

Recent Developments in Planning Case Law

JOHN PUGH-SMITH¹

INTRODUCTION

The aim of this paper is to provide a coherent and reasonably comprehensive review of case law over the last twelve months for the planning practitioner. My choices primarily highlight cases which contain new or clarified principles of law; but I also provide some useful examples of judicial thinking on existing issues. For ease of delivery, they have been arranged under subject headings in alphabetical order. However, in order to avoid duplication, this paper does not cover EIA or Nature Conservation, which are dealt with by my colleague and fellow presenter, Stephen Tromans QC.

ALTERNATIVES

I start by drawing attention to two cases on the issue of alternatives. The first, *Derbyshire Dales District Council v Secretary of State for Communities and Local Government*² concerned a joint challenge by the Council, and, the Peak District National Park Authority against the Secretary of State's decision to grant planning permission for four wind turbines. In the decision letter, the inspector had decided that consideration of alternative sites was not necessary, either as a matter of law or on the merits of the proposal, and, that the proposal would make a valuable contribution to strategic targets for renewable energy generation. On the first, it was submitted that as the inspector had made a clear finding that the proposal conflicted in some respects with the development plan he had made a fundamental error in holding that it was not necessary as a matter of law or policy to consider whether the need could be met on some alternative site that would cause less harm to development plan policy. Rejecting this ground of challenge, Lord Justice Carnwath held that there was a difference between saying on the one hand that consideration of

¹ Barrister, 39 Essex Street Chambers, London WC2R 3AT. www.39essex.com; email: john.pugh-smith@39essex.com

² [2009] EWHC 1729 (Admin)

a possible alternative site was a potentially relevant issue so that a decision-maker did not err in law if he had regard to it, and saying on the other hand that it was necessarily relevant so that he erred in law if he failed to have regard to it. To uphold the latter statement, one had to find a legal principle that compelled, and not merely empowered, him to do so. It was impossible to say that there was anything in section 78 of the Town and Country Planning Act 1990 (“the 1990 Act”) or in the relevant policies, that expressly or impliedly required the inspector to consider alternative sites, especially as none had been identified here. The emphasis of s.78 was on consideration of the particular application in question. Although the statutory provisions and policies relating to the National Park required special regard to be paid to their protection they fell short of imposing a positive obligation to consider alternatives that might not have the same effects. Accordingly, it was a matter of planning judgment on the facts. That was how the inspector had approached the point, and, which he had been entitled to do so.

In the second, *The Governing Body of Langley Park School for Girls v London Borough of Bromley*³, the Court of Appeal was concerned with alternative locations within the same site. The appellant had sought a judicial review of Bromley’s decision to grant planning permission to rebuild and resite the existing Langley Park Boys School within its own grounds, which was also Metropolitan Open Land (MOL). A feasibility study had identified three options for the siting of the new buildings. The Girls School was sited next door to the Boys School. Whilst it did not object to the principle of re-development it contended that the proposed siting on the open part was in the most prominent and destructive location possible. On the issue of alternatives, the judgment of Lord Justice Sullivan is of interest in its emphasis that upon the degree of the injury that would be caused by the application proposal - the less that injury the less need there would be to consider whether that injury would be reduced by an alternative siting. In contrast, where there were clear planning objections to a proposed development, the more likely it was that it would be relevant to consider whether that objection could be overcome by an alternative proposal. Here, there had been serious flaws in the committee report in that while it had advised that the impact of the proposals on the MOL should be carefully considered, it had failed to analyze the possible impact and to express any conclusion as to the extent to which the openness and visual amenity of the MOL would be injured by the proposed development. Furthermore, the consideration of the various siting options had not addressed the issue of the relative impact of those different options. As the committee had not been advised to consider the nature and degree of harm arising from the proposal before deciding whether it would treat the suggested alternative option as relevant; and given the lack of any assessment of harm in the report, it would have been unable to reach an informed conclusion.

³ [2009] EWCA Civ 734

APPEAL PROCESS

The issue of appeal handling been the subject of two challenges within the last 12 months. In *Parker v Secretary of State for Communities and Local Government*⁴ an interesting procedural point arose concerning the extent to which a procedural irregularity can be cured through the planning appeal process. There, an application to renew outline consent for the erection of 15 fisherman's cabins at an angling centre situated in an AONB. The LPA had refused permission, in part because the applicant had not supplied either the parameters of the scale of the development or a design and access statement (as required by the Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2006). The inspector had concluded that the development would significantly improve the appearance of the existing site and would enhance the economic and social wellbeing of the area in accordance with the aims of the relevant guidance and policies. On the procedural point, the Deputy Judge (Keith Lindblom QC) held that section 79(6) of the Town and Country Planning Act 1990 ("the 1990 Act") was not to be construed narrowly and was not intended merely to allow the Secretary of State to deal with an appeal that was bound to fail, even if the local authority would have had to refuse it on procedural grounds under the provisions of the 2006 Order. The inspector had asked himself whether there was insufficient information for the inquiry to proceed and whether anyone's interests would be prejudiced if it did. He had not misapprehended the requirements of the Order and his conclusion that there was sufficient information was not unlawful. Furthermore, his decision to impose the usual controls attached to outline permissions but to reserve other matters, including scale, to subsequent approval was neither unreasonable nor unlawful.

