlighted that under the principle of cooperation in good faith, Member States are obliged to take all measures necessary within their competence to ensure that where EIA has not taken place, the consent is revoked or suspended in order to carry out EIA and, moreover, to make good any harm caused by failure to carry out EIA. The detailed procedural rules for doing so are a matter for Member States, but clearly under domestic law a planning permission can be revoked under s.97 of the TCPA 1990, subject to payment of compensation, before the building operations are completed. The Court also held, importantly, that individuals may invoke the provisions of the EIA Directive in national courts, despite the fact that this may have adverse repercussions for the developer; this could not be described as “inverse direct effect” as the UK government had suggested.

As a piece of European jurisprudence Wells undoubtedly strengthens the hand of EIA claimants in a number of respects, in particular by indicating that a purposive approach is required to the concept of development consent, and emphasising the ongoing duties of authorities to make good past breaches of EIA requirements where this is possible under domestic procedures. Whether this will enable claimants to re-open issues where the domestic time-limits for judicial review would not allow the original decision to be challenged remains to be seen following the deliberations of both the ECJ and the House of Lords in Barker (the Crystal Palace case).

In Barker, the ECJ has still to hear the preliminary reference made by the House of Lords in June 2003 as well as the infraction proceedings brought by the Commission against the UK. The potential significance of this case is whether, in appropriate circumstances, EIA should be carried out at the reserved matters stage where none has been undertaken before the grant of outline consent. The Court of Appeal took a strong view that it was the outline permission that

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4 Infraction proceedings have also been instituted in respect of the White City litigation involving CPRE: see R v Hammersmith & Fulham LBC, ex parte CPRE [2000] Env LR 532 (Richards J); [2000] Env LR 544 (Court of Appeal); [2000] Env LR 532 (Harrison J). They have also been taken against the UK in relation to the CPRE Litigation (relating to lawful development certificates, pollution control and Crown Immunity which, as David Elvin QC points out in his paper to the Oxford Joint Planning Law Conference, September 2004, Inclusivity and Integration? – Recent Legal Developments, shows the extent to which the Commission is carefully monitoring compliance with the EIA Directive. With regard to individual projects as well as its transposition.

5 The questions asked in the reference include:

“(2) Does the Directive require an EIA to be carried out if, following the grant of outline planning permission subject to conditions that reserved matters be approved, without an
amounted to the relevant “development consent” for the purposes of the EIA Directive. However, although *Wells* dealt with a difference procedural context, it does act as a particular pointer as to the way in which matters could well develop jurisprudentially, and, all in the context of the current reprieve to outline consents under the 2004 Act.

Currently, there are two reported English cases which have directly touched upon the effects of *Wells*. The first is *Burkett* when, in granting permission to appeal the decision of Mr Justice Newman in January 2004, the Court of Appeal queried what remedy Mrs Burkett was now expecting, given that the development under challenge had been commenced and the ECJ decision only raised the possibility of the permission still being quashed, with compensation being paid to the developers. However, the appeal was subsequently abandoned; though the costs aspects have been the subject of the continuing involvement of the Court of Appeal in a separate determination, to which we will return below.

The second recent case is *R (The Noble Organisation) v Thanet District Council*. There, the challenge was to the grant of reserved matters in respect of a leisure development on a business park. Both at the outline stage, and, at reserved matters, the council had made a screening decision that no EIA was required. However, Noble argued that, as a matter of EC law, the council should have looked behind the formal validity of the earlier decisions and examined the adequacy of the consideration previously given to the need for an EIA. Mr Justice Richards

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EIA being carried out, it appears when approval of reserved matters is sought that the project may have significant effects on the environment …?

(3) In circumstances where:

(a) national planning law provides for the grant of outline planning permission at an initial stage of the planning process and requires consideration by the competent authority at that stage as to whether an EIA is required for the purposes of the Directive; and

(b) the competent authority then determines that it is unnecessary to carry out an EIA and grants outline planning permission subject to conditions reserving specified matters for later approval; and

(c) that decision can then be challenged in the national courts;

may national law, consistently with the Directive, preclude a competent authority from requiring that an EIA be carried out at a later stage of the planning process?”

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6  [2001] EWCA Civ 1766
7  *R (Burkett) v Hammersmith & Fulham LBC* [2004] Env LR 45
disagreed. On normal domestic law principles, he considered that a challenge to the validity of an earlier decision was impermissible. He saw nothing in the EIA regime that subverts the normal position, and, that what the ECJ had said in *Wells* about the obligation to nullify the consequences of a breach of the Directive as not to be taken as calling into question the validity of earlier decisions which are no longer open to challenge under domestic law. The judge also considered that the obligation (to re-consider and, if necessary, revoke) was expressed to be subject to national procedural rules (with a standard proviso concerning the principles of equivalence and effectiveness). He drew attention to the particular issue in *Wells* being whether an earlier permission could be revoked or modified, rather than whether it could be treated as invalid; and even that particular issue was clearly stated to be a matter for determination by the national court applying national procedural rules. Moreover, if it were possible to mount indirect challenges of this kind to the validity of earlier EIA decisions then that would be destructive of legal certainty, which was as much a principle of EC law as of domestic law.

