PLANNING CASE LAW UPDATE 2007

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1. As in previous years, this update presents a personal selection of noteworthy decisions fromthe last 12-18 months.

2. Abbreviations used generally in this paper are as follows:

TCPA - Town & Country Planning Act 1990

PCPA - Planning & Compulsory Purchase Act 2004

EIA, SEA - Environmental impact assessment, strategic environmental assessment

EIA Regulations - Town and Country Planning (Environmental Impact Assessment) (England & Wales) Regulations 1999

Habitats Regulations - The Conservation (Natural Habitats, etc.) Regulations 1994, S.I. 1994 No. 2716

SEA Regulations - The Environmental Assessment of Plans and Programmes Regulations 2004 S.I. 2004 No. 1633

(1) The duty to give reasons

(a) The grant of planning permissions

3. It used to be the case that reasons were only required for the refusal of planning permission. However, since 2003 LPAs have been under a duty to give reasons when granting permission. Article 22(1) of the Town GDPO requires that decision notices must include a summary of both the reasons for the grant, and the policies and proposals in the development plan, that are relevant to the decision. ODPM Circular 08/2003 advises that reasons are required to enhance the transparency of the planning system and that LPAs should consider whether the reasons they propose to give are adequate.

4. The first case to consider this duty was ***R (Wall) v Brighton & Hove City Council*** [2005] 1 P&CR 566 where it was conceded that there had been a failure to give adequate reasons. The decision notice stated that the decision to grant permission had been taken having regard to the policies and proposals in the relevant plans and all relevant material consideration. A brief indication was given of what the various policies covered, but the notice went no further.
Sullivan J examined the background to Art.22(1):

> "53. Over the years the public was first enabled and then encouraged to participate in the decision-making process. The fact that, having participated, the public was not entitled to be told what the local planning authority's reasons were, if planning permission was granted, was increasingly perceived as a justifiable source of grievance, which undermined confidence in the planning system. Thus the requirement to give summary reasons for a grant of planning permission should be seen as a further recognition of the right of the public to be involved in the planning process. While the requirement to give 'full reasons' for a refusal of planning permission, or for the imposition of conditions, will principally be for the benefit of the applicant for planning permission, who will be better able to assess the prospects of an appeal to the Secretary of State, the requirement to give summary reasons for the grant of planning permission will principally be for the benefit of interested members of the public. The successful applicant for planning permission will not usually be unduly concerned to know the reasons why the local planning authority decided to grant him planning permission.

> 54. Parliament decided that this extension of the public's rights under the Planning Code was necessary even though in many cases it could reasonably be inferred that the members would have granted planning permission because they agreed with the planning officer's report. Parliament could have, but did not, limit the obligation to give summary reasons to those cases where the councillors did not accept their officers' recommendation."

5. Sullivan J did not consider that Art. 22(1) imposed an undue burden on LPAs because officers' reports usually include recommended reasons for refusal or for the imposition of conditions and there is no reason why officers could not similarly include summary grounds for recommending a grant of permission. He added that:

> "58. The new requirement to give summary reasons for the grant of permission will be particularly valuable in cases where members have not accepted officers' advice, where the officer has felt unable to make a recommendation, where the officer's report fails to take account of a material consideration, but that omission is said to have been remedied by the members during the course of their discussions, or where an irrelevant factor has been relied upon by some members during the course of their discussions and it is important to ascertain whether it was one of the Committee's reasons for granting planning permission. In such cases – and I emphasise that these are merely examples -- there would have to be very powerful reasons for not quashing a decision notice which did not include the local planning authority's summary reasons for granting planning permission. To allow extrinsic post hoc evidence as to what the local planning authority's reasons were in such cases would perpetuate the very problems that Parliament intended the substituted article 22(1) to address.
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> 59. While there can be no objection in principle to a local planning authority amplifying its summary reasons, since by definition they will not be its full reasons for granting planning permission (see above), it would equally frustrate Parliament's intention if local planning authorities were able to rely post facto on entirely different or wholly new reasons for granting planning permission: see *Ermakov* at page 315j [that is R v Westminster Council Ex P Ermakov [1996] 2 All ER 302]. It is difficult to see why a local planning authority which has failed to include any summary reasons for granting planning permission in its notice of decision should be placed in any better position."

6. In ***R (Ling (Bridlington) Ltd) v East Riding of Yorkshire Council*** [2006] EWHC 1604 (Admin) permission had been granted for a fun park and wheel (similar to the London Eye) on the seafront in Bridlington. The decision notice stated that "The proposal has been considered against the policies below and it is considered that the scheme accords with these policies, and there are no material considerations which indicate a decision should be otherwise…". Sir Michael Harrison held that the reasons were adequate because the members had followed the officer's recommendation in respect of both grants of permission, save for the imposition of the glazing condition, the reasons for which had been apparent from the reason given for its imposition. In those circumstances, the summary of reasons could be shortly stated. The summaries in question were really as short as they could be, anything less would be inappropriate, but they did reflect the conclusion in the officer's report in each case. Anything further might be said to be giving a summary of reasons for reasons. Although it would appear that the authority might be adopting a standard formula, it was applied to the individual circumstances of the cases before it.

7. Sir Michael Harrison also set out four factors which he considered to be relevant in considering the adequacy of reasons for the grant of permission:

> "47. The first is the difference in the language of the statutory requirement relating to reasons for the grant of planning permission compared to that relating to the reasons for refusal of planning permission. In the case of a refusal, the notice has to state clearly and precisely the full reasons for the refusal, whereas in the case of a grant the notice only has to include a summary of the reasons for the grant. The difference is stark and significant. It is for that reason that I reject the claimants' contention that the standard of reasons for a grant of permission should be the same as the standard of reasons for the refusal of permission.

> 48. Secondly, the statutory language requires a summary of the reasons for the grant of permission. It does not require a summary of the reasons for rejecting objections to the grant of permission.
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> 49. Thirdly, a summary of reasons does not require a summary of reasons for reasons. In other words, it can be shortly stated in appropriate cases.
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> 50. Fourthly, the adequacy of reasons for the grant of permission will depend on the circumstances of each case. The officer's report to committee will be a relevant consideration. If the officer's report recommended refusal and the members decided to grant permission, a fuller summary of reasons would be appropriate than would be the case where members had simply followed the officer's recommendation. In the latter case, a short summary may well be appropriate."

