



Neutral Citation Number: [2026] EWCA Civ 484

Case No: CA-2025-000610

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**PLANNING COURT**  
**Mr Justice Kerr**  
**[2025] EWHC 350 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/04/2026

**Before:**

**LORD JUSTICE PETER JACKSON**  
**LORD JUSTICE ARNOLD**  
and  
**LORD JUSTICE DOVE**

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**Between:**

<b>The King (on the application of Moran)</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>Medway Council</b>	<b><u>Respondent</u></b>
<b>-and-</b>	
<b>Secretary of State for Housing, Communities and Local Government</b>	<b><u>Intervener</u></b>

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**Wayne Beglan** (instructed by **Holmes & Hills**) for the **Appellant**  
**James Neill** (instructed by **Medway Council**) for the **Respondent**  
**Charles Streeten** (instructed by **Government Legal Department**) for the **Intervener**

Hearing date: 24 February 2026  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 17 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Dove:

### Introduction

1. The appellant appeals from the order of Kerr J dated 20 February 2025 in which he dismissed the appellant's claim for judicial review of the respondent planning authority's decision to decline to determine the appellant's planning application on 9 November 2023. Local planning authorities have the power to decline to determine applications in various instances, one of which is provided for in the circumstances described in section 70C(1) of the Town and Country Planning Act 1990 which is set out below. It was the respondent's conclusion that the circumstances described in section 70C(1) of the 1990 Act applied which led them to their decision to decline to determine the appellant's application. In the light of the issues raised in respect of the proper construction of section 70C(1) of the 1990 Act, the Secretary of State for Housing, Communities and Local Government was granted permission to be joined in this appeal as an intervener.

### The Facts

2. On 10 November 2020 the appellant became the registered owner of the land which is the subject of this case and which is at Plot C, Sharps Green, Lower Rainham Road, Rainham, Kent. The appellant is a Gypsy or Traveller and the respondent is the local planning authority for the area. On 14 May 2003 the respondent adopted its Medway Local Plan. Prior to the appellant coming into ownership of Plot C it was the subject of development control activity. A full account of the factual background in this case is contained in the judgment below. What follows is a summary of the key elements of the site history which are directly relevant to the issues which are concerned in this case.
3. The starting point is that on 3 May 2017 the respondent served an enforcement notice on the then owners of the site identifying a number of breaches of planning control. They were described in the following terms in the enforcement notice:

**“THE MATTERS THAT APPEAR TO THE LOCAL PLANNING AUTHORITY [TO] CONSTITUTE THE BREACH OF PLANNING CONTROL**

1. Material Change of Use

Without the benefit of planning permission the unauthorised change of the use of the Land to residential use and the stationing of caravans and mobile homes.

2. Operational Development

Without the benefit of planning permission the unauthorised development of the Land including:

- a) the laying of hard surfacing
- b) the storage and breaking of vehicles; and
- c) the stock piling of hardcore and aggregate”

4. The notice required the site to be cleared and restored to its former condition within six months of the date of the notice. It appears that following the service of the notice an occupant of the land sought to appeal against it but their appeal was not accepted by the planning inspectorate on the basis that they had no right of appeal. The enforcement notice therefore came into effect. Thereafter on 7 May 2018, following the respondent resolving to take direct action to ensure compliance with the enforcement notice, an application was made for change of use of the land to the keeping of horses with a residential use for three Romany Gypsy families, three static caravans, three touring caravans and associated parking and other ancillary facilities. On 24 August 2018 a committal order was made in respect of those then occupying the site following the earlier grant of an injunction against them. On 28 August 2018 the respondent, relying on section 70C of the 1990 Act, declined to determine the application which had been made on 7 May 2018. A judicial review was launched in respect of that decision and in accordance with the committal order those occupying the site departed. Permission to apply for judicial review was refused on the papers on 8 November 2018.
5. In Spring 2020 building work was commenced for the purpose of, again, changing the use of the site to a residential caravan site including the stationing of three caravans, the laying of hardstanding and access works. During the course of 2020 other applications were made all essentially for a change of use to residential use together with the stationing of mobile homes or caravans. The judge observed that prior to the acquisition of land by the appellant the respondent had invoked section 70C five times in relation to various applications which had been made at the site. In addition to this, the chronology notes that in around October 2018 the respondent had exercised its powers to take direct action and remove the breach of planning control from the land.
6. In May 2021 a further planning application was made in relation to the site by a Mr Read. The application sought a change of use to a residential caravan site including the stationing of three caravans together with hardstanding and other access works. On 27 May 2021 the respondent wrote to the occupiers of the site complaining in relation to the ongoing breaches of planning control, in particular the breaches of the enforcement notice. The following day the council invoked section 70C of the 1990 Act to refuse to determine the application which Mr Read had made. Notwithstanding the correspondence from the council requiring compliance with the enforcement notice, the site was not cleared and in February 2022 the respondent once more took direct action and cleared the site.
7. On 16 March 2022 an application for planning permission for a single bedroom house at the site was submitted and on 6 April 2022 the respondent declined to determine it relying for a seventh time on section 70C of the 1990 Act. On 8 September 2023 the appellant submitted the planning application which is involved in these proceedings. The application was for a change of use to residential use accompanied by the siting of caravans and mobile homes together with the construction of four day rooms and a stable building. The application was supported by a site plan, planning supporting statement, landscape policy assessment, a landscape visual appraisal and a preliminary ecological appraisal. The planning analysis which supported the application noted that there was an acknowledged need for an additional 34 pitches for Gypsies and Travellers in the area in the period from 2017 to 2035. The landscape and visual analysis sought to demonstrate that there would be no significant harm to the character of the surrounding countryside as a result of the development proposed. The appellant submits

that the application presented a detailed and carefully thought-through application providing a strong case in support of the development.

8. In response to the application, the respondent's Chief Planning Officer, Mr Harris, having sought legal advice, considered a report prepared by officers dealing with the question of whether or not the respondent could properly rely upon section 70C of the 1990 Act to decline to determine the application. The report noted the planning history and also the legislative background to section 70C of the 1990 Act. The report went on to note that which is not in issue in this case, namely that the proposals contemplated in the application for planning permission overlapped with the breaches identified in the enforcement notice in several important respects. In particular, they overlapped in relation to the residential use of the land; the stationing of mobile homes and caravans; and the laying of hardstanding. The report noted that the site had been cleared as a result of the direct action undertaken by the respondent, including the removal of the hardstanding and rubble. The report therefore concluded that the criteria for the engagement of section 70C were satisfied.
9. There was, as the report noted, a discretion as to whether or not to invoke the power granted by 70C of the 1990 Act and, in reaching the judgment as to whether or not it should be exercised, consideration needed to be given to any changes since the most recent decision to decline to determine an application on the site. Whilst the report noted that it was not the purpose of the report to undertake a full planning merits assessment of the application, it was nevertheless a "key consideration" to identify whether there was any realistic prospect that planning permission would be granted were the application to proceed to determination. The report concluded that it would be unlikely to be granted and provided the following analysis:

"The site, which is an unallocated site, is wholly unsuitable for the provision of residential accommodation. The benefits of the use of the site for additional residential accommodation for self-build or for Gypsy and Traveller communities, does not outweigh the significant and well-established harm to the character and appearance of the site and surrounding area in the absence of any exceptions which might justify it. The development is likely to have a significant detrimental impact on the rural character of the area, the adjacent SSSI and Undeveloped Coast, a classified Special Protection Area (SPA)/RAMSAR site. On that basis the uses proposed are clearly contrary to policy.