Similarly, the more recent approach of the Court of Appeal towards procedural breaches has been to temper the effects of *Berkeley (No.1)*. In that groundbreaking case, it will be recalled that the House of Lords had to consider whether substantial compliance with the EIA Regulations could only achieved through the production of a formal document (the Environmental Statement – “ES”). If not, then the decision-maker would not have the necessary “environmental information” to meet the requirements of the Directive (85/977), in consequence of which the planning permission must be quashed.

In *Jones v Mansfield DC* the Court of Appeal, in the context of an LPA issuing a negative screening opinion (i.e. that no ES was required), held that the issue of likely significant effects was one for the LPA to determine with Lord Justice Carnwath expressing the view that the true reach of the *Berkeley* principle was more narrow. In the subsequent case of *Richardson v FSS* the issue of procedural compliance was considered in the context of a breach of regulation 21 of the 1999 Regulations, which obliged the LPA to make available for public inspection a statement containing the main reasons on which the LPA’s planning decision had been based. Nevertheless, the Court of Appeal there drew a distinction between the procedural breach occurring after the

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8. [2004] EWHC 296 (Admin); November 12, 2004
9. [2001] 2 AC 603
grant of planning permission and that leading to it. More recently, in *Younger Homes* the Court, in the context of a negative screening opinion not being in a proper form and not placed on the planning register, also held that this procedural flaw was capable of resolution rather than necessitating the planning permission being quashed.

In respect of the quality of the ES itself, the decision of Mr Justice Sullivan in *R (Blewett) v Derbyshire County Council* is instructive. There, in the context of a landfill proposal, he rejected the claimant’s submission that there was a requirement to produce an ES in the correct form and to comply with the procedural requirements, distinguishing the facts of *Berkeley* upon the basis that, there, no ES had been produced. Rather, the EIA Regulations envisaged that the process of publicity and public consultation would give those persons who considered the ES to be inaccurate or inadequate or incomplete an opportunity to point out its deficiencies which, in turn, may lead the LPA to dismiss the application for lack of sufficient environmental information. However, the judge did recognize that there would be cases where the document purporting to be described as an ES was so deficient that it could not be reasonably described as such but that those instances were likely to be few and far between. However, as subsequently upheld in the Court of Appeal, Mr Blewett was successful in having the consent quashed due to the County Council’s inadequate failure to consider the Best Practicable Environmental Option (“BPEO”).

Indeed, a flavour of the current dilemmas affecting “environmental litigation” is found in the recent judgment of Lord Justice Brooke in *Burkett (No.2)*. The particular issue concerned the appropriateness, in a legal aid context, of setting off the costs awards in favour of Mrs Burkett as a result of her success in the House of Lords against that against her as a result of the failed substantive hearing. However, in an Addendum running to some four pages, the Court expresses concerns about the current imbalance, and the consequent need for further study, of the financial costs of pursuing public interest challenges and the extent to which they may be a potent factor in

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12 A petition for leave to appeal to the House of Lords was dismissed on 28 October 2004
13 *Younger Homes (Northern) Limited v FSS* [2004] EWCA Civ 1060; 30 June 2004
14 *Derbyshire Waste Ltd v Blewett & SSEFRA (intervening)* [2004] EWCA Civ 1508; 11 November 2004
15 *R (Burkett) v Hammersmith & Fulham LBC (No.2), Law Society and Legal Services Commission Intervening*; October 15, 2004; Times, October 20, 2004
deterring litigation directed towards protecting the environment from harm. In this regard, the Court drew attention to the 1998 Aarhus Convention requiring each signatory to have in place judicial procedures allowing members of the public to challenge acts of public authorities which contravene laws relating to the environment. As those procedures should be “fair, equitable, timely and not prohibitively expensive” and the Court’s concerns as to the cost-effectiveness of the courts as a means of resolving environmental disputes if the costs incurred in *Burkett* were in any sense typical. Secondly, the fact that the large expenditure on Mrs Burkett’s behalf had not, so far as the Court was aware, yielded any practical benefit to her or her neighbours although the development was now substantially complete. Thirdly, there was the issue as to what practical relief Mrs Burkett could have realistically have expected to obtain – now or at any previous stage of the proceedings.