8. Collins J also considered the duty to give reasons for granting planning permission in ***R(on the Application of Jacqueline Tratt v Horsham District Council*** [2007] EWHC 1485 (Admin). The claimant (T) applied for judicial review of a decision by the LPA to grant planning permission to a telecommunications company (H) for the erection of a 25-metre high mast 130 metres from her house. The LPA had granted permission, stating that the proposal was consistent with the provisions of the development plan. T contended that these reasons given for granting permission were insufficient for the purposes of Art. 22(1).

9. Collins J held that the LPA had failed to give appropriate summary reasons. The reasons ought at least to have stated why the issues had been decided in favour of H. Applying Wall, he held that summary reasons should deal in summary form with the substantial issues that had formed part of the consideration of the planning application. Collins J also questioned some of the factors identified by Sir Michael Harrison in Tratt:

> "18. Although not specifically raised by either counsel, it seems to me that there was a failure here to include a summary of the relevant policies. It is in my judgment insufficient simply to identify a policy without indicating what it concerns. What is required is a summary of the relevant policies, not merely a list of policies which are considered to be relevant. The summary need be no more than a few words identifying the relevant aspect of any policy but that in my view at least must be given. Accordingly, the decision failed to comply with that part of article 22(1)(b)(i). However, as I say, that point was not taken by Mr Kolinsky and he concentrated on what he submitted was a defect in the reason, as it was stated. He submitted that that could not on any view be regarded as a sufficient reason for granting the permission in the circumstances of this case…
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> 19. … clearly, interested members of the public will be those for whom the reasons to grant will be of the greatest concern but it must be remembered that an objector may well want to know whether there is a prospect of a claim for judicial review of the decision and therefore the summary reasons will be material so that he can indeed consider whether the Council has on the face of it properly had regard to all to which it ought to have had regard. Equally, the applicant may also have an interest to know and to be satisfied that there is no legal problem in the grant because obviously if there were he would know that it might be dangerous for him to go ahead immediately in reliance upon that permission, particularly if there had been vociferous and detailed objection by interested parties to it. Accordingly, as it seems to me, the need to give reasons is based upon the same considerations as the need to give full reasons for the refusal of a planning permission but of course, as Sullivan J pointed out, so far as the applicant is concerned, if there is a refusal, it is wider than whether there was an error of law because he has to consider whether there is a chance that, were he to appeal, that appeal might meet with success …
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> 25. I have, I confess, some slight difficulty with the first two of those stated relevant factors. It seems to me that in principle the purpose of the giving of reasons is the same whether they be full or summary. The requirement in planning cases -- indeed not only in planning cases -- has always been recognised to be that the reasons are to enable an individual, be he objector or failed applicant, to see whether there might be grounds to challenge the decision and, accordingly, if in paragraph 47, when Sir Michael was stating that the standard of reasons for grant should not be the

> same as the standard for refusal, he was intending to indicate that the same principle that I have referred to should not apply, then I do not accept that that is an appropriate approach. If, on the other hand, all that he was intending to say was that there is a significant difference in the standard required for summary as opposed to full reasons, although each should have regard to the same purpose, then I have no difficulty.
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> 26. The second relevant factor is an indication that there is no need for a summary of the reasons for rejecting objections. It seems to me that reasons in relation to planning decisions must normally deal with the main issues that have been raised. That is again a clear basis upon which the adequacy of reasons should be judged. In this case, the officer's report indicates what were the main issues and they really are need, siting and possible health concerns, and in siting I include, of course, the visual impact of the mast. It seems to me that the reasons ought at least to have stated, albeit only in a sentence in each case, why those issues have been decided in favour of the applicants. It is true that all that would have been required perhaps in relation to, for example, need was that the Council, had been satisfied that a need for the mast had been established in order to provide the necessary coverage; so far as siting was concerned, that the Council had been satisfied that this was the best available site for the mast because it had the least impact insofar as visual amenity was concerned; and, so far as health considerations, that there was no risk to health in having the mast sited where it was.
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> 27. Mr Cosgrove has suggested that, if one looks at the decision as a whole and sees the conditions and the reasons given for the conditions, it must have been obvious, and indeed implicit, that the Committee had indeed decided that those considerations had been met and therefore that the laconic statement that the proposal was consistent with the provisions of the development plan suffice. Incidentally, there were, it seems, two plans, certainly on the face of it two plans which were regarded as relevant, because it is far from clear whether all the three policies are in one. But that apart, as I say, Mr Cosgrove suggests that a reading of the whole would make that clear.
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> 28. I have no doubt that the reasons stated in the circumstances of this case do not meet what was required. It may be that in an entirely straightforward case where there have been no objections to the relevant application (and that may well be often the situation) it is unnecessary to do more than to state that the proposal was consistent with the plan. It would be helpful, I think, to indicate that no objections have been raised to it and that would make the position clear. Perhaps adding there were no material considerations which pointed in any other direction might be sufficient. But it is a dangerous approach for Councils to make. It lays them open to claims that insufficient reasons have been given and it would be prudent and sensible in all cases for Councils, and obviously for officers in making their reports, to bear in mind the need that summary reasons must deal in summary form, with the substantial issues which have formed part of the consideration of the planning application and that they are likely to be used by objectors to see whether there may be some reason to seek judicial review. If reasons are defective and do not deal with what they ought to deal with, that may lay the Council open to a judicial review claim."

10. The adequacy of reasons given for the grant of planning permission was challenged in ***R (Midcounties Co-operative Ltd) v Forest of Dean DC*** [2007] EWHC 1714 (Admin). Tesco had applied for planning permission to demolish a sports club and to replace it with a superstore, petrol station and a rugby ground. The LPA granted permission and a further permission under s.73 TCPA 1990 varying the condition stipulating the hours during which the rugby ground could be floodlight. The claimant, which had opposed the planning applications and which owned a supermarket adjacent to the sports club, sought judicial review contending that the LPA's reasons were insufficient to comply with Art. 22(1) GDPO. The decision notices had listed the development plan policies to which regard had been had and stated

> "The development is considered to comply with these policies and guidance notes and it is not considered that it will cause material harm to the amenities in the area."