Moreover, the Environmental Agency flood map for planning shows the site as in flood zone 3, an area with a high probability of flooding. The proposed use is classified as highly vulnerable to flood risk and development should not be permitted for such use in flood zone 3 (Table 2 of Food risk and coastal change Government guidance). Even if the site was limited to flood zone 2, for the proposed use a sequential test and then if this was met, an exception test would be required. There is no evidence that it would not be possible to locate the proposed development in alternative low-risk areas to meet the sequential test (and even if it was, it is highly unlikely that the exception test would also be

met), such that the grounds for refusal or permission on flood risk grounds would remain.

The site itself sits outside of the urban area, located within the open countryside and therefore policies BNE25 and BNE34 of the Local Plan are relevant. These policies seek to enhance the character of the countryside and more particularly in those areas designated as Areas of Local Landscape Importance (ALLI) to ensure that any development does not materially harm the landscape character and function of the area. The site is located within the Riverside Marshes Character Area as set out in the Medway Landscape Character Assessment 2011 (MLCA). This character area is identified as forming an important buffer to the urban edge of Gillingham and protects Natura 2000/Ramsar sites, is a valuable recreational and diversity resource, green corridor from countryside into urban area and is integrally linked to the Lower Rainham Farmland character area.

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This proposal would introduce development within an area that was previously open in in appearance and is located within close proximity to the North Kent Marshes Special Landscape Area (Policy BNE45) which are particularly valued landscapes protected by specific policies. The proposal would have an adverse impact on the visual and landscape character of the area and none of the abovementioned policies is supportive of this form of development in this location. The site also falls within the area identified in the Environment Agency flood map for planning as susceptible to tidal flooding. The introduction of mobile homes or caravans in this area would be contrary to Policy CF13 of the Local Plan and should not be permitted in accordance with subsequent Government flood risk guidance, referred to above.

It is noted that the current submissions include a Planning Support Statement, a Landscape and Visual Appraisal, a Landscape Policy Assessment and a Preliminary Ecological Appraisal. Consideration has been given to these submissions, but it is not considered that they overcome all the fundamental concerns raised by the development, such that a different conclusion should be reached. This includes recognition that the ALLI designation has limited weight in reaching a decision and that it would be possible to enhance biodiversity of the site, bearing in mind the neglected state of the land and the significant disturbance caused by previous unauthorised development. The development would be in a rural location, harmful to the character and appearance of its surroundings and would be unacceptable with regard to flood risk.

***Likelihood of success – special circumstances and other considerations***

The application is stated to be for use by Gypsies/Travellers and although the applicants' status as Gypsy/Traveller has not been tested, such status has been assumed for the purposes of the preparation of this report. Medway Council undertook a Gypsy & Traveller Accommodation Assessment (GTAA) in 2017 which was completed in 2018 as part of the Local Plan process. The 2018 GTAA showed that there is a shortfall in the provision of sites for Gypsy and Traveller families. An update to this Assessment was commissioned in late 2022 and is still underway, although it is recognised that there is still a shortfall in sites. However, the shortfall in sites does not mean that any given site though receive permission or be tacitly accepted through inaction. Instead, the lack of sites is a consideration to be weighed in the balance when considering whether a site is acceptable. In this case the site is wholly contrary to policy and therefore the lack of sites is not expected to be sufficient to outweigh the harms and would not justify the granting of permission."

10. The report specifically took into account that the planning merits of the site for the purposes advanced in the application had not previously been considered, whether by the respondents or on appeal. The report noted, however, that in deciding to take direct action in order to enforce development control in both September 2018 and March 2022 there was an assessment of the planning merits and of the particular considerations associated with the welfare needs of the site occupants at the time. The report therefore considered that little weight could be afforded to the fact that the merits of residential use of the site had not been previously tested at appeal. In conclusion, the report recommended that the powers under section 70C of the 1990 Act be deployed. Mr Harris accepted that recommendation. It was this decision which was challenged through the application for judicial review.

The Law

11. Section 171A identifies that for the purposes of the 1990 Act the term "a breach of planning control" is used to define the carrying out of development without the required planning permission, or alternatively failing to comply with any condition or limitation subject to which planning permission has been granted. The carrying out of development without the required planning permission is a reference to the definition of development contained within section 55 of the 1990 Act, and the requirement for permission contained within section 57. Section 171A also defines the issuing of an enforcement notice as "taking enforcement action" for the purposes of the 1990 Act.
12. Section 172(1) of the 1990 Act entitles a local planning authority to issue an enforcement notice where there has been a breach of planning control and it is expedient to issue the notice having regard to the provisions of the development plan and any other material considerations. Pursuant to section 173(1), an enforcement notice is required to state the matters which in the opinion of the local planning authority constitute the breach of planning control and the nature of that breach, namely whether

what has happened is undertaking development without planning permission or failing to comply with a condition or limitation on a permission which has already been granted. The enforcement notice is also required by section 173 of the 1990 Act to specify the steps which the local planning authority requires to be taken or the activities which must cease in order to achieve the purposes of remedying the breach, by making any development comply with the terms upon which it was granted by discontinuing that use, or restoring the land to its condition prior to the breach taking place, or alternatively remedying any injury to amenity which has been caused by the breach. Examples are given of the types of works and activities which may be specified as requirements of an enforcement notice. The notice is required to specify the date on which it is to take effect as well as specifying the period by which the steps required by the notice must have been taken.

13. Section 174 of the 1990 Act provides for appeals against enforcement notices. Under section 174(2) there are various grounds upon which an appeal against an enforcement notice may be brought and they are specified in the following terms:

“(2) An appeal may be brought on any of the following grounds—

(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

(b) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control;

(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

(e) that copies of the enforcement notice were not served as required by section 172;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy

any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.”

14. By virtue of section 174(2A) an appeal may not be brought on the grounds specified in section 172(2)(a), hereinafter “an appeal under ground (a)”, on the basis that permission should be granted for the matters specified in the notice as the breach of planning control, if the land to which the enforcement notice relates is in England and the

enforcement notice was issued at a time after the making of an application for planning permission which was related to the enforcement notice.

15. Under section 180 of the 1990 Act if planning permission is granted after the service of an enforcement notice for development carried out prior to the grant of the permission, the notice shall cease to have effect to the extent that it is inconsistent with the permission granted. By section 181 of the 1990 Act compliance with an enforcement notice does not discharge the notice, and in relation to changes of use of land the discontinuance of such a use pursuant to an enforcement notice shall, if resumed, be treated as a contravention of the enforcement notice. Similar provisions relate to breaches of planning control in relation to building works and engineering operations. Section 188 of the 1990 Act and article 43 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 require the local planning authority to keep a register on which is held information in relation to any enforcement notices served in relation to the land in their area (along with other notices associated with the enforcement of development control).
16. Section 70C of the 1990 Act was brought in via an amendment to the Act effected by section 123 of the Localism Act 2011. Section 70C provides as follows:

**“70C Power to decline to determine retrospective application**

(1) A local planning authority [...] may decline to determine an application for planning permission [or permission in principle] for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.

(2) For the purposes of the operation of this section in relation to any particular application for planning permission [or permission in principle], a “pre-existing enforcement notice” is an enforcement notice issued before the application was received by the local planning authority.”

17. The incorporation of the words “or permission in principle” were inserted by the Housing and Planning Act 2016 at Schedule 12, paragraph 14 to include a relatively new form of permission for development. The section appears as part of a sequence of sections dealing with the powers of local planning authorities in relation to planning applications. Section 70 contains the discretion to grant or refuse applications for planning permission and provides that they are to be determined having regard to the provisions of the development plan and any other material considerations. Section 70A provides that the local planning authority may decline to determine an application for planning permission if either, in the period of two years ending with the date on which the application is made, the Secretary of State has refused a similar application, or has dismissed an appeal against the refusal of a similar application, or that the local planning authority have refused more than one similar application without there being any appeal against such refusal. Section 70A(4A) also brings within the scope of section 70A a similar application to an application deemed to have been made by virtue of an

appeal under ground (a) of 174(2) by section 177(5). Thus, if an enforcement notice is served and a ground (a) appeal is dismissed, and an application similar to the development comprised in the ground (a) appeal (i.e. similar to the breach of planning control specified in the notice), then section 70A also entitles the local planning authority to refuse to consider such an application.