The effects on the 2006 amendment to the GDPO was also the subject of a challenge by an LPA in R (*Newcastle City Council*) *v Secretary of State for Communities and Local Government*⁵ where the challenge was brought against the decision by the Planning Inspectorate (PINS) to accept a planning application as valid for the purposes of its registration as an appeal. The interested party had made an application for planning consent which, in effect, required the demolition of a derelict two storey building in central Newcastle near to the Tyne and replace it with a nine storey building. The Council thought that what was necessary under section 62(3) of the 1990 Act was a satisfactory site plan and, from the "local list", six further items: first, a daylight/sunlight study; second, a bat survey; third, a contaminated land survey described as a desktop survey; fourth, a wind assessment; fifth, an archaeological desktop survey; and sixth, information about views and a photo montage. As none of those were provided the Council did not determine the application, subsequent to which the interested party submitted a non-determination appeal to PINS. The Council

⁴ [2009] EWHC 2330 (Admin)

⁵ [2009] EWHC 3469 (Admin)

then wrote to PINS stating that they did not consider the application to be valid because it omitted the documents which I have mentioned. PINS confirmed in response that “valid applications must meet the mandatory national requirements set out in annex A of Circular 02/2008 and any additional information specified by the LPA and pre-published on its website. After some time PINS finally wrote suggesting that it could itself determine whether what was necessary for the planning application to be valid. Granting the claim, Mr Justice Langstaffe took the view Section 78 has to be read consistently with Section 62(3) and Article 20 of the GDPO 1995 (as amended), that is, that a planning application is to be regarded as valid only if it contains requirements thought necessary or specified by the LPA. It must also be the case that they may insist or regard as necessary for the purposes of validity only those matters which have been included in the local list published on the website under Article 20(3A). 35. Whatever the position may have been in the Court of Appeal decisions in the *Bath* and *Geall* cases⁶, since the statutory changes there is now no room for doubt as to what is or what is not a valid application in principle, with Section 62(3), containing, as it does, the words that the LPA may require that an application must include “such particulars as they think necessary”, thereby making the LPA the arbiter of what is necessary.

In *Gates Hydraulics Limited v Secretary of State for Communities and Local Government*⁷ the issue concerned reliance on the Statement of Common Ground. There, an issue had also been raised concerning external noise that might result from the development. The Statement had concluded that specified noise mitigation measures, which formed draft planning conditions would provide adequate protection against noise. As a result, the company had decided not to call its expert as the noise issues had been agreed. However, the inspector had concluded that the proposed development would have an unacceptable impact upon future neighbouring residents due to noise. Holding that the inspector should have raised any concerns about noise issues at the inquiry, the Deputy Judge (Frances Patterson QC) went on to hold that it had been procedurally unfair for the inspector to come to the conclusions she had without providing the company with an opportunity to address her concerns. The requirements of natural justice had been breached as the procedure that was adopted was unfair. The inspector's decision was therefore quashed.

The case of *Fry v Secretary of State for Communities and Local Government*⁸ is a reminder to ensure that the inspector conducts an adequate site visit, particularly where the appeal is being dealt with by written representations. The appeal concerned a listed building enforcement notice requiring the removal of four dormer windows on the basis that they were new works. The appellant was arguing that there was evidence that such windows had existed in the roof of the building many years previously and that he had simply replaced what had already been there. The

⁶ *R v Bath & North East Somerset Council v SSE* [1999] JPL 984 and *Geall v SoSE* [1999] JPL 909

⁷ [2009] EWHC 2187 (Admin)

⁸ [2009] EWHC 1052 (Admin)

inspector had been asked to go into the roof space to examine what might be there, which would bear on the issue as to the nature of the dormer windows. He had declined to go. Instead, he had concluded, on the papers, that the evidence showed that the appellant's construction work had obliterated any evidence of windows having been there in the past. Mr Justice Ouseley held that given the scope for confusion in respect of the written representations and the importance to the appellant as to what could be seen of any former dormers, the inspector should have done what he was asked to do and ought to have inspected the interior of the roof space. His failure to do so meant that what could have been a material consideration was ignored and the appellant's expectations as to how the site inspection would be conducted had been thwarted.

The shortcomings of the written representations procedure were also revealed in *Eley v Secretary of State for Communities and Local Government*⁹ although the case turns very much on its facts. Here the nine week "cut-off" led to an appellant's report confirming the existence of badger activity on the site, although disclosed to the LPA, not being taken into account by the Inspector, who had proceeded upon the mistaken belief that there was no conclusive evidence of such activity. However, the LPA, although aware from its own report of such activity, had never considered this to be a reason for refusing permission. Accordingly, Mr Justice Wyn Williams took the view that neither the non-disclosure nor the mistake went to the heart of the decision. It should also be noted that the outlier sett had been removed in accordance with proper procedures there was additional reason for not quashing the Inspector's decision.

In *Secretary of State for Communities and Local Government v Connolly*¹⁰ the issue concerned unfairness arising from the local authority's failure to provide the inspector with the full and material planning history of the site, as part of its written representations. The facts concerned two applications, the first for proposed extensions to the north and south sides of a neighbour's property and the second just on the north side, which had both been refused by the local authority. The inspector had granted approval for the appealed north side extension unaware that the local authority had refused a second application. For its written representations, the authority had simply relied on the appeal questionnaire and the committee report in respect of the first (appealed) application. The Court laid stress on the fact that the evidence relating to the planning history of the site was capable of being established in an uncontentious and objectively verifiable form as it was documented in the local authority's decision on the second application. Further, the Connollys had not been responsible for the mistake and the mistake played a material part in the inspector's reasoning. This is another case which highlights the potential shortcomings of the

⁹ [2009] EWHC 660 (Admin)

¹⁰ [2009] EWCA Civ 1059 appealing [2008] EWHC 2873 (Admin)

written representations appeal procedure and the need for the local authority to ensure that the inspector is adequately informed.

DEVELOPMENT PLAN CHALLENGES

It will be recalled that in *Blyth Valley Borough Council v Persimmon Homes (North East) Ltd & Ors*¹¹ a Core Strategy inspector had appeared to have approached the issue of soundness upon the basis that a policy was presumed to be sound unless evidence was produced demonstrating the contrary, as that was what the 2004 version of PPS12 had stated. However, the Court of Appeal held that as section 20(5) of the 2004 Act was couched in neutral terms its effect was more appropriately reflected in the later version of PPS12 which had dropped the presumption of soundness and now (at para. 4.49) merely states: *“The starting point for the examination is the assumption that the local authority has submitted what it considers to be a sound plan”*. That erroneous belief by Inspectors, that there was a legal presumption of soundness, also led to a quashing of the policies of the Surrey Waste Plan which, addressing both strategy and site specific allocations, identified the now infamous Clockhouse Brickworks as a proposed waste incinerator facility. In *Capel Parish Council v Surrey County Council*¹² Mr Justice Collins also criticized the lack of rigour undertaken by the appointed Inspectors in their examination as to whether the policies were sound. He remarks that *“they would have not only to consider any specific points made by objectors but also any material matters which could indicate unsoundness. This would, in relation to specific allocations, include consideration of whether the process whereby the sites were chosen and others said to be more appropriate rejected was satisfactory.”* It is to be hoped that the Planning Inspectorate, in the light of this further judgment, will encourage its Inspectors to, indeed, apply a more rigorous process to their examination process even if that leads to a modest extension of sitting days!