11. Collins J upheld the claim and quashed the permissions because the reasons contained in the decision notices were inadequate. He observed that some LPAs had not appreciated the effect of Art.22(1), but since LPAs were already accustomed to

suggesting reasons where applications were refused or for the imposition of conditions, there was no reason why they should not routinely do the same in summary form for a grant of planning permission. Collins J considered the purpose of Art.22(1): an objector, wishing to challenge a decision to grant planning permission, might be interested in knowing whether the local authority had proper regard to all material considerations, and an applicant seeking planning permission might be concerned to check that there was no flaw in the grant of permission.

12. The obligation to give summary reasons was based on the same considerations that applied to the obligation to give full reason. Therefore the summary reasons should cover the main issues that formed part of the consideration of the application for planning permission. Accordingly, the purpose of giving reasons was the same whether they were full or summary. Where there were no objections to an application for planning permission, that could be stated in the notice of a decision and it would suffice in such circumstances to say no more than that the application accorded with the relevant policies:

> "28. As I said in *Tratt*, I have some difficulty with the first two of Sir Michael's four factors in particular. The purpose of giving reasons is the same whether they be full or summary and are needed to enable any interested person, whether applicant or objector, to see whether there might be grounds to challenge the decision. If in stating that the standard of reasons should be different for a grant than for a refusal all that Sir Michael was doing was reflecting the difference between summary and full, there is no problem. But if he was intending to indicate that there was a difference in the purpose of giving reasons, and so what they should deal with I must respectfully disagree with him. Since I am clear that the reasons should cover the same matters whether full or summary, I do not accept Sir Michael's second factor. If there have been objections which raise one of the main issues in considering the application, the reasons for rejecting them will equally be reasons for granting permission. I do not think the distinction drawn by Sir Michael in paragraph 48 is a true distinction. Thus if for example a main objection to a development is its allegedly damaging effect on visual amenity, it would be appropriate to state that the LPA was satisfied that its effect would not be detrimental to visual amenity because it would be adequately screened or sited so as not to be intrusive or whatever dealt with the particular objection.
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> 29. Whether or not I would have agreed with Sir Michael about the adequacy of the reasons in the Ling case is nothing to the point. I am entirely satisfied that the reasons given in the permissions in this case were inadequate. Mr Clarkson submits that the claimants were informed readers, were aware of the officer's reports and so would know why the decision had been reached. That does not save inadequate reasons. Article 22(1) requires the reasons to be included in the notice and should not require the interested party (who may not have been aware of the application as an objector) to have to search the background material including officer's reports to understand why permission was granted and in particular whether there were any issues raised against the application. No doubt if there were no objections, that can be stated and it will suffice in such circumstances to say no more than that the application accorded with the relevant policies.
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> 30. There is a further defect in that there is not only failure to refer to relevant policies (a failure which is said to be due to computer error: that is no excuse) but a failure to do more than list the supposedly relevant policies. Article 22(1) requires a summary of the policies. That is not the same as a list of the policies. The purpose behind the requirement for a summary is I believe to enable the reader to see the relevance of the policy. All that is needed is an indication of what the policy deals with insofar as it is material to the permission in question."

13. Adequacy of reasons was again the issue in the very recent case of ***R (Smith) v Cotswold District Council*** 21/11/07. This is an important case as it shows the limits of this basis for challenging the grant of permission. The appellants (S) appealed a decision refusing an application for permission to apply for judicial review of the grant of planning permission by the respondent local authority. An owner of a cottage in a conservation area had applied for

planning permission to demolish a garage and replace it with a single storey extension. The planning committee of the local authority referred the matter to a conservation officer. The conservation officer was critical of the application but concluded that the impact on the wider area was limited and recommended approval. The planning committee granted planning permission. S applied for permission to seek judicial review of the decision on the ground that it was irrational and as no proper reasons had been given. The judge rejected the application and held that the decision was not irrational and that whilst he was inclined to agree that insufficient reasons had been given there had been a delay in the application for judicial review.

14. The Court of Appeal (Clarke MR, May, Hallett LJJ) held that given the finding that the decision was not irrational it was fanciful to think that the planning committee would come to a different decision if required to give better reasons. Approving ***Tratt*** and ***Wall*** the Court of Appeal stated that planning authorities were clearly obliged to give proper reasons for their decisions and the instant decision did not detract from that principle, but on the facts of the case it was clear that the judge was right to refuse permission because there was no real possibility of the planning committee coming to a different decision if required to give proper reasons.

(b) Negative screening opinions for EIA purposes

15. Finally, the question of whether there is a duty to give reasons when making a negative screening opinion for EIA purposes is likely to come before the Court of Appeal in 2008 in ***R (Mellor) v Secretary of State For Communities & Local Government*** [2007] EWHC 1339 (Admin).

16. In ***R v Secretary of State for the Environment, Transport and Regions, ex parte Marson*** [1998] Env LR 761 the Court of Appeal held that there was not, although the European Commission, in a scarcely timely response to ***Marson***, has recently announced that it will be taking infraction proceedings against the UK in relation to the failure to give reasons for negative screening decisions. However, Article 4 of the EIA Directive makes no reference to providing reasons in determining whether EIA is required in marked contrast with Article 9 relating to decisions to grant or refuse consent. Article 9 expressly requires the authority to make reasons for the decision available to the public. Furthermore, Article 3(7) of the more recent SEA Directive also provides a clear contrast to Article 4 of the EIAD in that it expressly requires that reasons be given "for not requiring an environmental assessment".

(2) Planning judgment and alternatives

17. The relevance of alternatives when reaching a planning judgment on the adequacy of the design of a development was considered by the Court of Appeal in ***First Secretary of State & West End Green (Properties) Ltd v Sainsbury's Supermarkets Ltd*** [2007] EWCA Civ 1083. The appellants appealed against the quashing of the Secretary of State's decision to grant planning permission to W. The permission was for a mixed development of a retail supermarket, 307 residential units, 156 holiday units, associated car parking and landscaping at a site near Paddington Green, on the western side of the Edgware Road north of the A40 Marylebone Flyover in London. After a public inquiry the inspector recommended the refusal of planning permission on the ground that the design of some of the buildings proposed for the site was inappropriate and contrary to urban design and conservation area planning policies. He noted that an alternative application for permission put forward by the respondent (S) indicated that a better design solution was possible. The secretary of state granted permission on the basis that the benefits of the scheme in the form of regeneration of a brownfield site and the provision of affordable housing were sufficient to outweigh the adverse impact on the character of the conservation area and listed buildings adjacent to the site.