18. Section 70B provides a power to decline to determine overlapping applications. There are a number of conditions which must be satisfied to bring an application within the scope of section 70B. Section 70B(1)(a) gives rise to an entitlement to decline to determine an application made on the same day as a similar application. Under section 70B(2) the local planning authority may decline to determine an application where there is a similar application under consideration by them and the determination period for that application has not expired. Section 70B(3) entitles the local planning authority to decline to determine an application where there is a similar application being considered by the Secretary of State, in particular, for example where it is under appeal pursuant to section 78 of the 1990 Act and the Secretary of State's decision has not yet been issued. Section 70B(4) entitles the local planning authority to decline to determine an application where a similar application has been granted, refused or not determined by them within the determination period and at a time within which an appeal could be made to the Secretary of State under section 78 but that period has yet to expire. Thus, section 70C appears as part of a sequence of sections of the 1990 Act which provide a power for the local planning authority to decline to determine the merits of an application made to them pursuant to section 70 of the 1990 Act.
19. Section 73A of the 1990 Act provides the power to grant planning permission for development which has already been carried out prior to the date of the application. This power is specifically stated to apply to development carried out without planning permission or without complying with some condition to which a planning permission had been made subject.
20. At the heart of this case is the question of the proper construction of section 70C. The correct approach to statutory interpretation was encapsulated by Lord Nicholls in his speech in *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Limited* [2001] 2 AC as follows:

“I go back to first principles. The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by section 31(1) of the Landlord and Tenant Act 1985? No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose: "the policy and objects of the Act", in the oft-quoted words of Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030. The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation.

Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used."

In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. Another, recently enacted, principle is that so far as possible legislation must be read in a way which is compatible with human rights and fundamental freedoms: see section 3 of the Human Rights Act 1998. The principles of interpretation include also certain presumptions. To take a familiar instance, the courts presume that a mental ingredient is an essential element in every statutory offence unless Parliament has indicated a contrary intention expressly or by necessary implication.

Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the

Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, "the mischief and defect for which the common law did not provide": Heydon's Case (1584) 3 Co Rep 7a, 7b. Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.

This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned. Lord Diplock drew attention to the importance of this aspect of the rule of law in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279-280:

"The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation."

This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which

the legislation was enacted. This is a matter of everyday occurrence.

That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations.”

21. The application of these principles enables the identification of the mischief which the statutory provision is designed to address and assists in the identification of the purpose of the legislation to enable the application of the principles set out in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. In *Padfield* Lord Reid set out the correct approach in the following terms:

“It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.”

22. Judicial reviews in relation to the application of section 70C of the 1990 Act have been determined on several previous occasions at first instance. For reasons which will become clear, it is necessary to review those authorities prior to embarking upon the resolution of the issues which arise in the present case, as it might be thought there is some tension between them.
23. The first of these cases in time was *R (Wingrove) v Stratford-on-Avon District Council* [2015] EWHC (Admin) 287. The claimant in that case was the proprietor of an equestrian business which she conducted on her farm. In June 2012 the local planning authority served an enforcement notice on her alleging that in breach of planning control she had erected a building on the farm to provide two units of residential

accommodation. The claimant did not appeal the notice. Thereafter on 21 March 2014, after two prior applications and compromised judicial review proceedings, the claimant applied for retrospective planning permission for the retention of two units of residential accommodation to serve the needs of the equestrian business at the farm subject to appropriate occupancy conditions. The local planning authority exercised its discretion under section 70C of the 1990 Act to decline to determine that application.

24. The claimant sought judicial review of that decision. Cranston J dismissed the claim. In paragraph 21 of his judgment Cranston J referred to an article by Professor Michael Purdue in which Professor Purdue observed that the purpose of section 70C of the 1990 Act was to prevent retrospective applications being made simply to delay enforcement. This article clearly influenced the conclusion which Cranston J set out in respect of the effect of section 70C in paragraphs 30-32 of his judgment:

“30 Section 70C of the 1990 Act confers a wide discretionary power on local planning authorities to decline to determine a retrospective planning application for a development, subject to an enforcement notice. The legislative history of section 70C demonstrates that Parliament’s intention was to provide a tool to local planning authorities to prevent retrospective planning applications being used to delay enforcement action being taken against a development. It seems to me that there is a legislative steer in favour of exercising the discretion, especially since an enforcement notice can be appealed and the planning merits thereby canvassed. Since delay is the bugbear against which the section is directed, a claimant’s actual motives to use a retrospective planning application to delay matters is clearly a consideration in favour of a decision to invoke section 70C.

31 There may be factors pointing against exercising the discretion in section 70C of the 1990 Act to decline to determine an application which for a local planning authority to ignore would open their decision to a public law challenge. Examples might be where for legitimate reasons there has been a failure to appeal an enforcement notice and the development is plainly compliant with planning provisions (for example, they have been patently misapplied or have changed) or the development can readily be made acceptable by the correct planning conditions. However, section 70C is far from being a gateway for applicants to canvass the full planning merits: it is a discretion to decline to determine those merits, not a discretion to determine them.

32 In this case there is no real evidence that the claimant was badly advised at the time, or unaware of the opportunity to appeal the enforcement notice. There have been no statements from her in this litigation, except for a short statement on a matter of no direct relevance. In any event, the claimant’s right of appeal and the time limits and grounds of appeal were clearly stated on the enforcement notice itself. The fact is that the claimant has a long history of engagement with the planning process, including with enforcement action. It was a reasonable

inference for the council to draw that the application for retrospective planning approval was to delay effective enforcement yet further, in relation to residential units which have now been there for over five years, without planning approval. The council was entitled in coming to conclusions about the claimant's intention to take into account that she had not sought pre-application advice, and that her expressed wish, in the Frampton's covering letter of 21 March 2014, was that in light of the retrospective planning application any prosecution would be "held over".

25. The next case to address the question of the effect of section 70C of the 1990 Act was the case of *R (on the application of O'Brien) v South Cambridgeshire District Council and the Secretary of State for Communities and Local Government* [2016] EWHC 36 (Admin), [2016] JPL 656. The claimant in that case was a Traveller who prior to 22 June 2005 had stationed a caravan on the site in question to enable her and her family to reside at the site. On 22 June 2005 the council served an enforcement notice requiring that the use of the land for stationing residential caravans cease and that the caravans and other structures on the site be removed. The claimant's husband appealed against the enforcement notice, including as a ground of appeal that planning permission ought to be granted for the development pursuant to ground (a). That appeal was subsequently withdrawn, and the enforcement notice came into force.
26. On 4 August 2006 the claimant's husband applied for planning permission for a change of use of the site to use as a residential Gypsy caravan site for a period of four years. The application was refused and an appeal against that decision was dismissed by an inspector on 2 June 2008. On 9 January 2012 the claimant applied for planning permission for a change of use of the site to enable the stationing of residential caravans. That application was refused and the claimant appealed. The appeal was dismissed in May 2014. On 25 March 2015 a further application for planning permission was made for a change of use of the site to use as a single Gypsy and Traveller residential pitch involving the stationing of a mobile home, a touring caravan and the creation of an amenity building for a temporary period until 2 May 2018. The council invoked section 70C of the 1990 Act and declined to determine the application.
27. The claimant sought judicial review of the council's decision. Lewis J (as he then was) dismissed the claim which was advanced before him on a number of bases. One of the submissions advanced was that the purpose of section 70C of the 1990 Act was to form part of a package of measures designed to prevent developers abusing the planning system and delaying the enforcement process. It was submitted that only in the context of an application for planning permission for an unauthorised development used as a delaying tactic to prevent enforcement action could the provisions of section 70C of the 1990 Act be triggered. Thus, it was submitted that where a planning application had not been prompted by the service of an enforcement notice and there was no question of it being used to delay enforcement action, section 70C of the 1990 Act could not properly be invoked by the local planning authority. Lewis J rejected that submission for the following reasons:

"40. First, in my judgment, the words of the 1990 Act s.70C are clear. They permit a local planning authority to decline to determine an application for planning permission for

unauthorised development if that would involve granting permission in respect of matters which a “pre-existing enforcement notice” relating to the land specified as constituting a breach of planning control. A pre-existing enforcement notice is defined in the 1990 Act subs.70C(2) as “an enforcement notice issued before the application was received by the local planning authority”. The only requirement is a temporal one, namely that the planning authority have issues the enforcement notice before receiving the application for planning permission. There is no requirement that there needs to be consideration of whether the application for planning permission was made in response to the enforcement notice and as a means of delaying the enforcement process.