In *R (Stamford Chamber of Trade & Commerce and FH Gilman & Co) v Secretary of State for Communities and Local Government and South Kesteven District Council*¹³ the High Court (Mr Rabinder Singh QC sitting as a Deputy High Court Judge) had to consider an application for judicial review of an LPA's decision not to request the saving of a safeguarding policy by the Secretary of State (SSCLG) without public consultation and the SSCLG's acceptance of the LPA's decision that there was no need to retain that policy. The claimants were an unincorporated association responsible for promoting business and tourism in the local area and making representations to various bodies and a company concerned about local traffic problems which had participated in relevant planning and highway matters. The deposit version of the local plan had been produced at a time when the Department of Transport and the relevant highway authority were proposing various relief roads in the area. As a consequence,

¹¹ [2008] EWCA Civ 861

¹² [2009] EWHC 350 (Admin)

¹³ [2009] EWHC 719 (Admin)

that version included those schemes within a safeguarding policy, the effect of which was that planning permission for any development that would prejudice the construction of the new roads would be refused. Following the bringing into force of the Planning and Compulsory Purchase Act 2004 (Commencement No.2, Transitional Provisions and Savings) Order 2004, the LPA had not included the safeguarding policy in the list of policies it wished to see saved as all the schemes which it expected to be completed had been, so that that policy was no longer needed. Refusing the application, it was held that on the facts the claimants had not made out their primary case that the LPA had created a legitimate expectation that there would be public consultation before it decided not to request the secretary of state to save the safeguarding policy of the local plan. There was no established practice of consultation and certainly no express promise of consultation. A legitimate expectation needed to be founded on a statement that was clear, The judge also noted that, here, it was significant that, in the development of planning policies, a duty of consultation was often required either by legislation or pursuant to an express statement of policy, but, the lack of such an express duty was a powerful indicator that no such obligation should be imposed. As there was no legal principle which imposed on the local authority a duty of public consultation in the absence of any express promise that there would be one the SSCLG's acceptance of the LPA's decision not to save the safeguarding policy was rational and, therefore, lawful. It is understood that permission to appeal has been granted. Permission to appeal was granted on 15th July 2009¹⁴.

In the combined hearing of the two challenges to the East of England Plan, City & District of St Albans v Secretary of State and Hertfordshire County Council v Secretary of State for Communities and Local Government¹⁵ the issue of alternatives in the context of SEA was successfully raised in respect of housing allocations to Hemel Hempstead, Welwyn Garden City and Hatfield. The essential issue was whether these developments had to occur on such a scale in and around the towns as to require the erosion of the green belt around them. Mr Justice Mitting held that although acceptance of the need to accommodate economic pressures on the outskirts of London necessarily involved extensive house building and some erosion into the green belt in the London Arc, it might not have been inevitable that that had to occur around those towns. Article 5 of the SEA Directive and reg.12(2) of the 2004 Regulations¹⁶ required that reasonable alternatives to development had to be identified, described and evaluated before a choice was made as to how a plan should be modified. As no reasonable alternatives to development that might affect the green belt had been identified or examined in the environmental reports obtained in relation to those towns a decision had been made to erode the green belt without reasonable alternatives being properly considered through means of environmental assessments

¹⁴ [2009] EWCA Civ 1017

¹⁵ [2009] EWHC 1280 (Admin)

¹⁶ Environmental Assessment of Plans and Programmes Regulations 2004

that were compliant with the Directive and the Regulations. With regard to Harlow, the environmental effects of the expansion had already been exhaustively considered and alternatives addressed. It was therefore clear that development around the town had been properly considered through an iterative process. Accordingly, the Secretary of State had been entitled to decide, without obtaining a further environmental report, that expansion into the green belt should occur.

As an important sequel to this case, the Government submitted to judgment in a similar challenge to policies in the South East Plan by CPRE and various local authorities, and withdrew the emergent South West RSS for further consideration.

Recently, in *Barratt Developments plc v Wakefield MDC & Secretary of State for Communities and Local Government*¹⁷ an unsuccessful attempt was made to quash Policy CS6 ‘Housing Mix, Affordability and Quality’ of Wakefield’s adopted Core Strategy with Barratt arguing that the 30 per cent district-wide affordable housing requirement imposed an unrealistic target and that it did not pay due regard to PPS3 and PPS12 the Yorkshire and Humberside Plan (the RSS to 2026). Whilst Mr Justice Pitchford acknowledged that the policy was “not happily drawn and had the capacity to confuse”, properly construed, however, it was not undeliverable and inflexible. The policy did pay due regard to national policy and to the relevant RSS, and, set a justifiable target for sites above a workable threshold limit, recognising that the target was achievable only in certain economic conditions. Application of the policy that affordable housing should be provided where possible meant that provision had to depend on the exigencies both of the site and of market conditions at the time the application for permission was made. The policy provided the flexibility required by making the target subject to negotiation. The alternative, namely to provide stepped percentages based on variable economic conditions, was unworkable and doomed to failure because of the difficulties of accurate prediction and definition. Having regard to the need for affordable housing, this had been the best that the inspector could do in unusual and unstable economic times. It was an undeniable consequence that, while national policy wished to provide both improved targets to deliver affordable housing and developers with the requisite degree of certainty for the purposes of planning development, current economic conditions had, at least for the time being, undermined policy. However, it could not be said that the solution adopted in this case was irrational.