18. Crane J had quashed the grant of permission on the basis that obtaining the benefits of the scheme did not require that the disadvantages had to be accepted or, at least,

that the Secretary of State's reasoning did not explain why the disadvantages of the scheme had to be accepted. The appellants submitted that once a development was found on its own merits to be acceptable it did not matter that a different design of development on the same site might be possible that would render the development of that site even more acceptable.

19. S also submitted that the Crane J's decision could be upheld on the additional grounds that the Secretary of State had failed to take account of the national policy on design issues set out in Planning Policy Statement 1 and had misapplied policy DES 1 in the development plan for the area that required the highest standards of design.

20. The Court of Appeal (Mummery, Keene LJJ, David Richards J) allowed the appeal and held that there was no legal principle that planning permission for a development had to be refused if a different scheme could achieve similar benefits with a lesser degree of harmful effects. In relation to the second ground, the Court of Appeal held that a development plan policy requiring the highest standards of design had an aspirational quality and therefore a proposed development did not breach the policy just because some improvement could be made to the design of an aspect of it.

> "36. Sainsburys contend that what is significant here is that the decision-letter never suggests that the benefits of redevelopment could not be achieved in a way which avoided or at least lessened the harm to the conservation area and the setting of the limited buildings. Mr Hicks stresses that the Secretary of State's own policies as set out in Planning Policy Guidance note 15 (PPG 15) requires a "high priority" to be given to preserving or enhancing the character or appearance of a conservation area, and that if a proposal conflicts with that objective there will be a strong presumption against the grant of planning permission (paragraph 4.19). He also draws attention to the fact that the Secretary of State accepted that Building B, as well as Building E1, would cause harm to the conservation area. When one puts such harm together with the prospect that the redevelopment benefits could be achieved by a better-designed scheme, the logical conclusion has to be that permission for Option A should have been refused, leaving the developer to come back with an improved scheme.
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> 37. I do not accept that that is the logical outcome, and certainly not the only logical outcome. Like so many aspects of planning judgments, it is a matter of degree. There may well be cases where the degree of harm which would result from a proposal is such that it is decided that the benefits which the proposal would bring must await a new scheme with an improved design. The decision maker may properly and lawfully reach that conclusion in appropriate cases. Conversely, there may also be cases where the degree of harm is not judged to be so great that it warrants rejecting the proposal and sending the developer away, on the basis that he will come up with an improved scheme. There may well be disadvantages from the public standpoint in terms of delay and uncertainty in rejection of a current proposal. Certainly there is nothing inherently illogical or unlawful in the decision-maker concluding that a scheme is acceptable, even though a yet better scheme could be devised. Into which of these two categories a proposed development falls is a matter of planning judgment for the decision-maker, only to be impugned on the usual Wednesbury grounds.
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> 38. There is certainly no legal principle of which I am aware that permission must be refused if a different scheme could achieve similar benefits with a lesser degree of harmful effects. In such a situation, permission may be refused but it does not have to be refused. The decision-maker is entitled to weigh the benefits and the disbenefits of the proposal before him and to decide (if that is his planning judgment) that the proposal is acceptable, even if an improved balance of benefits and disbenefits could be achieved by a different scheme. As Miss Lieven pointed out and as is obvious, certainly to anyone with experience of the planning system, a refusal of permission will inevitably lead to delay and may mean considerable uncertainty about what results. A fresh application to the local planning authority would be required, by which time circumstances may have changed. The economics of redevelopment may be different, the attitude of the local planning authority may not be exactly the same as before, and so on. Fresh planning judgments would have to be made on a new scheme. Inevitably the benefits of redevelopment would be later in coming. I therefore reject any proposition that the Secretary of State could logically only decide to refuse permission."

21. An inspector's planning judgment was challenged in ***North Wiltshire DC v Secretary of State for the Communities & Local Government*** [2007] EWHC 886 (Admin). The applicant LPA applied to quash the inspector's decision to allow an appeal a refusal to grant planning permission for affordable residential development on a site. The planning inspector had identified that the proposed development site did not lie within or adjoining a village and was to be treated as being within the open countryside. He considered that the site did not comply with the rural exception site policies for affordable housing within the applicable development plan. However, the planning inspector held that, having regard to other material considerations such as the "pressing need" for affordable housing, and sustainability, it was appropriate to grant conditional planning permission. The LPA argued that the inspector had failed to have regard to the relevant development plan and other material policies, failed to give adequate reasons for his decision, and had reached a decision that was perverse.

22. Judge Gilbart QC held that the inspector had been entitled to conclude that the development was, subject to conditions, appropriate development. Although the inspector's decision letter was clumsily worded he had not misapplied the relevant development plan or planning policy guidance, nor had he failed to have regard to "other" material considerations that had been relevant to the exercise of his planning judgment:

23. In ***Britannia Developments Ltd v Secretary of State for Communities & Local Government*** [2007] EWHC 812 (Admin) Judge Gilbart QC held that an inspector has erred by failing to have regard to the effect of his refusal of retrospective planning permission on the occupiers of houses that were the subject of an enforcement notice. Seven houses in a development of 81 houses had not been built according to the permission and the LPA has served enforcement notices. At the date of the inquiry, 3 of the 7 houses had been sold and were occupied. The inspector allowed the developer's appeal in respect of 2 of the houses, but dismissed the appeal in relation to the remaining 5. Judge Gilbart QC held that the inspector had erred by failing to have regard to the impact of his refusal of planning permission on the occupiers of the five houses in question. It was obvious that it was possible that enforcement action could be taken by the local authority in respect of the houses. Such enforcement action would cause significant disturbance to the occupiers of those houses and the planning inspector should have addressed as a material consideration whether the effect of that disturbance was sufficient to outweigh the disturbance to the privacy of the occupiers of other houses in the development.

24. In ***Richmond-upon-Thames LBC v Secretary of State for Communities and Local Government*** [2006] EWHC 3324 (Admin), Judge Gilbart QC held that an inspector had misconstrued the applicable supplementary planning guidance. The applicant LPA applied to quash the inspector's decision to allow the appeal of the second respondent developer (D). D had applied for permission to develop 28 residential units on an area of land. D was required under the relevant development plan and planning guidance to provide affordable housing as a condition of any grant of permission for development on the site. The LPA had failed to reach a decision and D appealed to the secretary of state.