However, such comments need to be set against the fact that from 1st January 2005 the Freedom of Information Act 2000 came into force, giving a general right of access to information held by public authorities. It also includes provisions enabling the information and associated access to justice provisions of the Aarhus Convention to be met, in which regard the separate Environmental Information Regulations 2004 also came into force on the same day. Accordingly, the presumption now is that environmental information will need to be disclosed unless there are compelling reasons for withholding it. The limited exceptions will include adverse affects on international relations, defence, public security, the course of justice and commercial confidentiality.

### HUMAN RIGHTS

**Interference with amenities**

In the context of planning law, other than in respect of gypsies, the specific protection of human rights have been considered by the higher levels of the judiciary not to warrant special treatment. Now, in *Lough v FSS*[^17^], the Court of Appeal has held that Article 8 rights[^18^] and those under

[^16^]: See, for example, *R (Edwards) v Environment Agency* [2004] EWHC 736; [2004] 2 P&CR 20 in which Keith J held that Mr Edwards had sufficient standing, with public funding, to bring a judicial review against the absence of an environmental statement before the grant of a IPPC permit although he had not been part of the consultation process. Accordingly, in that instance there had been no abuse of the process.


[^18^]: The right to the respect for private and family life and home
Article 1 of the First Protocol\(^{19}\) have to be seen in the context of competing rights and are, effectively, integral to the normal planning decision making process. In consequence, it is unnecessary for the decision maker to articulate in explicit terms the carrying out of a proportionality balancing exercise. The challenge was brought by the Bankside Residents Association seeking to oppose a proposal for a 20 storey building adjacent to the Tate Modern Gallery. The context was a proposal contrary to the Southwark UDP and findings by an inspector that the proposed development would entail loss of daylight, sunlight and overshadowing on neighbouring properties and interference with television reception. A petition to the appeal to the House of Lords was dismissed in early November\(^{20}\). In terms of the wider implications of the appeal, although the House of Lords has not granted leave, an issue of general public interest still needs to be addressed, namely, what is the proper threshold test that a claimant must satisfy to show that there has been an interference with his Convention rights.

The need to provide reasons

The existence of issues affecting human rights does not require any different approach to the giving of reasons as Lord (Simon) Brown explained in his speech in the *South Bucks District Council v Porter (No.2)*\(^{21}\), the failed challenge by the LPA to the grant of planning permission to Mrs Porter to retain her mobile home in the Green Belt (which had been the subject of the earlier injunction proceedings that went to the House of Lords in 2003\(^{22}\)). There, the Inspector’s reasons had been briefly stated explaining Mrs Porter’s hardship and why he was granting planning permission subject to a personal occupancy condition but they were otherwise intelligible and adequate.

In the subsequent case of *First Secretary of State v Chichester District Council*\(^{23}\) the Court of Appeal decided to remit, for re-determination, an application for planning permission for a private gypsy caravan site where the Inspector had, in particular, wrongly equated a shortage of gypsy sites as, in itself, a violation of Article 8 rights\(^{24}\). Echoing the approach in *Lough*, though not by specific reference, Lord Justice Auld remarks that in a case like this where the planning harm caused by the development is said to be weak and the countervailing material considerations, including the personal circumstances of the applicants, are said to be strong, recourse to Article 8

\(^{19}\) The right to the protection of property and the peaceful enjoyment of possessions

\(^{20}\) [2004] 1 WLR 2892

\(^{21}\) [2004] 1 WLR 1953 @ para. 36

\(^{22}\) [2003] 2 WLR 1547

\(^{23}\) [2004] EWCA Civ 1248; [2005] 1 WLR 279

\(^{24}\) The right to respect for private and family life
may add little but unnecessary complication to the balancing exercise required for the planning decision by section 54A of the 1990 Act.

Finally, in *Coates v South Bucks District Council* ²⁵ the Court of Appeal has provided further guidance on the court’s discretion in deciding whether to grant an injunction and the reasons for a decision that turns essentially on a test of proportionality i.e. protection of the environment against article 8 rights of protection of the family and home. Here, the site was a particularly sensitive one in the green belt with a lengthy planning history which indicated that it was unlikely that a further grant of planning permission would succeed. The appellants had also delayed seeking consent, had not been long on the site and had no local connection. Staying the injunction until a planning application had been determined, therefore, would not be proportionate.

**NATURE CONSERVATION**

**Human rights**

In *R (Fisher) v English Nature* ²⁶ the Court of Appeal was asked to consider a challenge to the lawfulness of a decision by English Nature to confirm a statutory SSSI designation²⁷ in respect of 13,335.70 hectares of intensely farmed arable land, the nesting territory of the stone-curlew, a European protected species of bird in respect of whom an SPA²⁸ had also been made. At appeal, the issues were whether the SSSI designation and notification procedures had been appropriate and whether there had been a breach of the appellants’ rights under Article 1 of the First Protocol. The appropriateness of a SSSI designation, and, over so extensive an area was, unsurprisingly, considered by Court, to have been addressed by English Nature in a rational and fair manner of their statutory responsibilities. Accordingly, there had been no procedural irregularity and no disproportionate impact on the appellant’s Article 1 First Protocol rights.