¹⁷ [2009] EWHC 3208 (Admin)

DUE PROCESS

A remarkable situation arose in the context of a planning appeal in *Secretary of State for Communities and Local Government v Ortona Limited*¹⁸. There, the inspector had, until 2003, worked for some 28 years in the planning department of the County Council which was the main objector to the appeal development, the redevelopment of a former bus station. He had been responsible for transport planning. The Court of Appeal held that the fundamental issue was whether the circumstances would lead to a fair minded and informed observer concluding that there was a real possibility of bias. These were not the Inspector's length of service with the County Council nor the fact that he had been involved with structure plan policies generally. Rather, what was of critical importance was his responsibility within the County Council for transport planning, in which capacity he would have been directly responsible for the formulation and implementation of the transport policies in issue in the appeal. Although the period of four years since leaving the county council might in some cases have been sufficient to exclude any real possibility of bias, here, the Inspector's close involvement with the formulation and implementation of the transport policies put the case into a special category.

A different procedural issue arose in *R (Majed) v London Borough of Camden*¹⁹ concerning the planning application process itself and neighbour notification. Camden had adopted a statement of community involvement (SCI), which required, in respect of planning applications involving alterations, additions or demolition works, the SCI identified the statutory requirement as either a site notice or letter with occupiers of the application premises and adjoining occupiers likely to be affected by the proposals receive a letter". Owing to an administrative error, Mr Majed, who was the closest neighbour, was not notified of a planning application for a first-floor side extension and did not discover the existence of the planning permission until building works had commenced. Granting the application for judicial review upon the basis that there had been a breach of a legitimate expectation, the Court of Appeal held that Camden's SCI was a paradigm example of such a promise and a practice. However, it would not be appropriate to quash the planning permission as the extension had been completed and was now occupied and in view of the history of the matter, in particular the lack of any development plan objection, the lack of any real planning harm to Mr Majed and the very real and obvious prejudice that would be suffered by the householder, enforcement action was inconceivable. However, it was appropriate to grant declaratory relief to the effect that there had been a breach of legitimate expectation.

¹⁸ [2009] EWCA Civ 863 on appeal from [2008] EWHC 3207 (Admin)

¹⁹ [2009] EWCA Civ 1029

ENFORCEMENT

The procedure following the remission of an enforcement notice appeal decision to the Secretary of State was considered in *R(Perrett) v Secretary of State for Communities and Local Government*.²⁰ Five enforcement notices had been upheld on appeal. A High Court challenge that the Inspector had incorrectly dealt with the ground (a) appeal (whether planning permission should be granted) had been conceded. The appellant, in these latest proceedings, had judicially reviewed the decision to confine the redetermination to ground (a) and not ground (d) (lawfulness) as well. That challenge had been unsuccessful with the judge holding that as the ground (d) decision was legally sound there was no reason to reopen it. In the Court of Appeal it was held that although there had to be a rehearing sufficient to enable the Secretary of State to remedy the error identified by the Court, as there was an absence of any further provision it was left to the Secretary of State to decide how to go about the task. It did not follow from the use of the word "rehearing" in s.289(5)(a) of the 1990 Act that the Secretary of State was required to hear the appeal afresh. A rehearing was a broad concept which depended on context and could involve a much more limited exercise than was required when an appeal took the form of a rehearing under CPR r.52.11.

The focus then switches to the merits of enforcement action over a discontinuance notice. In the recent case of *R (Usk Valley Conservation Group & ors) v Brecon Beacons National Park Authority*²¹ Mr Justice Ouseley was faced with a judicial review application by local residents seeking to quash a planning permission for the relocation of an existing camp site. In that regard, the residents were successful, the judge holding that the permission was invalid because there had been a contrast between what had been applied for and what was actually granted. Justifying the appropriateness of that quashing the Judge raises a number of criticisms of the LPA including the fact that the permission was for a different development from the one applied for (or was for more than what was applied for); that the LPA had failed to make reasonable enquiries to try to obtain the factual information necessary to provide a rational basis for a decision on the application before it; and that it had failed to screen the application for EIA purposes. The case is of particular note for the Judge's upholding of the LPA's decision to take enforcement rather than discontinuance action on the basis that no compensation was payable in respect of the former was lawful; although, on the facts, he finds it to be wanting in another respect. He draws attention to the fact that s.102 of the 1990 Act involves a decision as to whether a discontinuance order is expedient in the interests of the proper planning of the area, and, that that expedient decision necessarily requires attention to be paid to the advantages and disadvantages of taking one or other or none of the available steps under s.102. Where public money is at stake, because the statute has made

²⁰ [2009] EWCA Civ 1365 on appeal from [2009] EWHC 234 (Admin)

²¹ [2010] EWHC 71 (Admin)

compensation part of the statutory scheme being invoked, it is obvious that its cost was a consideration relevant to expediency since, in reaching a planning decision, an authority was entitled to choose the course of action which avoided the payment of compensation. However, as there was no evidential basis that warranted a higher valuation based on compensation extending to the whole of the land the Judge found that the LPA's decision was flawed because of its reliance on that particular valuation.

Next, there is the latest twist in the *Fidler* saga²², the Surrey farmer in enforcement battles with Reigate & Banstead Council, who proceeded to build a new house and hide it behind straw bales and a tarpaulin until the four year immunity period had elapsed in July 2006. In *Fidler v Secretary of State for Communities and Local Government*²³ this s.289 challenge was against three out of the twelve enforcement appeals. The main issue was whether the activity of erecting and removing the straw bales did or did not form part of the overall "building operations", the Inspector having found that their erection was an integral part of the deception. The Deputy Judge, Sir Thayne Thorbes, upholding this finding, accepted that as there was such a close and intimate connection between the erection/removal of the straw bales and the construction of the dwelling as to lead to the conclusion that the former was an essential part of building operations intended to deceive the LPA and to achieve by deception lawful status for a dwelling built in breach of planning control. This case is in contrast with that of the Court of Appeal in *Secretary of State for Communities and Local Government & Beesley v Welwyn Hatfield Council v*²⁴ upholding a Lawful Development Certificate permitting the use of a hay barn internally fitted out as a home (see further below).