41. Secondly, the logic of the provision is clear. The aim is to ensure that the applicant cannot insist upon having two separate considerations of the underlying planning merits, namely by having a right to appeal any refusal of planning permission and a right to appeal against the enforcement notice on the ground that planning permission should be granted. The intention is that the applicant cannot insist on more than one determination of the underlying planning merits of the development. That is the mischief, or abuse, that the 1990 Act s.70C is intended to remedy.

42. Thirdly, the 2011 Act s.123 also deals with the situation where the development has occurred, there is then an application for planning permission and the local authority subsequently serves an enforcement notice specifying that the development that has occurred constitutes a breach of planning control. The 2011 Act deals with that situation by enabling the applicant to continue with the application for planning permission (including appealing against any refusal or non-determination of the application) so that the underlying planning merits will be addressed but prohibiting an appeal against the enforcement notice on the ground that planning permission should be granted. Again, the underlying purpose is clear. It is to prevent the applicant being able to insist upon utilising two separate means of having the underlying planning merits of the development considered.

43. The common thread underlying both parts of the 2011 Act s.123, therefore, is the introduction of mechanisms to prevent the application being able to insist upon more than one consideration of the underlying planning merits of a development in circumstances where the planning authority have issued an enforcement notice specifying that the development constitutes a breach of planning control.”

28. As a consequence of this understanding of the purpose of section 70C of the 1990 Act, Lewis J concluded that it applied to the case he was considering and its exercise was

justified. Lewis J noted that the claimant had relied upon the views expressed by Professor Purdue and quoted by Cranston J in giving judgment in the case of *Wingrove*. Lewis J considered that the observations in the article were not seeking to provide a definitive description of all the circumstances in which section 70C of the 1990 Act might be properly invoked. He further noted that Cranston J's observation that section 70C ensured that an application could not have multiple "bites at the cherry" were consistent with his conclusions as to a proper understanding of section 70C of the 1990 Act.

29. The next case in which issues concerned with section 70C of the 1990 Act were raised was the case of *R (on the application of Seventeen De Vere Gardens (Management) Limited) v Royal Borough of Kensington and Chelsea* [2016] EWHC 2869 (Admin). The facts of that case were that the claimant, who owned the freehold title to 15 and 17 De Vere Gardens, erected netting in December 2013 across the rear of number 17 to 21 De Vere Gardens in order to control an infestation of pigeons which was creating a nuisance. No prior planning permission was sought in relation to the erection of the netting and on 3 April 2014 an enforcement officer from the local planning authority began an investigation.
30. On 3 July 2014 agents on behalf of the claimant submitted a planning application to the local planning authority which the local planning authority refused to validate on the basis that it did not contain scale drawings. Given the cost involved in producing the drawings the claimant asked the local planning authority to pause any consideration of the application whilst they assessed other options to control the pigeon infestation. On 22 October 2014 the local planning authority emailed the claimant's agents threatening enforcement action if the netting enclosure was not removed within 14 days. On 11 December 2014 the local planning authority issued an enforcement notice stating that the notice was to take effect on 12 January 2015. On 7 January 2015 the claimant appealed on ground (a), contending that planning permission ought to be granted, along with ground (e) in relation to the requirements for service of the enforcement notice and ground (g) pertaining to the period for compliance specified in the notice. By the time of the appeal the earlier planning application had lapsed on the basis of the claimant's failure to perfect its shortcomings with respect to the drawings. The claimant failed to pay the fee required in relation to the deemed planning application under ground (a), thus dooming that ground to failure.
31. The claimant advanced the ground (g) appeal on the basis that it needed more time to enable it to lodge a further application for retrospective planning permission containing the information required by the local planning authority in the form of scale drawings. The inspector allowed the appeal under ground (g) to the extent that she increased the period for compliance with the enforcement notice to five months with the effect that it would end on 15 March 2016. On 7 January 2016 a further application for retrospective planning permission was submitted, this time accompanied by all of the necessary drawings and information. At a meeting of the local planning authority's relevant committee on 8 March 2016, they decided to exercise their powers under section 70C of the 1990 Act to decline to determine the application. The claimant then challenged that decision by means of judicial review.
32. The claimant's case was advanced on the basis that the officer's report leading to the decision to use section 70C of the 1990 Act was fundamentally flawed and materially misleading. The report suggested that the committee had little if any discretion and

could decline to determine the application if it had already been the subject of an enforcement notice which had itself already been the subject of an appeal. It failed to adequately inform the committee that, properly understood, the inspector's decision read in the context of the planning history had given rise to an extension of time for compliance with the enforcement notice so as to enable the claimant to resubmit the retrospective planning application for the same development as the first application but accompanied by all of the necessary details. As a result, the committee had been misled by the officer's report and their decision should be quashed. This was an argument which Hickinbottom J (as he then was) accepted.

33. As part of his reasoning, Hickinbottom J gave consideration to the application of section 70C of the 1990 Act in circumstances where there had not been a determination on the merits under ground (a), but an appeal under ground (g) had succeeded so as to allow time for the submission of an acceptable planning application. Hickinbottom J adverted to the conclusions reached by Lewis J in *O'Brien* at paragraphs 41 and 44. He went on to provide the following analysis pertinent to the circumstances of the case he was considering at paragraph 33 of his judgment:

“However, where the relevant merits have not been determined, section 70C is not designed to prevent them being considered. Thus, in *Ioannou v Secretary of State for Communities and Local Governments* [2014] EWCA Civ 1432, it was held that, in an enforcement appeal, it is open to an inspector to grant an appeal under ground (g) to allow time for a planning application to be made for something outside the development with which the notice itself is concerned. Sullivan LJ, giving the judgment of the court, said (at [38]):

“If, as in the present case, an alternative scheme is put forward which is not part of the matters stated in the enforcement notice as constituting a breach of planning control, but which the Inspector considers may well be acceptable in planning terms, he can follow the course which the inspector adopted in the present case: allow the appeal under ground (g) and extend the period for compliance with the notice so the planning merits of the alternative can be properly explored.”

That is not in conflict with the aims and purpose of section 70C. The main proposition derived from *Ioannou*, so far as the issues in this claim is concerned, is that for an inspector to allow an appeal under ground (g) to allow an appellant time to bring an effective appeal under ground (a) is not in itself incongruous; and, dependent upon the circumstances, it may be entirely appropriate.”