In *R (Trailer and Marina (Leven) Limited) v SSETR and English Nature* ²⁹ the issue before the Court of Appeal was whether the transitional provisions introducing amendments introduced to

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²⁵ [2004] EWCA Civ 1378; 22 October 2004
²⁶ [2004] EWCA Civ 663; [2005] 1 WLR 147
²⁷ Site of Special Scientific Interest under s.28 of the Wildlife and Countryside Act 1981
²⁸ Special Protection Area designated under the Birds Directive (79/409/EEC as amended by the Habitats Directive 92/43/EEC)
²⁹ [2004] EWCA Civ 1580; 16 December 2004. The compensation in question was some £19,000 per annum in respect of not using the canal for fishing and boating.
the Wildlife and Countryside Act 1981 by the Countryside and Rights of Way Act 2000, which removed the ability of English Nature to maintain compensation payments under a management agreement under the old 1981 Act\(^\text{30}\), were incompatible with Article 1 of the First Protocol. Upholding the decision of Mr Justice Ouseley\(^\text{31}\) the Court took the unsurprising view, after \textit{Fisher}, that the restriction on compensation, which meant that a landowner could not be paid in respect of operations which the landowner wished to undertake in the future, reflected a changing view over time as to the relationship between owner’s rights and the public interest. The provisions for the control of property did not amount to “disguised appropriation” nor did they come anywhere near the hypothetical category of a measure which was manifestly so disproportionate that it offended against the first sentence of Article 1 of the First Protocol.

\textbf{Overriding public interest}

In \textit{R (Newsum) v Welsh Assembly Government}\(^\text{32}\) the Trustees of the Duke of Westminster’s Estate had challenged a decision by the Welsh Assembly refusing to grant a licence for the translocation of a population of great crested newts upon the basis that there was “no imperative reason of overriding public interest” which required the quarry in question, which was disused, to be worked immediately. The Court of Appeal, reversing the lower court, held that the relevant words in Regulation 44(2)(e) of the Habitats Regulations 1994 contemplated a project, vital in the public interest, which would necessarily have an effect on protected wild animals or plants. As the Trustees had not submitted that the grant of planning permission itself was a purpose of overriding public interest the Assembly had been entitled to take the view that it did. However, the Court was at pains to point out that the overlapping jurisdiction between the Countryside Council for Wales and the Assembly coupled with the wording of the Regulations had unnecessarily complicated matters.

\begin{footnotesize}
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\item[\textit{30}] Section 30. These amendments significantly amended section 28, introduced new sections 28A-28R and repealed sections 29 and 30. The transitional provisions in Schedule 11 had the effect that any notification of an area of special scientific interest given under the original section 28 had effect, subject to a few small necessary exceptions, as if it had been served under the new section 28.
\item[\textit{31}] [2004] EWHC Admin 153; [2004] JPL 1512
\item[\textit{32}] [2004] EWCA Civ 1565; 22 November 2004
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The need for appropriate assessment

In context of the Habitats Directive\textsuperscript{33}, a further potentially troubling decision of the ECJ has recently emerged in the \textit{Waddenzee} case \textsuperscript{34} concerning the renewal of annual licences, granted for limited periods over several years, by the Dutch Secretary of State for agriculture, nature conservation and fisheries for the mechanical fishing of cockles in the Waddenzee SPA. Although the Habitats Directive does not define the terms “plan” or “project” the ECJ was of the opinion that a new (appropriate) assessment was required for each licence both of the possibility of carrying on that activity and of the site where it should be carried out. This approach is based both on the precautionary principle, and, upon the basis that the integrity of the site should not be adversely affected. The Court also stressed how rigorous the appropriate assessment must be as a process, and, that the activity may only be authorized where no reasonable scientific doubt remains as to the absence of effects on the integrity of the site

CROWN EXEMPTION

The implementation of Part 7 of the 2004 Act, removing Crown exemption, is currently scheduled for the end of 2005. During the course of this year, the Courts have been asked to address two specific issues affecting public/private partnerships. In the first case, \textit{R (Mid-Devon DC) v First Secretary of State}\textsuperscript{35} the issue concerned the restoration of a site used as a holding and disposal site for the carcasses of animals slaughtered during the Foot and Mouth outbreak. DEFRA (the successors to MAFF) had agreed to restore the site but had not been able to reach agreement with the landowners as to the amount of compensation payable. Accordingly, in order to break the deadlock the Council had decided to issue enforcement notices against the landowners. The Inspector quashed the notices upon the basis that the development was immune from enforcement under section 294(1) of the TCPA 1990 as it had been carried out by or on behalf of the Crown although MAFF had had no interest in the land. Mr Justice Keith took the contrary view, holding that there had to be a specific legal interest before Crown immunity applied.