I now turn to two cases on the extent of the planning inspector's powers. In the first, *Charles Storer Limited v Secretary of State for Communities and Local Government*²⁵ the issue concerned whether the inspector could impose restrictions on the hours of operation and number of vehicle movements outside the material change of use. The enforcement notice had alleged a material change in the use of the site arising from a change, and, intensification of the type of materials brought onto it; a change from mainly paper to co-mingled waste. The inspector had found that there had been a material change of use but only in the receipt and bulking of co-mingled waste, and, that absent the co-mingled waste, the increase in vehicle movements and hours of operation in the 10 years up to the enforcement notice would not have given rise to a material change of use. The Deputy Judge (Stephen Morris QC) held that the inspector had not been entitled to impose requirements that went beyond what was necessary to confine relevant activities to the lawful use. Therefore, he had erred in law.

²² See previously *Fidler v First Secretary of State* [2004] EWCA Civ 1295

²³ [2010] EWHC 143 (Admin)

²⁴ [2010] EWCA Civ 26

²⁵ [2009] EWHC 1071 (Admin)

In the second, *Howells v Secretary of State for Communities and Local Government*²⁶, the High Court (Frances Patterson QC) had to consider the ability of the inspector to amend the plan attached to the enforcement notice. It concerned the unauthorised use of agricultural land for the importation and storage of inert waste materials; and the inspector had concluded that it was appropriate to alter the plan as it differed from the actual development present on the site and as the alteration would not cause any injustice to the appellant. The Deputy Judge held that as s.176(1) of the 1990 Act gave an inspector the power to extend the requirements of an enforcement notice the corollary of that power was that an inspector had the power to amend the plan so long as injustice was not caused to the parties. Here, he had been entitled to assume that the appellant had put all of his case before him, in particular as to what land had been used for what purpose; so it could not be said that he had been unfairly denied the opportunity to address the inspector about the uses of the land and, by extension, the area of land on which those uses were carried out.

Finally, I draw attention to two cases on injunctions under section 187B of the 1990 Act. The first, *Barnet Borough Council v Alder*²⁷, is a reminder that despite the fact that there may be a pending appeal against the refusal of planning permission, an injunction can still be granted. There, the case concerned the continued use of a residential property as a school following two refusals and one unsuccessful appeal. The local authority had given due consideration to the school and had not required it to shut down immediately, but it had been entitled to require compliance with the enforcement notice by a certain date. The previous inspector had considered that the harm caused by the breach was serious. Accordingly, on the facts, no substantial weight could be given to the prospects of success of the pending appeal. In the second, *Brentwood Borough Council v Ball*²⁸ Mr Justice Stadlen, drew attention to the need, when considering granting an injunction against a gypsies whose occupation of land was unlawful, that any hardship caused to their children should be accorded no less weight than it otherwise would be on its merits by reason only of the illegality or even deliberate illegality of the conduct of their parent. On the balance of probabilities, the gypsies had no alternative accommodation or any realistic prospect of obtaining such accommodation. As it was likely that they would be forced to expose themselves and their children to the dangers inherent in resorting to unlawful and peripatetic roadside parking an injunction would therefore cause significant hardship to the gypsies, to members of their families and, in particular, to their children.

²⁶ [2009] EWHC 2757 (Admin)

²⁷ [2009] EWHC 2012 (QB)

²⁸ [2009] EWHC 2433 (QB)

GREEN BELT

It will be recalled that in Wychavon District Council v Secretary of State for Communities and Local Government²⁹ the Court of Appeal took a more generous view holding that the word "special" in PPG2, para. 3.2 connoted not a quantitative test but a qualitative judgment as to the weight to be given to the particular factors amounting to "very special circumstances" for planning purposes. This approach was then followed by Sir George Newman in SB Herba Foods Ltd v Secretary of State for Communities & Local Government and South Cambridgeshire DC³⁰ which concerned a proposed extension to a factory where the main building lay outside the green belt but where the extension would be built within the green belt. The court considered that Mr Justice Sullivan's approach in the Chelmsford Borough Council³¹ case had led the inspector into error and that his approach in Doncaster MBC v SSETR³² which had been preferred by the Court of Appeal in the Wychavon case should have been adopted. To be fair to the inspector the confusion between the two Sullivan decisions was not cleared up until the Court of Appeal's decision in Wychavon and the judgment in that case was delivered after the inspector had issued his decision letter. However, the result was a successful challenge.

The approach in Wychavon was also considered by Robin Purchas QC, sitting as a Deputy High Court Judge, in Summers Poultry Products Limited v Secretary of State for Communities and Local Government³³, another factory extension though with all the buildings within the Green Belt. There, the inspector had correctly applied a qualitative judgment as to the weight to be given to a particular factor. In reaching that conclusion, his primary consideration was the inappropriateness of the development and its impact on the open character of the countryside and that it had not been shown that the need for compliance with relevant regulations on food hygiene and animal welfare through the proposed development was the only way to secure compliance. Another point of interest was the judge's rejection of the argument that placing the development on a brownfield site did not amount to an encroachment of the green belt, remarking that as open countryside ranged from farm fields to dwellings and agricultural structures agricultural hard-standing or similar structures could be classified as developed land, yet still be open countryside.