25. The inspector identified the primary issue as being the calculation of the financial contribution payable by D to the LPA for the provision of affordable housing in off-site developments in lieu of the provision of affordable housing on the site. The inspector sought to apply the formula contained in the LPA's supplementary planning guidance that required, inter alia, the calculation of the market value of equivalent housing units to those for which permission was sought. In considering the market value of equivalent units the inspector had regard to the market value of existing units of a type similar to those for which permission was sought. Adopting that interpretation the inspector calculated the appropriate figure for D's contribution for the provision of off-site affordable housing, allowed D's appeal and granted conditional permission.

26. The local authority contended that the inspector had misapplied the formula and erred in his
calculation of the market value of the units to be used in calculating D's contribution for the provision of off-site affordable housing. Judge Gilbart QC agreed and held that the inspector had erred in his interpretation of the formula in the SPG. Following ***Cranage Parish Council v***
First Secretary of State (2004) EWHC 2949 (Admin), the inspector should take a purposive and not an overly legalistic approach to the interpretation of the policies.
27. The inspector's interpretation of the formula used to calculate D's financial contribution was
unreasonable and illogical. He should have considered properties comparable to those for which permission was sought as the basis for his calculation of market value and should not have had regard to housing units that were not of the same type. Accordingly he should have had regard to the market value of newly built properties of the type proposed on the site in
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question rather than pre-existing properties. The inspector's approach had the absurd effect that if the site in question was a more attractive site than the majority of sites in the area, the developer would have his contribution assessed on a lower value than was actually the case for
his site, and if the site in question was less attractive than the majority of sites in the area, he would have it assessed on a higher value than was actually the case.
28. The importance of a purposive and practical interpretation can be seen from the following extract from the judgment:
"15. I should make one other observation on the interpretation and application of policy. It involves two stages. The first is interpretation and the second is, once interpreted, its application. At the second stage the decision maker will address other material considerations which he may decide should affect whether he applies the outcome of the interpretation in full or at all …
17. The Inspector's approach is, first, to take the value of units to be that derived by averaging out the values achieved in transactions of any one bedroom or two bedroom properties in the postcode area in which the site lies, and, secondly, to include within that exercise all types of such units, whether newly built or not. Of course, in both cases he is doing so within the relevant size band.
18. Is that approach of the Inspector a reasonable interpretation? I start by the context. The policy in the Unitary Development Plan seeks the provision of units within schemes which are given planning permission; in other words, in the way in which the policy is preferred to operate there would be built on the site a number of units. If the contribution route is followed, the Council is entitled to a contribution whereby, in the words of the UDP, "equivalent provision" is enabled elsewhere, and, as already observed, more detail is given in supplementary planning guidance.
19. In my judgment, 17.3 and 17.4 of supplementary planning guidance are only capable of meaning that one is seeking to ascertain the value of units as if the preferred route of on site provision had been taken. They are also directed to valuing equivalent provision, i.e. new built units, not existing units. Mr Greatorex and Mr Philpott, for the Secretary of State and the interested party respectively, were driven to argue that the only factor relevant to determining equivalence was the number of the units and whether they were one or two bedroom units within the agreed size bands.
20. The claimant's interpretation of policy is that it requires that one assesses the value of the units which would notionally be built on the appeal site. One does so by assessing the market value of such units. The developer's contention, which the Inspector supported, is that one takes the number and size of the units. One then looks at the value of transactions throughout the postcode area for properties of that size, whether newly built or not, and then take an average value per transaction. One then simply takes that as the value to be used for the calculation of the contribution. That approach was supported by the Inspector.
21. It is conceded by the Secretary of State and the interested party that the claimant's interpretation could be correct. I regard the developer's interpretation, which the Inspector accepted, as misconceived and obviously wrong. I do so for the following reasons.
a. First, it has the effect of negating the fundamental objective of the policy, which is that the provision be equivalent. If new built units command higher prices than second hand units (as was accepted) that is not by chance or whim, it is because they are more attractive places to live. If the market regards a flat in a house conversion as not being the equivalent of a new built flat, how could a policy aimed at making equivalent provision on a value basis do so?
b. Second, as the Inspector says in paragraph 16, the point of the exercise is to identify the relevant market value of units so that the "equivalent provision" contribution can be calculated. Assessing the market value of proposed development is a very common place valuation exercise and presents no difficulties at all. One has an identified site, with an identified type of development. All the matters which inform a valuation are known, such assistance to facilities, visual appearance,

whether the neighbouring uses are noisy or quiet, and so on. One may properly have regard to other transactions in the area in which the site lies to inform that judgment, i.e. use them as comparables, in which process the valuer will use his judgment to identify matters which differ as between the comparables and the subject site. Mr Greatorex and Mr Philpott submitted that such a process is something to be found in the Lands Tribunal, as if that made it other than normal. To hear their submissions one would have thought that valuation of this straightforward kind was a black art of a subtlety beyond the scope of a planning inquiry. I emphatically reject that contention. We are not talking here of some analysis requiring a sophisticated series of assumptions such as residual valuation, but of the everyday process of assessing value by the use of judgment having regard to the value of recent transactions in the property market. It is what every estate agent does many
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times a day when valuing property. The Inspector has adopted an interpretation which requires a different method. It requires one to take an average of all transactions in an area and then derive a value for units notionally constructed somewhere in that area on an unknown site or sites. It prevents any realistic attempts at valuation as it prevents any judgment being formed on a site specific basis. It also makes no allowance for any differences between properties or locations.
c. It has the extraordinary effect that if the site in question is in a less attractive location than the run of properties in the area, his interpretation would drive the market value up above the market value of any units constructed on the site.
d. It follows also that the Inspector's interpretation has the effect that, first, if the site in question is a more attractive site than the run of sites in the area, the developer has his contribution assessed on a lower value than is actually the case for his site; and I repeat, if the site in question is less attractive than the run of sites in his area, he would have it assessed on a higher value than is actually the case. That is absurd. No interpretation of policy which produces that absurd result is reasonable."

29. In ***Orange Personal Communications Services Ltd v Birmingham City Council*** [2007] EWHC 760 (Admin), Wilkie J held that a planning committee had erred in granting planning permission for change of use of land from vacant industrial land to a vehicle depot as the planning officer had not evaluated and explained objections to the application and had misdirected the committee as to the current use of land.