\textsuperscript{33} 92/43/EEC
\textsuperscript{34} Case C-127/02: \textit{Landelijke Vereniging tot Behoud van de Waddenzee} v \textit{Staatssecretaris van Landbouw, Natuurbeheer en Visserij}; 7 September 2004
\textsuperscript{35} [2004] EWHC 814; [2004] 2 P&CR 28
In *R (Cherwell DC) v First Secretary of State*[^36] the issue before Mr Justice Collins concerned a proposal for an Accommodation Centre for asylum seekers. It was proposed that the Home Office would retain ownership of the site and would seek approval of reserved matters but a DBO contractor[^37] would be granted a lease to undertake the development and operate the centre. The proposal elicited widespread opposition from local residents as a result of which a non-statutory public inquiry was held. However, the Secretary of State decided, contrary to the Inspector’s recommendation, to approve the proposed development. The Council’s challenge contended that the Home Office had not been entitled to adopt the non-statutory procedure since the development was to be carried out after the lease was granted to the DBO contractor. The judge took a contrary view holding that the development would be carried out “by or on behalf of the Crown” at the relevant time, in consequence of which the Home Office had adopted the correct procedure. A subsequent hearing before the Court of Appeal took place in early July and judgment was recently given upholding the first instance decision[^38].

**DUE PROCESS**

**Publicising planning applications**

In *R (Gavin) v Haringey London Borough Council*[^39] the issue before the Court was the consequences of a LPA failing adequately to publicise a planning application. A firm of builders merchants, Wolseley Centers, had purchased a site in Archway, North London and submitted a planning application in North London for a new warehouse facility and hire “center”. Although the claimant lived and worked, as a solicitor, across the road he had not been notified, by letter, of the planning application although others had been. No site notice had been erected. In September 2000 planning permission had been granted. However, it was not until March 2003, when an excavator arrived to dig trial pits that the claimant enquired and was told by the LPA, by a letter dated 7th April 2003, that a valid planning permission existed. In the event, a period of 32 months had elapsed between the grant of planning permission and the commencement of judicial review proceedings. In the view of Mr Justice Richards, the LPA had undoubtedly failed to publicise the Wolseley planning application sufficiently under Article 8(4)(a) of the T&CP (General Development Procedure) Order 1995. Had there not been undue delay he would have

[^37]: DBO: design, build and operate  
[^38]: [2004] EWCA Civ 1420; October 28, 2004; The Times, November 4, 2004  
quashed the permission. In the event, given the prejudice to Wolseley, he restricted himself to a declaration that the LPA had failed to comply with the necessary publicity requirements and the requisite EIA obligations (no doubt anticipating that Mr Gavin might wish to apply through the Local Government Ombudsman for compensation). The case is of particular interest in three respects. First, was the willingness of the court to accept delay where a sufficient explanation and prejudice arose. Secondly, that despite the seriousness of the breaches, the court was still not prepared to quash the planning permission. Thirdly, the judge emphasised that the developer was entitled to rely upon the LPA to discharge the publicity requirements under the GDPO and was not obliged to monitor the steps taken by the LPA to comply with them. Fourthly, third parties were entitled to rely upon information in the planning register; and that, in consequence, quashing a planning decision long after it had been made would be detrimental to good administration as well as causing hardship and prejudice to the developer.

The recent decision of *R (Pridmore) v Salisbury District Council*40 is another salutary tale. Here, the interested party, a Mr Docking, had applied for planning permission to construct a new bungalow on part of the garden at the rear of his property with an access route including a widened splay. Although the application certified that all the land belonged to the applicant part of it in fact belonged to the claimants. The LPA became aware of the situation and suggested that either the application should be withdrawn and renewed or that notice should be served on the claimants. Mr Docking submitted an amended plan and a certificate B certifying that the claimants had been notified. The LPA assumed this to be true and granted planning permission for the amended proposals. Mr Justice Newman quashed the decision, remarking that to preserve the permission, under the Court’s discretionary power not to quash, would come close to undermining the mandatory scheme of the legislation. It is one thing to fail to give notice to an unidentified owner of part of the land, as in the case of *Main v Swansea City Council*41 but it was quite another to certify that prior notice of an application has been given, when it was known that no such notice has been given. It was yet worse to certify that notice has been given on a stated date when no notice had been given on that day or at all.