More recently, in the The River Club v Secretary of State for Communities and Local Government³⁴, the view was taken by another Deputy Judge, Frances Paterson QC, that the issue of "very special circumstances" required the inspector to carefully evaluate the circumstances and factors before him and decide whether those circumstances cumulatively amounted to "very special circumstances"; though that

²⁹ [2008] EWCA Civ 692

³⁰ [2008] EWHC 3046

³¹ [2003] EWHC Admin 2978

³² [2002] JPL 1509 para 70

³³ [2009] EWHC 533 (Admin)

³⁴ [2009] EWHC 2674 (Admin)

approach to determining "very special circumstances" was not a straight jacket upon the inspector that required him to attribute an exact weight to each circumstance. In that case, which concerned a retrospective application for a fitness studio required to maintain the financial viability of a sporting club, whilst the decision letter had set out his overall conclusion that no special circumstances existed, that was linked back to the individual circumstances and was not a cumulative decision. The judgment is also of interest for holding that the words "any other harm" in PPG2, para. 3.2 were to be given their plain and ordinary meaning i.e. any harm that would occur through allowing a development (in a green belt) and not simply any green belt specific harm (such as loss of openness). Accordingly, the inspector had been entitled to consider the issue of sustainability in that context.

The issue of building extensions and the meaning of "original dwelling" in PPG2, para. 3.6 was touched upon in Dacorum Borough Council v Secretary of State for Communities and Local Government³⁵. There, the issue arose in the context as to the word "original" and whether it applied to the building which it was actually proposed to extend and not some pre-existing demolished building which had since been replaced. Policy 22 of the adopted local plan included a critical test requiring that the resulting building should be less than 130% of the floor area of the "original dwelling". The explanatory text to this policy then stated that this meant either the dwelling that existed on the site on 1 July 1948, or, if there was no dwelling on that site at that time, the first dwelling built after that date, as it existed when first built. Here, the dwelling, which had been demolished in the late 1990, had had a floor area of 90 sqm. The replacement dwelling erected thereafter currently had a floor area of 145 sqm. With the proposed conservatory added it would become 157 sqm, an extension representing just over 108% of that replacement dwelling but 174% of the original dwelling. Upholding the decision of Mr Justice Cranston, Lord Justice Keene highlights that both the phraseology itself, within the body of Policy 22, and, within the explanatory text contrasted "replacement" with "original" dwelling. Emphasizing the primacy of the development plan (by reason, currently, of s.38(4) of the 2004 Act he contrasts this appeal with that in the Heath & Hampstead case³⁶, where PPG2

³⁵ [2009] EWCA Civ 1494 on appeal from [2009] EWHC 304 (Admin)

³⁶ R (Heath & Hampstead Society) v Camden LBC [2008] EWCA Civ 193 where the Court of appeal held that . 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. Like Cranston J, Keene LJ in Dacorum also distinguishes two 1999 High Court cases, Brentwood BC v SSETR & Churley (Judge Rich QC) (unreported) and Ascot Wood Ltd v SSETR [2000] PLCR 265 (Nigel Macleod QC) upon the basis that each was dealing with different Local Plan policies

guidance was able to assist where the statutory development plan words were not precisely defined; but he does find that the inspector in the present case had erred in making the assumption that the words “original dwelling” in policy 22 of the Local Plan had the same meaning as the words “original building” in paragraph 3.6 of PPG2, “*whatever that meaning might be*”. As to the practical outworking of this decision, at first instance, Mr Justice Cranston thought that a lack of plans when an original building had been replaced should not provide an insuperable barrier to his interpretation; but as one commentator subsequently pointed out³⁷ it may be difficult to check the dimensions of the original building if there have been alterations since July 1, 1948.

In *Guildford Borough Council v Secretary of State for Communities and Local Government*³⁸ Mr Justice Cranston was faced with a similar issue once again. Here, the Council applied to quash the appeal decision upon the basis that the inspector had misdirected himself in relation to the LPA’s Green Belt policy guidance and the appropriateness of referencing comparator extensions. Dismissing this challenge, the Judge holds that planning judgment had to be exercised with regard to the nature of the dwelling and its location and that, ultimately, however, the issue of proportionality was a matter of planning judgment, and, that one relevant consideration to the exercise of that judgment was the LPA’s own approach to similar applications in the locality. Public law principles demanded a consistency of approach by LPAs. In the instant case, he noted that the LPA had previously acceded to planning requests for extensions in the same locality which had exceeded the homeowner’s proposals. Accordingly, the inspector had been entitled to regard that factor and had not misdirected himself in law in relation to the relevant planning guidance documents.

HERITAGE

It will be recalled that in *R (Arndale Properties Limited) v Worcester City Council*³⁹ the correct approach to the designation of conservation areas was explained by Mr Justice Sullivan in the context of one officer’s desire to save an unlisted cricket pavilion, in poor condition, from demolition. Now in *R (Metro Construction Limited) v Barnet London Borough Council*⁴⁰ a very similar state of affairs has been repeated. was the suit sought to designate a conservation area which included the pavilion. The land in question consisted of a former monastery which had been bought by Metro. The monastery itself was included in the local list because of its significant contribution to the heritage and character of the borough, but the Secretary of State had refused to list it on the basis that it lacked special architectural or historic interest. The local

³⁷ [2009] JPL 1326

³⁸ [2009] EWHC 3531 (Admin)

³⁹ [2008] EWHC 678 (Admin)

⁴⁰ [2009] EWHC 2956 (Admin)

listing was not enough to protect against demolition of the monastery, and when Metro had announced its intention to develop the land for residential use, the Council had proposed the designation both of the monastery and its gardens as a conservation area. Metro had both argued that the site did not contain the necessary qualifications for designation, and, had offered an assurance that the building would not be demolished. However, the local authority doubted the truthfulness of that assurance and, placing reliance on a written letter of support from English Heritage, designated the site. Mr Justice Collins, following *Arndale*, held that the designation was in reality no more than an attempt to achieve what the Secretary of State's refusal to list had frustrated and the site could not properly be regarded as forming a conservation area. Accordingly, the manner in which the designation was reached was unlawful since the purpose of the designation was improper. Furthermore, the Council's failure to trust Metro's assurance not to demolish the building was unreasonable, having been based solely on a report from a neighbour that "attempts" had been made to remove trees!