30. The claimant (O) owned and operated a site that housed an important telecommunications
switch which contained highly sensitive equipment. S owned an adjacent site and shared with O a privately maintained access road. In 1999 predecessors to S had been granted planning permission to use the land for storage and distribution of quarry products but the planning permission was never implemented and expired. In 2004 S applied for planning permission to turn the site into a waste handling and storage development. O objected predominantly on the basis that dust could interfere with the operation of the switch, and submitted an environmental
report on the effects of the proposed development. The application was subsequently withdrawn.

31. S applied for planning permission for change of use from vacant industrial land to a vehicle
depot for up to 14 lorries and six construction vehicles. O objected and drew reference to the environmental report that had been prepared for the previous application. A planning officer prepared a report but attached no weight to the environmental report submitted by O. At the meeting to consider the planning application the planning officer erroneously informed the committee that the current lawful use of the site was for quarry products, as identified in the expired 1999 planning permission.

32. Wilkie J held that:

"29. In my judgment it is plain that the intervention of the planning officer at the meeting wrongly to inform the committee that there was an extant planning permission for a similar use, which was more severe in its potential impact than the one they were considering, did identify a fall back position which obliged the decision maker to have regard to it. Furthermore, it is plain from the context of the discussion which had taken place in advance of that intervention, and the very limited discussion on other matters which took place after that intervention, that this intervention was highly material in the decision shortly after taken by the committee unanimously to grant the permission sought. Whilst it is right to say that a number of councillors addressing the issue had indicated before the intervention that they were content to have the matter dealt with by appropriate conditions, they were by no means the majority of the members present and, in any event, their interventions came before Mr Mullaney had made his statement, which may have had the effect of persuading them otherwise. In my judgment it is unrealistic for the defendant to suggest that the erroneous intervention of the officer at that stage of the debate was anything other that material and

gives rise to an error of law which makes the subsequent decision susceptible to being quashed, subject to the exercise of my discretion."

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(3) The meaning of "development" – polytunnels for agricultural purposes

33. The issue of whether polytunnels amount to development requiring planning permission was considered by Sullivan J in ***R (Hall Hunter Partnership) v First Secretary of State*** [2007] 2 P&CR 5. Enforcement action had been taken against a strawberry farm in Surrey, within both the green belt and substantially within an area of great landscape value and of outstanding natural beauty. The LPA issued an enforcement notice in respect of the erection, for nine months of the year, over 34 to 45 hectares of large plastic walk-in polytunnels for growing soft fruit including linked blocks of up to 24 tunnels. An inspector had dismissed the growers' appeal subject to a time extension for removal.

34. It was contended that the tunnels were not "development" within the meaning of section 55(1) of the 1990 Act, that if they were "development" then the inspector had erred in concluding that they were not "farming operations" and so permitted development. However, Sullivan J took the view that the inspector, having considered all the circumstances, particularly the tunnels' size, degree of physical attachment and permanence, his conclusions were not unreasonable nor revealed any conceivable error of law.

(4) Fairness: consistency in decision making

35. It is well-established that a second inspector is entitled to take a different view from a previous inspector: see e.g. ***North Wiltshire District Council v Secretary of State for the Environment*** (1993) 65 P. & C.R. 137 and ***ADT Auctions v. SSETR*** [2000] J.P.L 1155. However, in such cases the subsequent Inspector (or decision-maker) must set out adequate and rational reasons for taking a different approach. As Mann LJ held in the ***North Wiltshire*** case at p. 145:

"In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

36. Two recent cases provide contrasting examples of the operation of the requirements of consistency.

37. In ***Dunster Properties Ltd v First Secretary of State*** [2007] EWCA Civ 236 this did not occur and that the inspector had merely repeated the proposition that each case should be judged on its own merits in the light of the conclusions reached by the individual inspector. This was found

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to be inadequate and it is noteworthy that Burton J. who had refused the appeal explored with counsel the possibility of referring the matter back to the second inspector for him to give further reasons. This of itself should have indicated that the reasoning was inadequate. The Court of Appeal, indeed, held the reasons to be inadequate and quashed the decision. Lloyd LJ
held that the previous inspector's discussion was a material consideration and had to be taken
into account. He held:

"21. It seems to me that, although not much by way of reasons may have been called for on the part of Mr Mead, it was not sufficient for him, having expressed the exact opposite view from Mr Sargent on the question of principle, to decline to comment on the inconsistency. Moreover, to explain the differences as being attributable to the different merits of the different schemes, as in the last sentence in his last paragraph, seems to me to be clearly inadequate when it comes to a general question such as whether any first floor extension could be consistent with the relevant planning policies. Nothing in the two proposals differed relevantly in that respect, although of course in terms of detailed design they did differ.

22. It seems to me that a factor which is relevant to the duty to give reasons in planning decisions is the point which emerges more clearly in cases such as ***Flannery***[1] than in the planning cases, that the requirement to give reasons concentrates the mind and if fulfilled is likely to lead to a more soundly based decision (see Henry L.J. in ***Flannery*** at page 381). This particular reasoning does not seem to me to be foreign to the policy about adequacy of reasons in a planning context, although Lord Bridge made it clear in ***Save Britain's Heritage*** at page 168 that it is always for the party challenging the decision to show that the statement of reasons is such as to raise a substantial doubt whether the decision was reached on relevant grounds and was otherwise properly reached. Merely to show a doubt in the reasoning is not enough. At page 176 at H he spoke of the requirement to give reasons as a "salutary safeguard" to show that the decision was based on relevant and rational grounds and that any applicable statutory criteria had been observed. If, as the judge accepted by his wish to have been able to remit the case for further reasons, the reader cannot tell why Mr Mead disagreed with Mr Sargent on the principle then the salutary safeguard has not performed its intended function.

23. In my judgment ... Mr Mead did not adequately perform his obligation to give reasons for this decision in respect of his refusal to follow the basis of the earlier appeal decision which was a material consideration. In this respect it seems to me that by declining to comment, other than to refer to his own reasons already expressed, Mr Mead appears not to have faced up to his duty to have regard to the previous decision so far as it related to the point of principle as a material consideration. An omission to deal with the conflicting decision, as in the ***North Wiltshire*** case, might have been sufficient in itself. But Mr Mead's last sentence in paragraph 8 suggests that he has not grasped the intellectual nettle of the disagreement, which is what is needed if he is to have had proper regard to the previous decision. Either he did not have a proper regard to it, in which case he has failed to fulfil the duty to do so, or he has done so but has not explained his reasons, in which case he has not discharged the obligation to give his reasons."