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40 [2004] EWHC 2511 (Admin); 5 November 2004
41 (1985) 49 P&CR 26
The appearance of bias

In *R (Georgiou) v Enfield LBC*\(^{42}\) applications for planning permission and listed building consent for offices, a consulting room and the erection of a mental health nursing home. The proposals were first considered by the LPA’s Conservation Advisory Group (CAG) as well as by the planning committee, three members of whom had also sat on the CAG, which supported the proposals. The claimant, the chairman of a local business association and an active member of other local representative groups, claimed that the circumstances in which the committee resolved to grant approval created the appearance of bias since concerns, amongst others, from the highways aspects of the proposals as well as objections from the Social Services Department and the local NHS Primary Care Trust had not been sufficiently drawn to members’ attention. Mr Justice Richards upheld the challenge, observing that there was a real possibility of bias in the sense of decisions being approached with closed minds and without impartial consideration of all the planning issues as well as deficiencies in the reporting of the results of public consultation.

Again, in the subsequent case of *R (Ghadami) v Harlow DC*\(^ {43}\) the issue arose in the context of a resolution to grant planning permission for a major redevelopment of Harlow town centre, focused in particular on a retail centre known as the Harvey Centre. The claimant, Mr Mohammed Ghadami, owned commercial premises that would be affected by the proposed development. He appeared in person but was not a lone voice as three members of the Planning Committee had provided witness statements in support of his claim. Richards J, following the approach he had taken in *Georgiou* of the standpoint of the fair-minded and informed observer\(^ {44}\), upheld a claim of apparent bias or predetermination in relation to the Chairman of the Planning Committee, Councillor Garnett, who had sought to remove Mr Ghadami’s objections in a particular telephone discussion with him, and, that the decision to grant planning permission had been reached by a majority of 4 votes to 3.

The appearance of fairness

In *Tromans v Cannock Chase District Council*\(^ {45}\) the issue concerned a dispute over the number of votes cast at a planning committee meeting. The appellants objected to a proposed development on a plot next door on amenity grounds. The votes were 7-6 in favour of granting

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\(^{42}\) [2004] 2 P&CR 380; 7 April 2004  
\(^{43}\) [2004] EWHC 1883 (Admin); 30 July 2004  
\(^{44}\) Following the House of Lords decision in *Porter v Magill* [2002] 2 AC 257
consent whereas the appellants counted them the other way round. Although they raised the matter at the meeting it proceeded without any verification or other investigation of the votes in fact cast. In consequence, the Court took the view that the Council had not acted fairly and that entitled the appellants to have the decision quashed.

The duty to give reasons for granting planning permission

Article 22 to the General Development Procedure Order 1995 (“the GDPO”) was amended with effect from 6 December 2003\(^{46}\) to place a positive duty on LPAs to provide summary reasons for the grant of planning permission or for the approval of reserved matters in the decision notice. In *R (Wall) v Brighton & Hove City Council* the High Court has now provided some guidance, in the context of a successful challenge by an adjoining neighbour to a proposal for a replacement apartment block, as to how those reasons should be provided. Having emphasised the importance of giving reasons to assist all those involved in the planning process, Mr Justice Sullivan then states the following:

“55. The new requirement does not impose an undue burden upon local planning authorities. Officers' reports customarily include recommended reasons for refusal of planning permission or for the imposition of conditions. Members are free to debate those recommendations and agree or disagree with them, adding or striking out reasons for refusal or conditions. When officers recommend the grant of planning permission there is no reason why their reports should not similarly contain recommended summary grounds for so doing. Very often the conclusions in an officers' report will in effect be a summary of the grounds for granting planning permission. The members will be able to adopt or amend the officers' summary grounds, but the requirement to set out summary grounds in the decision notice will ensure that the members decide in public session why they wish to grant planning permission.

58. The new requirement to give summary reasons for the grant of permission will be particularly valuable in cases where members have not accepted officers' advice, where the officer has felt unable to make a recommendation, where the officer's report fails to take account of a material consideration, but that omission is said to have been remedied by the members during the course of their discussions, or where an irrelevant factor has been relied upon by some members during the course of their discussions and it is important to ascertain whether it was one of the Committee's reasons for granting planning permission. In such cases -- and I emphasise that these are merely examples -- there would have to be very powerful reasons for not quashing a decision notice which did not include the local planning authority's summary reasons for granting planning permission. To allow extrinsic post hoc evidence as to what the local planning authority's reasons were in such cases would perpetuate the very problems that Parliament intended the substituted article 22(1) to address.”

\(^{45}\) [2004] EWCA Civ 1036; 2 November 2004
\(^{46}\) Town and Country Planning (General Development Procedure) (England) Amendment) Order 2003, article 5, which introduced a new Article 22(1)(a) to the GDPO 1995.
The Judge, Mr Justice Sullivan, also points out that whilst a failure to include the summary reasons in a decision notice will not render the grant of planning permission null and void if the defective decision notice is challenged in an application for judicial review the court will have a discretion to quash the notice. How it exercises that discretion will depend upon the particular facts of the case.