34. The next case in this sequence of considerations of section 70C of the 1990 Act is the case of *R (on the application of Banghard) v Bedford Borough Council* [2017] EWHC 2391 (Admin), [2018] PTSR 1050. The material facts of this case were that the claimant was the beneficiary of planning permission to erect a storage building on his land. The claimant subsequently constructed a building on the correct footprint of the permission but used it as a dwelling house rather than a storage building. As a consequence, the

local planning authority served an enforcement notice on the claimant against which he appealed, including ground (a) in the grounds of appeal. The inspector dismissed ground (a) but allowed the appeal under ground (g) to extend the time period for compliance with the enforcement notice.

35. After the appeal decision, the claimant submitted a further planning application for a storage use of the building consistent with the use that had been granted planning permission earlier. The local planning authority declined to determine the application exercising their power under section 70C of the 1990 Act. Natalie Lieven QC (as she then was) sitting as a Deputy Judge of the High Court concluded that the local planning authority had no jurisdiction to decline to determine the application under section 70C of the 1990 Act. She expressed her reasons for reaching that conclusion in paragraphs 29 to 33 of her judgment in the following terms:

“29 The purpose of section 70C is, as explained by Lewis J in *O’Brien’s* case [2016] JPL 656, to ensure that the applicant cannot insist on two separate considerations of the planning merits by having a right to appeal the refusal of planning permission and an appeal against the EN on effectively the same grounds. As Cranston J put it in *Wingrove’s* case [2015] PTSR 708, the applicant cannot have multiple bites of the cherry. However, in the present case the effect of the council’s interpretation of section 70C is that rather than the claimant having multiple bites of the cherry he has had none. He has not been able to have the planning merits of the storage building he now wishes to construct considered by the local planning authority and ultimately on appeal. The inspector on the EN appeal could not consider them because he had an EN against residential use before him and the ground (a) appeal could only relate to that use, and the council’s decision to rely on section 70C means that the claimant cannot have the matter considered under section 70 of the TCPA as would usually be the case.

30 In terms of the correct approach to section 70C, I do not agree with Mr Smyth that Parliament intended to balance some potential unfairness against the need for effective enforcement action. Rather the parliamentary intention was to ensure fairness in all cases, because an applicant could have his or her application determined under either the EN appeal or through the medium of the planning application but not both. If this approach is taken there is no necessary unfairness in any individual case and in every case the individual can have the application determined. There may of course be cases where the developer fails to appeal, as happened in *Wingrove’s* case, and section 70C can still be used. But in such cases the developer had a full opportunity to a fair process and did not avail himself of it. There may also be cases where the developer makes a very minor change from what was considered in the enforcement appeal, whether in terms of a minor change to the nature of the use applied for or a minor change to the built form. In those

circumstances it will be open to the local planning authority to rely on section 70C. Such a decision will indeed involve the exercise of planning judgment by the authority. However, on the facts of this case I think the position is clear. The matter specified in the enforcement notice as constituting the breach was the unauthorised erection of a dwelling house. Planning permission was for a storage use, so in my view it cannot be said on the facts of the case, that section 70C could lawfully be engaged.

31 On the facts of the present case, it is correct, as Mr Smyth says, that the claimant chose not to implement the 2010 permission and therefore is to some extent the author of his own misfortune. However, it seems to me that that is beside the point in analysing the correct approach to section 70C. The fundamental principle must be that an individual can have their application determined once.

32 The planning authority under section 70C does have a wide discretion and there is necessarily an element of planning judgment in whether the development for which permission is being sought involves “any part of the matters specified” in the EN as constituting the breach of planning control alleged. However, on the facts of this case I do not see how it can properly be said that the permission sought for a storage building is part of the breach of planning control in the EN, namely the erection of a dwelling house. The fact that some part of the building is the same and it is on the same footprint is not sufficient to mean that part of the matters is specified in the EN.

33 If one takes the statutory purpose as to be to ensure that effective enforcement cannot be avoided or delayed by those in breach of planning control having multiple bites of the cherry, then it is easy to see on the facts of this case why that situation does not arise. The EN inspector was clear that he did not have the power to consider the proposed storage use within the section 174 EN appeal. That is a very clear indication that the storage use was not part of the matters being enforced against. The point is further strengthened by the fact that there are also proposed to be changes to the building itself, so that it becomes suitable for a storage use.”

36. The final case in which section 70C of the 1990 Act has been considered at first instance is *R (Chesterton Commercial (Bucks) Limited) v Wokingham Borough Council* [2018] EWHC 1795 Admin), [2019] PTSR 2020. The claimant owned a site in the Green Belt upon which there was a Grade II listed building and its surrounding gardens and outbuildings. On the northern side of the site there was a large building comprising three connected sections together with a boat house incorporating living accommodation at the western end of the large building. At the eastern end of that building was an attached garage incorporating office and storage accommodation. Finally, there was a single storey storage building structurally connected to and linking the boat house and the garage with a terrace and outdoor seating area on its roof. There

was a dispute between the claimant and the local planning authority as to the extent to which any of this new building range had the benefit of planning permission. It appears that in due course at appeal, a planning inspector concluded that the boat house and garage elements of this building range had been constructed in accordance with the approved dimensions of a boat house and garage scheme for which planning permission existed. However, the link building for which no planning permission had ever been obtained made the new building larger in terms of the volume and footprint that had been approved as part of the garage and boat house permissions. Moreover, the completed overall structure was no longer two detached buildings with space between them but rather a range of attached buildings forming a single building structure.

37. On 23 May 2016 the claimant applied for retrospective planning permission for erection of a boat house, garage and store. On 22 June 2016 the local planning authority issued an enforcement notice alleging a breach of planning control in the following terms: “without planning permission the erection of an outbuilding, brick wall, gates and gateposts (“the building”) in the approximate position shown” on the attached plan. The outbuilding so described was the whole of the new range comprising the boat house, garage and the single storey linking structure between the two. On 25 July 2016 the local planning authority refused permission for the retrospective planning permission. The action required by the notice to remedy the breach of planning control was the demolition of the building, the excavation of the slab and the removal of all resultant materials from the land within three months. The claimant appealed against the refusal of the retrospective planning permission and also the enforcement notice, in particular under ground (a). The inspector concluded in his decision dated 13 February 2017 that the ground (a) appeal should be dismissed on the basis that the structure was contrary to Green Belt policy and not justified by very special circumstances.
38. The claimant’s appeal under ground (f), made on the basis that the remedial steps required by the enforcement notice exceeded what was necessary to remedy any breach of planning control, succeeded. The planning permissions for the construction of the boat house and garage as separate structures were still extant and capable of being implemented and thus the development could be modified without the need for complete demolition, such modifications ensuring that it complied with the extant planning permissions. The variation to the notice that the inspector made changed the requirements of the notice to demolishing the storeroom linking the garage to the boat house so as to comply with the terms of the relevant planning permissions for the boat house and the garage.
39. The claimant did not comply with the enforcement notice and on 7 August 2017 made a further application for planning permission for development described as “creation of a balcony to link garage and boat house at first floor level”. On 27 September 2017 the local planning authority declined to determine the application exercising their power under section 70C of the 1990 Act. The claimant sought to judicially review that decision.
40. Upper Tribunal Judge Martin Rodger QC, sitting as a Deputy Judge of the High Court, dismissed the application for judicial review of the local planning authority’s decision pursuant to section 70C of the 1990 Act. He noted the decision reached by Cranston J in *Wingrove* as well as the cases of *O’Brien* and *Banghard*. He offered the following observations in relation to the application of section 70C of the 1990 Act at paragraphs 60 to 62 of his judgment:

“60 Section 70C(1) is not concerned with the steps which the enforcement notice requires to be taken, or the activities which must cease, in order to remedy the breach or any injury to amenity which has been caused by the breach. In this case the inspector modified the enforcement notice (which required the removal of the whole building) by permitting an alternative course of remedial action (the removal of only the link section). That modification had no effect on the matters specified in the notice as constituting a breach of planning control. I therefore approach with some caution the submission of Mr White that, because of the modifications to the notice allowed by the inspector, the focus ought to be on the extent to which the original store room and the new balcony raised distinct planning considerations which required separate consideration. In practice it may not make much difference (because section 70C(1) allows consideration of any part of the land to which the enforcement notice relates) but in principle the inspector’s modification of the remedy is irrelevant, and what is important is the breach specified in the enforcement notice.