I also draw attention to the recent case of *Historic Buildings & Monuments Commission & Ors v Secretary of State for Communities and Local Government & Ors*⁴¹ concerning a challenge by English Heritage, Westminster City Council and a local resident, William Ashton, of the decision to grant planning permission for the Doon Street Tower, a 43-storey tower block on London's South Bank. The development included the provision of a community sports centre and swimming pool which was to be funded by the developer for 50 years, but no affordable housing. The site was not in a conservation area but the impact of the tower on nearby conservation areas and buildings such as Somerset House was a major issue. The inspector had concluded that permission should be refused, finding that the height of the tower would detract unacceptably from the setting of Somerset House and would also harm the settings of conservation areas in Lambeth and Westminster. However, the Secretary of State disagreed holding that the benefits of the scheme outweighed the heritage damage. The judgment contains an interesting analysis as to how the Secretary of State's planning judgment could trump that of her inspector. It is also of note in finding that as Mr Ashton, the local resident, had not taken a sufficiently active role in the "planning process" he was not a "person aggrieved" within the meaning of section 288 of the 1990 Act, applying a narrower definition of standing than the 'sufficient interest' test in judicial review. Although permission to appeal was granted by the judge on this topic, it is understood that only Mr Ashton is pursuing his part of the case to the Court of Appeal. Meanwhile, potential claimants would be advised to have made their own representations rather than relying simply on representations from local groups of which they are a member.

LAWFUL DEVELOPMENT CERTIFICATES

In *Ellis v Secretary of State for Communities and Local Government*⁴² the first instance case law on immunity from breach of condition notices has been reviewed by Mr Rabinder Singh QC sitting as a Deputy High Court Judge. There, planning permission for the house had been granted in 1961, subject to a condition that it be occupied only by people employed in agriculture or forestry and their dependants. It had always been occupied in breach of that condition, apart from some brief periods when it was unoccupied. During one such period the previous owner had applied for a certificate of lawfulness in relation to the occupancy of the house on the basis that the breach had begun more than 10 years earlier. He had then applied for planning permission, essentially seeking the removal of the occupancy condition. Both rejections by the LPA had been appealed. The inspector had dismissed the appeals, concluding in respect of the first that a certificate of lawfulness could not be granted because the breach had not subsisted continuously for at least 10 years at the date of the application. Upholding the dismissal, the Deputy Judge held that as it did not concern a breach that had started before 1964 and acquired immunity from enforcement action under the Town and Country Planning Act 1968 and subsequent legislation. However, as the relevant breach of planning control still had to subsist at the date of the application for it, did apply, the inspector had not erred in this respect.

In the recent case of *Secretary of State for Communities and Local Government v Welwyn Hatfield Council*⁴³ the Secretary of State and the appellant, Mr Beesley, successfully upheld the inspector's decision, quashed at first instance⁴⁴, that the construction of the building with the external appearance of a hay barn was lawful and not in breach of planning control because of the operation of s.171B(2) of the 1990 Act. After living in the building for more than four years Mr Beesley had applied for a certificate of lawfulness of existing use, on the basis that the time for enforcement action against use of the building as a dwelling under s.171B had expired. At the CLEUD appeal inquiry Mr Beesley had admitted that he had deliberately deceived the Council when he had applied for planning permission and that he had always intended to reside in the building as a dwelling. The Court of Appeal held that a strained construction of s.171B should not be adopted in relation to the deliberate deceit practised by Mr Beesley or out of concern for the difficulties that such conduct created for local planning authorities in enforcing planning control. The question was whether the situation, viewed objectively, was one for which the statute had provided a four year time limit or a ten year time limit. If it was considered that there should be a

⁴¹ [2009] EWHC 2287 (Admin)

⁴² [2009] EWHC 634 (Admin)

⁴³ [2010] EWCA Civ 26

⁴⁴ [2009] EWHC 966 (Admin)

different outcome in a case of dishonesty or deliberate concealment, it was for Parliament to amend the legislation accordingly. Furthermore, looked at as a whole, the physical and design features of what was built were those of a dwelling house, not a hay barn. A material change of use had occurred to which the four year rule applied.

PLANNING AND POLLUTION CONTROL

This thorny perennial was last revisited in *Hopkins Developments Ltd v First Secretary of State*⁴⁵ where the High Court found that an inspector had been entitled to conclude that, despite pollution control measures, it was inappropriate to grant planning permission for the development of a site as a concrete plant due to the impact of dust. Now, in *Harrison v Secretary of State for Communities and Local Government*⁴⁶ the issue arose in the context of a rejected ground (a) deemed application for planning permission to retain a facility for processing animal by-products. The inspector had found that the odour arising from the industrial processing caused very significant harm to the amenity of local people which he doubted the IPPC regime could be relied on to prevent. He concluded that the advantages to the local farming community of the development of the site as a waste management mechanism was insufficient to outweigh that harm to amenity which the processing caused, and he therefore declined to grant permission. In the High Court (Judge McKenna QC) the appellant contended that the inspector had erred in his approach to the relationship between the planning regime and the IPPC regime by departing from the IPCC regime and failing to follow or give notice of his intention to depart from the experts' consensus as set out in the statement of grounds. Following *Hopkins*, the Judge helpfully distinguished between the planning system (which had to determine whether the development of land was itself an acceptable use of the land and the impact of those uses) and the IPPC process (which controlled the processes or emissions themselves). He held that the inspector's decision that was one that was reasonably open to him on the evidence. There was also no basis for arguing that the inspector had failed to follow the experts' statement of common ground as he had exercised his overall planning judgment on the broader issues of the suitability of the appeal site for the proposed use by taking into account the level of local complaints and the extent to which issues of odour emissions were or were not realistically capable of being addressed assuming that the IPPC regime would be properly applied and enforced.