The issue of reasons under Article 22 has also been litigated in the case of R(Chisnell) v Richmond upon Thames London Borough Council in which judgment has just been given. Here, the claimant sought judicial review of a planning consent for a neighbour’s house extension. Under delegated powers two previous applications had been refused upon the basis that both proposals had involved the use of the extension as a separate dwelling, which was out of character and detrimental to the amenities of the area and neighbouring occupiers. The committee had been advised that these refusals had not been based on amenity or aesthetic issues and there would have to be a material change in circumstances for them to rely on any ground of refusal other than use as a separate dwelling. Quashing the resolution to grant, Mr Justice Newman, having found that the committee had been misled addressed the Article 22 point, that simply to refer the public or interested parties to the officer’s report and to the committee minutes was insufficient to comply with that requirement or to shed proper light on how the decision had been reached.

ENFORCEMENT

No right to imply an addition to a planning condition

In Sevenoaks District Council v First Secretary of State the issue before Mr Justice Sullivan was whether an implementation clause could be implied into a condition requiring the submission of certain details connected with earth bunding for a golf course. The Council had served an enforcement notice, which was quashed on appeal, alleging that the works had not been carried out in accordance with the relevant condition. The Court disagreed, holding that in order to give effect to the Council’s interpretation the condition ought to have included additional wording to the effect that the works had to be carried out as approved. Since a planning permission is a public document and that a breach of a condition may ultimately result in criminal consequences, it was essential that any planning condition should be clear on its face.

Mixed use developments

The decision of the Court of Appeal in *Fidler v First Secretary of State*[^49] helpfully addresses two issues: (a) that there is no “mixed use” class and (b) that under-enforcement does not mean that planning permission is deemed to be granted for those activities not specifically mentioned in the enforcement notice. The case concerned the use of a farmyard and buildings for agricultural purposes and for agricultural and general contracting. The contractors also used it for workshops, open storage for haulage and for other businesses. The LPA had served enforcement notices in respect of the business uses which Mr Fidler had appealed as well as applying for a CLEUD. The Inspector had, however, dismissed the CLEUD appeal and required all non-agricultural uses to cease on the site.

As to the first issue the Court of Appeal endorsed the decision made in *Belmont Riding Centre v First Secretary of State*[^50] that the use classes order has no application to a mixed use so that a finding of a material change of use is not avoided simply by showing that a component falling within a particular class has been substituted for another component falling within the same class. Lord Justice Carnwath also suggested that a more pragmatic approach to the issue of intensification can now be taken, since the 1991 reforms, in consequence of which the Inspector was not required to formulate different ‘before’ and ‘after’ descriptions of the mixed use.

The second issue turned on the interpretation of section 173(11) of the 1990 Act which in terms, enables the LPA to elect not to require steps to be taken to remedy the whole of the alleged breach of planning control. If they could have required any buildings or works to be removed or any activity to cease but do not so do then planning permission is to be treated as having been granted in respect of such development once all the requirements of the notice have been complied with. Following the unreported decision of the Court of Appeal in *Scott v Secretary of State* (2000)[^51] the Court drew attention to the pre-condition that the activity must have been one which the particular enforcement notice could have required to cease. It is not enough that it could have been the subject of enforcement action under a differently drafted notice. As Lord Justice Carnwath observes:

[^48]: [2004] EWHC 771.(Admin); March 22, 2004
[^49]: [2004] EWCA Civ 1295; 12 October 2004
[^50]: [2003] EWHC 1895 (Admin); [2004] JPL 593
[^51]: October 16, 2000. As also followed in *Maldon DC v Hammond* [2004] EWCA (Civ) 1073; 30 July 2004 (though this turned on the terms of a planning injunction)
“…an enforcement notice cannot require an activity to cease, unless it is part of the breach of planning control identified by the notice itself. Not only is this interpretation supported by the wording of the section, it also makes practical sense for all parties. It ensures that the authority does not give deemed permission by an oversight; and, for those interested in the land, it provides clarity as to what is and is not permitted.”  

Lord Justice Buxton, in his concurring judgment, also points out that LPAs were not obliged to seek out and specify every current breach before they took any enforcement action. Otherwise they would be in danger of creating “adventitious and irrational exemptions from planning control”.