61 Having identified the matters specified as constituting the breach, section 70C(1) then invites a comparison between those matters and the development to which the retrospective application for planning permission relates. The purpose of the comparison is to identify any overlap between the matters enforced against and the subject of the retrospective application. It is clear that something very much less than a complete coincidence between the matters enforced against and the matters for which permission is sought will be sufficient to engage section 70C(1). It is enough that the retrospective application relates to “the whole or any part of the land” to which the enforcement notice relates, and that granting it would involve granting permission for “the whole or any part of” the matters specified in the enforcement notice.

62 In the course of argument both counsel agreed that the question whether section 70C was capable of being relied on involves an element of planning judgment. I accept that submission, which is consistent with the decision in *Banghard’s* case [2018] PTSR 1050, but I would qualify it in two respects. The first is that the matters to be considered are of objective matters requiring a comparison between two documents, the enforcement notice and the application for planning permission. Making that comparison necessarily involves a judgment, possibly on a number of factors, but it remains a relatively limited exercise which is likely in most cases to be capable of only a single outcome. Secondly, and as a result, it seems to me to be important not to approach the application of section 70C as if it involves simply a single exercise of the authority’s discretion. Where reliance on the provision is challenged it is

necessary to consider first whether the circumstances described in section 70C(1) exist, so that the discretion to decline to determine an application is available, before considering any complaint about the manner in which the discretion has been exercised. In their submissions both parties tended to elide these stages.”

41. The judge made clear that the application of section 70C of the 1990 Act was not concerned with the extent of differences between two developments but rather the existence of similarities between them. The statutory language required an assessment of whether granting permission for the development comprised in the application would involve granting permission for any part of the matters specified in the enforcement notice. On the facts of the case the judge concluded that there was no doubt that granting planning permission for the development described in the application would include granting permission for matters specified in the enforcement notice. Secondly, the judge observed that the statutory purpose was also engaged where there had been an opportunity for the developer to have a consideration of the planning merits of their proposal which had been declined. In the case the judge was considering, he noted that it was common ground that the claimant could have invited the inspector to consider a reduction in the link section of the building to leave only the balcony as part of its appeal under ground (f). The judge concluded that the local planning authority were entitled to use the power under section 70C of the 1990 Act to refuse to consider the claimant’s retrospective application.

#### The Judgment

42. As eventually formulated, there were two grounds of challenge before Kerr J which were referred to as Ground 1 and Ground 3. Ground 1 was that the respondent had failed to take into account mandatory considerations. Ground 3 was the *Padfield* challenge that the respondent failed to apply section 70C in a manner consistent with its statutory purpose. Following a thorough review of the cases, Kerr J decided in relation to Ground 3 that the correct approach to section 70C was that identified in *O’Brien* by Lewis J. In Kerr J’s judgment, the fact that the exercise of the provision may have the effect of dealing with those applicants intent on delaying enforcement action did not mean that the purpose of the provision was limited only to that context. The correct understanding of the section’s purpose is that it is designed to prevent more than one consideration of the planning merits of a breach of development control that is the subject of an enforcement notice. Kerr J therefore concluded that the actions of the respondent in this case were not inconsistent with the statutory purpose of section 70C of the 1990 Act. As to Ground 1, he found that none of the considerations put forward on behalf of Mr Moran amounted to mandatory considerations in the sense of being so obviously material that it would be irrational to leave them out of account. The respondent had exercised its discretion pursuant to section 70C accurately and appropriately.

#### The Grounds

43. The appellant advances his case under three grounds. Ground one is the contention that the respondent’s use of section 70C of the 1990 Act in this case was inconsistent with the object of the legislation and contrary to the principles established in the case of *Padfield*. Understood in its proper statutory context, the purpose of this statutory provision is to defeat attempts to delay enforcement action, consistent with the

conclusions reached by Cranston J in the case of *Wingrove*. The appellant submits that the formulation provided by Lewis J in the case of *O'Brien*, namely that the purpose of section 70C of the 1990 Act is to avoid having two separate considerations of the underlying merits of the breach of planning control comprised in an enforcement notice firstly, was not part of the ratio of that decision, and secondly, was a formulation which gave insufficient consideration to the statutory context of section 70C and in particular that it is a power to decline to determine retrospective applications. Once it is appreciated that the statutory purpose of section 70C of the 1990 Act is to defeat delaying tactics in enforcement cases or landowners gaming the system, it becomes clear, in the appellant's submission, that section 70C could not apply to the present case. In the present case the appellant claims to have been unaware of the enforcement notice when he purchased the land and, moreover, any breach of planning control has been remedied by the direct action taken by the council in clearing the site. This is not a case where, in the appellant's submission, he is seeking to have two bites of the cherry: in truth there has never been any substantive consideration of the planning merits of developing the site for residential use and the stationing of Gypsy and Traveller accommodation.

44. In response to these submissions the respondent submits that the legal mischief with which section 70C of the 1990 Act is concerned is the existence of an opportunity to have two separate considerations of the underlying merits of a breach of planning control. Lewis J was correct when he identified that purpose in *O'Brien* at paragraph 41 of his judgment. Whilst the prevention of delay to enforcement proceedings may be a consequence of the use of the power in section 70C of the 1990 Act it is not the sole purpose of the provision. The intervener supports the respondent in these submissions.
45. Ground two of the appellant's case is related to ground one and is an argument based upon what is contended to be the correct statutory construction of section 70C of the 1990 Act. The appellant submits that this power could not apply to the application in this case because in the appellant's submission it could not apply to an application for prospective development. The appellant submits that the word "retrospective" in the heading of section 70C of the 1990 Act has to be read in the context of sections 70A and 70B of the 1990 Act. Sections 70A and 70B are focused on prospective applications and address the concern of repeated prospective applications and a multiplicity of simultaneous applications being made, both of which having the potential to wear down the local planning authority. By contrast, section 70C of the 1990 Act only applies in an enforcement context and, in that it is described as a power to decline to determine retrospective applications, the subject matter of the application would be development that has already taken place on the land and which requires planning permission. Thus, section 70C is intended to deal with the mischief of failing to comply with an enforcement notice and instead making retrospective applications in an attempt to retain the development that is the subject of the enforcement notice.
46. The respondent contends that as a matter of statutory construction there is nothing in the language of section 70C of the 1990 Act, whether read alone or in the context of the remainder of the Act, which limits the applicability of section 70 in the way envisaged by the appellant. The reference in the heading to "retrospective" does not restrict the operation of that section in the manner suggested by the appellant. Section 70 can also "look back" in the sense that applications subject to section 70C are made in respect of development which is already covered by an enforcement notice. In any event the

reference to “retrospective” is purely in the heading of the statutory provision which does not either control or override the language used in the enacted provisions. Further, the effect of the appellant’s construction is that merely because a site has been cleared after a breach of planning control, whether by direct action or compliance with the enforcement notice, there should be a fresh opportunity to have the merits of the development reconsidered. This is inconsistent with the overall scheme of the 1990 Act and is a potentially arbitrary distinction.