⁴⁵ [2006] EWHC 2823 (Admin)

⁴⁶ [2009] EWHC 3382 (Admin)

PLANNING PERMISSIONS AND THEIR INTERPRETATION

The general rule when interpreting planning permissions is clear and, some ten years ago, was summarised by Mr Justice Keene in the *Ashford* case⁴⁷. In essence, he found there to be a prohibition on examining the planning application or other extrinsic evidence save for limited and certain identified circumstances. However, does this rule prevent examining plans approved with the permission which clearly delineated the curtilage of the property? In *Secretary of State for Communities and Local Government v Barnett*⁴⁸ Lord Justice Keene revisited the point when, in upholding Mr Justice Sullivan's decision that plans were an essential part of any grant of planning permission, confirmed that what he had previously stated was not intended to apply to the interpretation of a full planning permission. Accordingly, on its face, a grant of full planning permission approves the application drawings. In this case the Court of Appeal also continued to uphold an enforcement inspector's conclusion that, having regard to the plans that were before him, a later planning permission for an extension to a building had not extended the curtilage and that it remained as marked on the plans for the original grant which had established the curtilage of the dwelling.

I also use this topic heading to make mention of *Secretary of State for Communities and Local Government & Peak District National Park Authority v Bleaklow Industries Limited*⁴⁹ in which the Court of Appeal has restated that the word "winning" means the process of accessing the desired mineral, and "working" means the process of removing it from its position in the land. In that case, it found that any minerals, whether limestone or any other rocks, which had to be removed in working the specified minerals were not being "worked" in the sense used in planning law. The host rock had to be treated as waste and disposed of accordingly. The mere fact that it might have a commercial value did not take it outside the scope of the condition relating to waste in the planning permission.

SECTION 106 AGREEMENTS

Since the introduction of the concept of the planning obligation in 1991, there have been very few cases dealing with issues arising from the drafting or operation of planning obligations – whether unilateral undertakings or agreements. One reason for this may be that the amended section 106 contains some specific drafting requirements that need to be observed in full. Consequently, provided the requirements of section 106 are followed strictly then what problems that do arise ought to be limited to straightforward breach of terms. However, the importance of strictly observing the drafting requirements of section 106 were highlighted in

⁴⁷ *R v Ashford Borough Council ex parte Shepway District Council* (1999) PLCR 12 QBD

⁴⁸ [2009] EWCA Civ 476 on appeal from [2008] EWHC 1601 (Admin)

⁴⁹ [2009] EWCA Civ 206

*Southampton City Council v Hallyard Ltd*⁵⁰. In this case in the Chancery Division Mr Justice Morgan held that a local authority was unable to rely upon section 106(3) to enforce a planning obligation upon a successor in title where the agreement had failed to specify the original obligor's interest in the land and therefore the agreement had not met the formal requirements imposed by Parliament in section 106(9).

Attention is also drawn to another Chancery Division case, *Waltham Forest London Borough Council v Oakmesh Limited*⁵¹ (Mr Bernard Livesey QC) where, although the agreement failed to comply with the requirements of section 106(9) as the land bound by it had not been identified in the plan annexed to it, the LPA was still able to enforce it by way of an injunction. It should be noted though that it was an estoppel argument prevented the defendant from succeeding on the non-compliance point – a whole series of letters in which it had repeatedly represented in unequivocal terms that it accepted the planning obligations.

TREES

The law on TPOs continues to grow. In *Palm Development Limited v Secretary of State for Communities and Local Government*⁵² Mr Justice Cranston has now considered the scope of woodland TPOs. He found that the absence of explicit pronouncements as to size exemptions in TPO legislation, unlike for conservation areas, was compelling evidence that the legislation intended no comparable limitation, in consequence of which saplings of whatever size were protected by a woodland TPO. Furthermore, there was nothing illogical in such TPOs applying to future trees; for as the purpose of a woodland TPO was to safeguard the woodland as a whole, which depended on regeneration or new planting, it had to extend to trees which grew or were planted after the TPO was made. The vegetation ordinarily called trees could not be considered in isolation from the scrub, shrubs and saplings within it.

Note should also be taken of *Bown v Bristol City Council*⁵³ where Mr Justice Wyn Williams rejected, on a preliminary issue, an application to quash a woodland TPO upon the basis that the claimant was not a "person aggrieved", if only for its highly unusual facts. Mr Bown had been employed by the Council as a tree officer. He had inspected the trees allegedly felled in the woodland and decided that no illegal activity had taken place. Acting under delegated powers, he had decided that the Council should not impose a TPO. Whilst he had made his view known to the local authority and attended a planning committee meeting he had not registered an objection, as a private individual, to the making of the TPO. As he had no legal or equitable interest in

⁵⁰ [2008] EWHC 916 (Ch).

⁵¹ [2009] EWHC 1688 (Ch)

⁵² [2009] EWHC 200 (Admin)

⁵³ [2009] EWHC 1747 (Admin)

the land and did not live in the immediate vicinity of the woodland. He was not a substantial objector. The phrase "someone who took a sufficiently active role in the planning process" did not extend to an employee of the decision maker who had participated in the decision making process and disagreed with the decision ultimately reached. That was so even when that employee wished to allege illegality against his employers.

USE CLASSES ORDER

It may be recalled that in *Tendring District Council v Secretary of State for Communities and Local Government*⁵⁴ Mr Justice Sullivan adopted a broad approach to the classification of uses within the Use Classes Order 1987, expressing the view that there were no clear lines to be drawn between hospitals, nursing homes and residential care homes. In consequence, they should not be placed, for the purposes of the UCO, into watertight compartments but rather that they represent a spectrum of care provided to those who need it, whatever their disability, whether that be caused by their physical or mental condition. In *Leelamb Homes Limited v Secretary of State for Communities and Local Government*⁵⁵ the issue of classification arose in the context of a continuing care and retirement community development. The inspector had treated it as a mixed class C2/C3 use but was found by the High Court (Robin Purchas QC) to have erred as he had refused to take account of parts of a unilateral obligation restricting the use of some proposed extra care market housing (bungalows) to persons in need of care and support (i.e. C2 use). As the inspector had only considered the obligation in relation to the affordable housing, not the bungalows, he had not addressed that potentially material consideration. His conclusion that the bungalows did not conform to local plan housing policies might have been different if he had taken into account the unilateral obligation so that the housing policy did not apply.

⁵⁴ [2008] EWHC 2122 (Admin)

⁵⁵ [2009] EWHC 1926 (Admin)