**PLANNING AGREEMENTS**

Two interesting cases on the interpretation of section 106 agreements are worthy of note. The first, *Patel v Brent London Borough Council*  

concerned the recovery of a highways contribution. Under an initial section 52 agreement, in connection with the grant of a 1990 planning consent for the development of a temple on the site of the former Neasden High School, the claimants (“the Mission”) agreed to pay £550,000 to the council in respect of certain contemplated highway works. The Mission, in the end, decided not to implement that consent but negotiated the sale of the site to a housebuilder. A 1992 consent for 149 dwellings led to the Mission entering into a section 106 agreement which required the deposit of £550,000, which sum was to be solely attributable to paying for highway improvements and/or traffic management measures necessary to improve access arrangements to/from the site. The council undertook to use its reasonable endeavours to complete the works by a specified stage. The relevant date in October 1994 passed. By August 1999 the Mission’s solicitors demanded the return of the contribution. Finally, in two phases, in 2001 and 2003 a scheme of signalisation and associated footpath widening was carried out using most but not quite all of the contribution plus accrued interest. From a planning law perspective, the most interesting point that emerges is the view of Mr Justice Hart that the statutory status of a planning obligation cannot be discharged by breach. As to the outcome, the judge ordered an inquiry as to what (if any) damage had been caused by the works not having been completed by the end of 1996, the date he found when their reasonable endeavours should have delivered them.

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52 Para.43
In *R (Legal and General Assurance Society Ltd) v Rushmoor Borough Council* the interpretation of a section 106 agreement arose in the context of a claim to quash two planning permissions for the division of a former retail warehouse into a number of smaller retail units and the construction of some new units. When the permission had originally been granted a planning agreement had been entered into containing a covenant that “any buildings to be constructed on the premises or any part thereof shall be used solely as a retail warehouse ..” The question before Mr Justice Collins, in that respect, was whether the use of the indefinite article should be construed as a limitation on number. Following a recent Court of Appeal decision, *Martin v David Wilson Homes Limited*, the judge highlighted that the restriction was in respect of the use, not of the building. Whilst the Court of Appeal had made it clear in *Martin* that questions of construction of agreements will always be fact sensitive and that one case can very rarely if ever be regarded as authority for another he felt that the Court could indicate how particular provisions should be approached; and in that regard it was obviously desirable that the same expressions used in different agreements should be approached for the purpose of construction in the same way. Here, the general approach showed that the indefinite article did not of itself bear an implication of singularity, and, that *Martin’s* case shows that in the context of a provision restricting use it is less likely to bear that implication. In the circumstances, he was satisfied that the words in the relevant covenant did not limit the number of units to be permitted on the premises but only limited the use of any such units to retail warehousing.

**FINAL THOUGHTS**

He was told not to do it but he did; and it will be recalled that as a “summer special” Keith Hill, the Planning Minister, introduced the Town & Country Planning (General Development Procedure) (England) (Amendment) Order 2003 reducing the appeal period from six to three months for all applications submitted on or after September 5, 2003 plus a couple of consultation papers. The consequences were inevitable leading to a dramatic increase in the number of appeals lodged with the consequent delay in their determination, running at over twelve months for a written representations site inspection or an hearing date. After much pressure and complaint from both sides of the development industry and, no doubt, the Planning Inspectorate,
Keith Hill, still the Planning Minister, gave us an early Christmas present and announced, with a flourish, on 17 December 2004, that he was increasing of the appeal period from three months to six months; and so with effect from 14 January 2005\textsuperscript{57}, Article 23 of the GDPO was changed back by the Town & Country Planning (General Development Procedure) (England) (Amendment) Order 2004. Well, that was certainly a test for all of us, the outworking of which will cover the remainder of 2005 and beyond as the backlog is slowly reduced. We knew the planning system was not delivering but why make it even harder for it to do so.

On 1 February 2005, a new PPS1 entitled “Delivering Sustainable Development is published plus a companion document “The Planning System: General Principles”. The only link between the two is a footnote in the Introduction to PPS1 to a sentence which informs the reader that the PPS replaces PPG1 (1997). It reads “Some policy guidance from PPG1 was updated and included in Annex B of the consultation to PPG1 published in February 2004. This material is being republished alongside this PPS”. The PPS1 is only 17 pages, to make it the more streamlined document that John Prescott et al indicated was to be the hallmark of the New Labour Reforms to the Planning System, as exemplified by PPS11 at 116 pages and PPS12 at a mere 96 pages. It has no Appendixes or Annexes. The “General Principles” Document is 8 pages. So why not put into an Annex or an Appendix. Why not give it a direct linkage? Is this another test for all of us or just the courts? Did the internal regulatory impact contemplate the appeal system having to await a test case? Perhaps, that question will be answered within the next twelve months by yet another change, plus, the outcome of a General Election. I was once told that the Labour Party was good for planning professionals if not always for their clients. Now I begin to know why!

\textsuperscript{57} Covering all refusals after 14 October 2004 according to PINS