38. By contrast, in ***Oxford City Council v Secretary of State for Communities and Local Government*** [2007] EWHC 769 the second inspector went to some lengths to explain the change of circumstances. The case was a sensitive one and involved a difference over the issue of noise nuisance generated by a restaurant. However, differing from his predecessor, the second inspector considered it appropriate to grant permission subject to conditions. The court (George Bartlett QC), taking into account the ***Dunster*** judgment, upheld his decision:

"37. Reviewing the decision in this way, it seems to me to be sufficiently clear why it was that the inspector concluded as he did and why he did not agree with the conclusion formed by the 1995 inspector. Taking into account all the matters that he had mentioned he had come to the conclusion that any harm to local residents could be sufficiently overcome through the imposition of conditions. That was a matter of planning judgment. It is evident that he did not consider (as the 2005 inspector had done) that such a judgment could only be reached if the use had been the subject of a trial, with an hours condition being complied with over the period of the trial, and it was not necessary that he should have said this expressly."

[1] ***Flannery v Halifax Estate Agencies Limited*** [2000] 1 W.L.R. 377.

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39. This case is also important for a procedural reason. Where a local authority has taken enforcement action and an inspector grants permission and quashes the enforcement notice, it
is essential that, on any appeal to the court, the local authority not only seeks to have the

permission set aside but also appeals against the quashing of the enforcement notice. George
Bartlett QC neatly explains why it is that there has to be an appeal both under s.288 and s.289
(albeit the time limits are different for each section).

(5) Fairness: bias and predetermination

40. In ***National Assembly for Wales v Elizabeth Condron*** [2006] EWCA Civ 1573[2], the Court of
Appeal (Ward, Wall, Richards LJJ) had to consider whether the Assembly's grant of planning permission for the carrying out of opencast mining and related reclamation operations at 400 hectare site near Merthyr Tydfil was vitiated by an appearance of bias. The application had been called in and after inquiry the inspector had recommended granting permission subject to
conditions. The Assembly's planning decision committee, consisting of four members of the Assembly including a chairman (J), resolved to allow the application subject to conditions.

41. The respondent objector (C) challenged the grant of permission. The judge dismissed the challenge under four headings but found in C's favour under the fifth, by which it was contended that the committee's decision was vitiated by the appearance of bias arising out of a
remark made by J in a casual meeting with an objector the day before the committee meeting, which indicated that he had already made up his mind to accept the inspector's recommendation.

42. The Court of Appeal held that the alleged remarks did not demonstrate an illegitimate predetermination of the planning application. Allegations of apparent bias had to be decided on
the facts and circumstances of the individual case. The relevant circumstances were those apparent to the court upon investigation; they were not restricted to the circumstances available
to the hypothetical observer at the original hearing.

43. On the facts, the words attributed to J that he was "going to go with the report of the inspector",
went no further than indicating a predisposition to follow the inspector's report and not a closed
mind. It did not matter how the person to whom those words were addressed had interpreted them since the question was whether the fears expressed by the complainant were objectively
justified. In that regard, there was a clear distinction between a legitimate predisposition towards a particular outcome and an illegitimate predetermination of the outcome. The wider context of a chance meeting and a casual remark was also important in assessing the significance of the words used. The judge had erred by disregarding relevant circumstances or
in his assessment of their significance. Having regard to the terms of the inspector's report, the
fact that the members of the committee had relevant training and were subject to a code of conduct, and the nature of their discussions, which were unusually prolonged, a fair-minded and informed observer would not conclude that there was a real possibility that J was biased:

"42. I take as my starting-point the actual words found to have been spoken by Carwyn Jones to Jennie Jones, which were put by the judge into direct speech as "I'm going to go with the report of the inspector". It was argued before the judge, and repeated before us, that those words go no further than a predisposition on the part of Carwyn Jones to follow the inspector's report and that a predisposition is to be distinguished from a predetermination or closed mind. The judge rejected the argument, stating at para 72 that the words "suggest a mind made up" and "suggest that so far as the speaker was concerned a conclusion had been reached, and that, on her unchallenged evidence, is how Jennie Jones interpreted them". I respectfully take a different view. In the light of

[2] The first instance decision was considered in the LGG 2006 Update.

the guidance to which I have referred, I would not place any weight on how Jennie Jones reacted to the words spoken. And when they are viewed objectively and in their context, the words appear to me to be consistent with the speaker having a predisposition to follow the inspector's report without necessarily having a closed mind on the subject.

43. We were referred to various cases in which the distinction has been drawn between a legitimate

predisposition towards a particular outcome (for example, as a result of a manifesto commitment by the ruling party or some other policy statement) and an illegitimate predetermination of the outcome (for example, because of a decision already reached or a determination to reach a particular decision). The former is consistent with a preparedness to consider and weigh relevant factors in reaching the final decision; the latter involves a mind that is closed to the consideration and weighing of relevant factors. The cases include R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd [1996] 3 All ER 304 at 320-321, Bovis Homes Ltd v New Forest Plc [2002] EWHC 483 (Admin) at paras 111-113, and R (Island Farm Development Ltd) v Bridgend County Borough Council [2006] EWHC 2189 (Admin) at paras 25-32. I do not propose to quote from them, since I regard the general nature of the distinction as being clear enough.
44. Mr George submitted that in some of the cases the court has been influenced in its approach by a recognition that allowance needs to be made in order to reconcile the responsibilities of public authorities as decision-makers with the workings of the democratic process and the fact that declarations of policy are frequently made in the course of that process. That may be so, but in my view it does not affect the validity of the distinction between predisposition and predetermination.
45. In addition to the words themselves, it is necessary to bear in mind the context in which they were spoken. As regards immediate context, these were a few words spoken towards the end of a short and rather tense conversation, following a chance encounter and without preparation or warning. The judge observed that a “throw-away” remark can be more revealing than might have been a more prepared or studied one. For my part, I think that a remark made in circumstances such as these needs to be treated with a considerable degree of caution. It is a case where the wider picture is particularly important in assessing the significance of the words used…
57. In the circumstances I feel entitled, indeed required, to reach a decision on the issue as raised in this appeal by forming a fresh assessment of my own by reference to the various circumstances that I have mentioned. The conclusion I have reached is that a fair-minded and informed observer, having considered all the facts as they are now known, would not conclude that there was a real possibility that Carwyn Jones himself or the PDC as awhole was biased when reaching the decision to grant planning permission. Viewed in its wider context, the brief remark by Carwyn Jones that is at the centre of the case provides an insufficient basis for the suggestion that the decision was approached with a closed mind and without impartial consideration of all relevant planning issues.”