47. These submissions of the respondent are supported by the intervener. The intervener adopts the approach taken by Lewis J in *O’Brien* and submits that the starting point in considering this ground is that the language of section 70C of the 1990 Act means what it says. The words are clear and permit a local planning authority to decline to determine an application for planning permission for unauthorised development if it would involve granting permission in respect of development which a pre-existing enforcement notice which is in force has enforced against as constituting a breach of planning control. The language of the section is not, therefore, restricted in the manner contended for by the appellant.
48. Further, the logic of section 70C of the 1990 Act is clearly to prevent an applicant insisting upon two separate considerations of the underlying planning merits. The intervener further submits that the amendments affected by section 123 of the Localism Act 2011 are also part of the statutory context which reinforce this interpretation. That provision applies where, following the carrying out of unlawful development, an application for planning permission is made for it and the local planning authority subsequently serve an enforcement notice in respect of that development. The provisions enable an appeal against the refusal of planning permission to continue but make clear that an enforcement notice cannot be appealed against on the ground that planning permission should be granted under ground (a). This is consistent with the respondent and the intervener’s interpretation.
49. The intervener also supports the respondent’s submissions in relation to the reference to “retrospective” in the heading to section 70C of the 1990 Act, noting (as does the respondent) that the word “retrospective” is not defined anywhere within the 1990 Act and is not used elsewhere in the wording of the legislation itself. The intervener further notes that the language of “matters specified in the enforcement notice as constituting a breach of planning control” cross-refer to the requirement in section 173(1)(a) that an enforcement notice must specify “the matters which appear to the local planning authority to constitute the breach of planning control”. These provisions combined with the provisions of section 173(11) of the 1990 Act provide a consistent approach in addressing breaches of development control. Section 173(11) identifies that where an enforcement notice could have required any buildings or works to be removed or any activity to cease but does not do so, and all other requirements of the notice have been complied with, then planning permission is to be treated as being granted by virtue of section 73A in respect of the development which was not made the subject of the requirement in the notice. Further clarity as to the overall purpose of the statutory scheme is provided by section 181(3) of the 1990 Act which specifies that any reinstatement or restoration of the breach of planning control identified in an enforcement notice shall be deemed to be the subject of the enforcement notice which shall apply notwithstanding that the earlier works have been removed or altered.

50. Ground three of the appellant's case is the contention that the respondent failed to take account of mandatory material considerations in exercising the discretion under section 70C of the 1990 Act. Firstly, the respondent failed to take account of the question of whether or not considering the merits of the appellant's planning application would or might delay effective enforcement action against a current breach of planning control. The respondent failed to take account of the fact that because there was no development currently on the site to enforce against there were no implications to be taken into account in respect of the proper and timely taking of enforcement action.
51. In respect of the merits of the proposed application, which was a mandatory material consideration, the respondent failed to give any consideration to policy H13 of the Local Plan. The policy was relevant because it addressed the criteria to be applied when considering development of Gypsy caravan sites and Travelling show people's quarters. This policy was of central relevance to the appellant's planning application and provided that Gypsy caravan sites and Travelling show people's quarters "will be permitted when considered against a range of criteria specified in the policy". Further, the respondent's decision did not identify the extent of the shortfall in Gypsy and Traveller sites which would impact on the weight to be attached to that consideration. The officer's assessment erroneously suggested that the site was in flood zone 3 when in fact the site was in flood zone 1 and therefore at the lowest risk of flooding on the Environment Agency's Flood Map for Planning. Finally, the respondent omitted to take account of the fact that no statutory consultee had objected to the proposal.
52. In response to these submissions the respondent relies upon the arguments which are raised against the appellant's ground two in relation to the question of whether or not the respondent should have taken account of delaying enforcement action when exercising its discretion. The respondent further submits that the points raised in relation to the planning merits of the application are not so obvious that they were obviously material considerations. It was not necessary for the respondent to provide a full merits determination of the planning application but only to make such assessment as was necessary in order to determine the exercise of the discretion under section 70C of the 1990 Act. In respect of policy H13 the decision clearly had regard to the planning policy context which included policy H13, and the policy was also covered in the Planning Support Statement which was before the officers. It was not necessary for the officers to undertake a detailed analysis of every criteria of policy H13. The report took account of the updated need position in relation to the shortfall in Gypsy and Traveller sites. The error in relation to flood risk was not so obviously material that it had to be taken into account. Nor was the absence of objections from statutory consultees.

## Conclusions

53. In my view it makes sense to start the consideration of the appellant's grounds with ground two, the point of statutory construction related to the identification of the purpose of section 70C of the 1990 Act. The conclusions reached in relation to ground two provide the framework for the consideration of ground one, and the question of whether or not the respondent's decision was contrary to the *Padfield* principle and the statutory purpose of this section. For the reasons set out below, I am entirely satisfied that the correct construction of section 70C of the 1990 Act is that it applies in the circumstances of this case. My reasons are as follows.

54. The starting point for consideration of this issue must be the language of section 70C of the 1990 Act itself, applying the principles of statutory construction which have been set out above, including in particular the principles set out by Lord Nicholls in *Spath Holme*. The section applies to planning applications which would involve granting “whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates” permission “in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control”. On a straightforward understanding of this statutory language, it clearly applies to the circumstances of the present case. The application proposed by the appellant seeks permission for the matters specified in a pre-existing enforcement notice as a breach of planning control. There is nothing in the language of the section which suggests that the section could not apply in circumstances where the enforcement notice has been complied with or direct action has been taken by the local planning authority to rectify the breach of planning control. The section does not preclude reliance upon it in circumstances where the planning application is prospective.
55. The reliance by the appellant upon the use of “retrospective” in the heading to section 70C of the 1990 Act is of little assistance to him. As is pointed out by the respondent and the intervener, the term “retrospective” is not defined in the Act and is, consistent with the language of section 70C(1) of the 1990 Act, clearly capable of being understood as alluding to an application which relates to a breach of planning control which has occurred in the past. The fact that it may have occurred in the past and been the subject of successful enforcement activity, in the sense of an enforcement notice being served and breach of control being remedied, does not justify the conclusion that the section is of no application. Indeed, the scheme of the enforcement provisions of the 1990 Act are clearly designed, working as a whole, to ensure that where it is expedient in the opinion of the local planning authority breaches of planning control are stopped, removed and not reinstated. Thus, the use of the term “retrospective” does not affect an understanding of the plain meaning of the section.
56. In my view given the language used in section 70C of the 1990 Act its purpose is clear. It is designed to enable a local planning authority to decline to determine an application for planning permission in respect of either the whole or part of a breach of planning control at a parcel of land which has a pre-existing enforcement notice issued in respect of that breach of planning control. It prevents a duplication of the consideration of the planning merits of the breach of planning control which is the subject of the enforcement action unless the local planning authority are prepared for that to be undertaken. The potential for the occupier of the land subject to the enforcement notice to insist upon more than one determination of the planning merits of the breach of planning control is in my view clearly the mischief which section 70C is aimed at and prevention of that is its statutory purpose.
57. Of course, there may be other consequential or collateral benefits arising from this purpose of the statutory provision. Those will depend upon the very many circumstances, which cannot be exhaustively defined, in which the discretion under section 70C of the 1990 Act may arise. Those benefits may include providing clarity and certainty to the planning status of the land the subject of the enforcement notice. A further benefit may be the prevention of unnecessary delay to enforcement action or precluding an occupier seeking to game the system or wear down the local planning authority. At its heart, however, it is clear that the purpose of section 70C is to preclude

any requirement that there be two separate considerations of the underlying planning merits of a breach of planning control in circumstances where the local planning authority have issued an enforcement notice against that breach of planning control prior to the submission of any application in respect of that breach.

58. In the light of that understanding of the application and the purpose of section 70C of the 1990 Act it follows that in my view both ground one and ground two of this appeal must be dismissed. I would have reached this conclusion simply on the basis of the proper construction of the section itself and as a result of that construction the clear purpose and objective which it seeks to fulfil. This conclusion is, in my view, also consistent with the various earlier authorities that have considered the purpose of section 70C of the 1990 Act and which are set out above. It is clearly consistent with the conclusions reached by Lewis J in *O'Brien*. Like Lewis J, I do not consider that in making the observations which he did in the case of *Wingrove* Cranston J was attempting to be definitive in relation to the purpose of section 70C of the 1990 Act. The comments which he made, with reference to the article by Professor Purdue, were reflective of the particular factual circumstances of that case. As I have already observed, the prevention of delay in the taking of enforcement action may be a beneficial consequence of the application of section 70C of the 1990 Act, but given the multiplicity of factual circumstances in which it can be applicable, delay in and of itself cannot conceivably be its only purpose.
59. The approach of Lewis J in *O'Brien* was specifically endorsed by Hickinbottom J in the case of *Seventeen De Vere Gardens*. That case was concerned with the specific circumstance of an inspector granting a ground (g) appeal in order to allow time for an occupier to make an effective application for the development comprising the breach of planning control. The case turned on the misrepresentation of the inspector's decision in the officer's report underpinning the decision to deploy section 70C of the 1990 Act. Since in the specific circumstances of that case there had yet to be a single determination of the merits and the appeal against the enforcement notice had been solely granted under ground (g) to enable that to take place the reasoning of Hickinbottom J was entirely consistent with the understanding of section 70C of the 1990 Act set out above.
60. The case of *Banghard* is also, in principle, consistent with the understanding of section 70C of the 1990 Act which has already been identified. The judge's analysis in paragraph 29 of her judgment in that case was expressly predicated on the validity of Lewis J's views in the *O'Brien* case and Cranston J's observation in *Wingrove's* case that an applicant is not entitled to multiple bites of the cherry. That was again a case which turned on its particular facts: the application which the local planning authority declined to determine was not one which sought permission for the breach of planning control specified in the enforcement notice. Section 70C of the 1990 Act did not therefore apply. Similar factual concerns underpinned the decision of the judge in *Chesterton*, which was a case that depended upon the assessment of whether granting permission for the development comprised in the application would involve granting permission for any part of the breach of planning control which had been specified in the pre-existing enforcement notice. Since that was the case, the local planning authority had been entitled to use their power under section 70C of the 1990 Act.
61. There are further points which support these conclusions as to the correct approach to the construction and the purpose of section 70C of the 1990 Act. Firstly, as pointed out

in particular by the intervener, the specific reference in section 70C of the 1990 Act to applications for permission in principle (as distinct from applications for planning permission) demonstrates that prospective applications are clearly intended to be within the scope of the section. Thus, it is intended that section 70C applies more broadly and to a wider range of factual circumstances than those under section 73A of the 1990 Act, namely applications for development that has already been carried out. The intervener's submission with respect to the effect of section 123 of the 2011 Act also reinforces the purpose of the legislator to ensure a consistent approach, namely that there is to be but one consideration of the planning merits in a case where there has been a breach of planning control in respect of which enforcement action has been taken by the service of an enforcement notice. There is therefore a consistent approach throughout the relevant legislation.

62. I am unable to accept that the appellant's reference to sections 70A and 70B of the 1990 Act justify a conclusion that section 70C is only relevant to retrospective applications for permission. The reality is that each of those sections addresses different considerations in respect of the proper administration of the development control system. Section 70C of the 1990 Act is specifically directed to the enforcement of development control and it is the other provisions of the legislation bearing upon enforcement of breaches of development control that are far more relevant context for understanding section 70C of the 1990 Act.
63. For all of these reasons I am unable to accept ground one of the appellant's case or to conclude that, in the light of the proper construction of section 70C of the 1990 Act and its purpose, the respondent was in breach of the *Padfield* principle; ground two must also be dismissed.
64. In the light of the conclusions that I have reached in relation to the proper understanding of section 70C of the 1990 Act and its statutory purpose the following questions arise for consideration by a local planning authority contemplating the use of section 70C in respect of an application they have received. Firstly, is there a pre-existing enforcement notice on the whole or part of the application site? If so, does the application seek permission for development which (in whole or in part) includes development identified as a breach of planning control in the pre-existing enforcement notice? If it does, then the local planning authority has a discretion as to whether to decline to consider the application or to accept it and determine it on its merits.
65. Turning to ground three, some initial observations are necessary prior to considering the detailed submissions which are made on behalf of the appellant. The first is that the terms of section 70C of the 1990 Act afford the local planning authority a broad discretion, in the sense that there are no matters specified or identified as criteria or particular considerations for the exercise of that discretion. Secondly, insofar as any challenge to the exercise of that discretion pursuant to section 70C of the 1990 Act concerns a rationality challenge to the exercise of planning judgment, this presents a high hurdle for a claimant to surmount: see the observations of Sullivan J (as he then was) in paragraph 7 of *R (on the application of Newsmith Stainless Limited) v Secretary of State for Environment, Transport and the Regions* [2001] EWHC 74 (Admin). This consideration has no doubt led the appellant to present ground three as a failure to take into account mandatory material considerations.

66. Dealing with the points that are raised specifically in the appellant's skeleton argument, the first is whether considering the merits of the planning application would or might delay effective enforcement action against a current breach of planning control. In my view the appellant's argument in this connection depends upon the submissions that are also made in relation to grounds one and two and which I have dismissed. In my view the officer's report took account of the relevant feature of effective enforcement action in relation to this case, namely that there had already been two investments by the respondent in direct action in order to remedy breaches of planning control. Thus, I am unable to accept that whether considering the application would delay effective enforcement action was in the particular circumstances of this case a mandatory material consideration. It was not irrational for the respondent to approach the matter in the way in which the officers did.
67. The next issue raised is the question of the consideration of the merits of a new application. This was a matter which was assessed by the officers. Whilst the exercise of the section 70C discretion did not require a full appraisal of the planning merits of the application, the respondent did review the planning merits of the material which were comprised in the application. The first point raised by the appellant is the absence of reference to policy H13. In my judgment this is a point without substance. Firstly, there was no need for the officer's report to specify every policy which was relevant to their assessment and secondly, the report noted the benefits of the use of the site for additional residential accommodation for the Gypsy and Traveller community but considered for the reasons given that these benefits could not outweigh the significant harm to amenity caused by the proposal. Assessments of the various criteria in policy H13 so far as relevant to the application were considered substantively in the officer's assessment.
68. The appellant also submits that the report failed properly to take account of the need for Gypsy and Traveller sites. This again is a submission I am unable to accept. The report directly addressed the shortfall of sites for Gypsy and Traveller accommodation and took that into account in assessing the acceptability of the site. The appellant points out the error that was made by the respondent in respect of whether the site was in flood zone three or flood zone one, but that error did not have a material impact on the exercise of the respondent's discretion. The respondent had already concluded that there were significant reasons in terms of the environmental impact of the proposal to justify the conclusion that section 70C of the 1990 Act should be applied and the mistake in relation to the flood zone could only lead to a conclusion that one of the many reasons given by the respondent for the site being unsuitable should be set aside. The appellant is entitled to observe that on a proper analysis one of the several reasons why the respondent had concluded that the site was unsuitable was inaccurate. That submission does nothing to gainsay all of the other reasons that the respondent set out in respect of the unsuitability of the site were to be disregarded. The final point raised, the absence of objections to statutory consultees, was again a matter which was not so obviously material to the exercise of the discretion under section 70C of the 1990 Act as to require it to be taken into account. In all the circumstances I am unable to accept there is any validity in the appellant's ground three.
69. For all of the reasons set out above each of the grounds of appeal which has been advanced should, in my judgment, be rejected. The analysis which was provided by

Kerr J in examining the case at first instance was correct and the reasons he provided accurate. It follows that the appeal against the order which he made must be dismissed.

**Lord Justice Arnold:**

70. I agree.

**Lord Justice Peter Jackson:**

71. I also agree.