44. As a diversion from pure planning cases, there have been 2 striking examples in the judicial
context which, nonetheless underline the need to avoid the appearance of bias at whatever level a decision is taken. The recent cases of ***El Farargy v El Farargy*** [2007] EWCA Civ 1149
and ***Howell v Millais*** [2007] EWCA Civ 720, provide extraordinary examples of an apparent lack of fairness on the part of High Court judges which have led to interventions by the Court of
Appeal.

45. In ***El Farargy***, a Saudi sheikh (S) claimed to be the beneficial owner of property which a wife
claimed was owned by her and her husband (H). H supported S's claim. At a pre-trial review and directions hearing in 2006 Singer J made several comments which led to an application by
S that the judge should recuse himself. Singer J had commented that he had "formed a view about [the] case" which was "near conviction", namely that H and S had agreed to present a false case and were running a campaign to make sure the wife was put at the maximum disadvantage. He also referred to S departing "on his flying carpet", to "every grain of sand [being] sifted", to the case being "a bit gelatinous...like Turkish Delight", and to a "relatively fastfree
time of the year".

46. S submitted that there was a real possibility that Singer J had formed so strong a view that H
and S were party to an improper combination or campaign so as to throw doubt on his ability to
try the issues with an objective, open judicial mind. S also argued that the judge's remarks would cause a fair-minded and informed observer to conclude that there was a real possibility
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that he was mocking S for his status as a sheikh, his Saudi nationality, his Arab ethnic origins, his Muslim faith, or some or all of those elements.

47. The Court of Appeal (Ward, Mummery and Wilson LJJ) firstly held that Singer J had been right

not to recuse himself on the basis that he had apparently already closed his mind. He had been
entitled to make preliminary remarks especially as he had already dealt with the matter on many occasions for many days. Moreover, in the light of H's appalling forensic behaviour, no observer could have been surprised that Singer J had formed a "prima facie" view, nor even that it was "near conviction". He had expressed himself in strong terms, but he had not overstepped the mark.

48. However, the Court of Appeal held secondly that the jokes and comments made by Singer J
were not just "colourful language", but were mocking and disparaging of S for either his status as a sheikh, his Saudi nationality, his ethnic origins, his Muslim faith, or some or all of those elements. The jokes would be perceived to be racially offensive, even though that was not the intention. They were likely to cause offence and result in a perception of unfairness. They gave
an appearance to the fair-minded and informed observer that there was a real possibility that Singer J would carry into his judgment the scorn and contempt the words conveyed:

"28. The other attack upon him is of a quite different character. It will be recalled that Mr Randall invited us to read extracts 1−4 with brackets inserted around the offending words. This was an utterly compelling piece of advocacy. There is a world of difference between saying: "If he chose to depart never to be seen again" and gratuitously adding "if he chose to depart on his flying carpet never to be seen again". Likewise it would have been unexceptional to say that the Sheikh would be present "to see that no stone is unturned", without glibly adding "every grain of sand is sifted". The judge could well make the point that he did not know what lines of communication were available to Saudi Arabia or wherever the Sheikh may be yet once again there was no need for the uncalled−for addition of "at this I think relatively fast−free time of the year". Without the additional words, the judge was making fair points but the incidental injections of sarcasm were quite unwarranted.

29. The third example is the worst. Mr Cayford quite clearly did not understand why the judge had interrupted his submission that the Sheikh's case was not entirely clear by commenting that the affidavit was "a bit gelatinous". He did not understand the interruption because he would not have appreciated that, as Mr Randall correctly submits, the judge was setting himself up to deliver the punch line to his joke, "a bit like Turkish Delight".

30. When I said at the beginning of the judgment that I found this case embarrassing, no little part of my embarrassment comes from my belief that the injection of a little humour lightens the load of high emotion that so often attends litigation and I am the very last judge to criticise laughter in court. I fully appreciate the conventional view that jokes are a bad thing. Of course they are when they are bad jokes − and I am sure I have myself often erred and committed that heinous judicial sin. Singer J. certainly erred in this case. These, I regret to say, were not just bad jokes: they were thoroughly bad jokes. Moreover, and importantly, they will inevitably be perceived to be racially offensive jokes. For my part I am totally convinced that they were not meant to be racist and I unreservedly acquit the judge of any suggestion that they were so intended. Unfortunately, every one of the four remarks can be seen to be not simply "colourful language" as the judge sought to excuse them but, to adopt Mr Randall's submission, to be mocking and disparaging of the third respondent for his status as a Sheikh and/or his Saudi nationality and/or his ethnic origins and/or his Muslim faith.

31. I have given most anxious thought to whether or not I am giving sufficient credit for the robustness of the phlegmatic fair−minded observer, a feature of whose character is not to show undue sensitivity. Making every allowance for the jocularity of the judge's comments, one cannot in this day and age and in these troubled times allow remarks like that to go unchallenged. They were not only regrettable, and I unreservedly express my regret to the Sheikh that they were made: they were also quite unacceptable. They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fair−minded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words convey. Singer J. may talk too much; yet he is a good judge. Unfortunately for him and for all of us, on this occasion he crossed the line between the tolerable and the impermissible. For that reason, allowing the appeal is inevitable."

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49. The Court of Appeal was however, uncomfortable with the procedure adopted in this case and
considered that it was invidious for a judge asked to recuse himself to have to sit in judgement
on his own conduct. If the circumstances permitted, an informal approach should first be made

to the judge, making the complaint and inviting recusal. A judge could, with honour, totally deny
the complaint but still pass the case to a colleague. If he did not feel able to do so, then it might
be preferable, if it was possible to arrange it, to have another judge take the decision, for where
the appearance of justice was at stake it was better that justice be done independently rather than require the judge to sit in judgement of his own behaviour.

50. The ***Howell*** case is perhaps even more surprising. This was an appeal against the decision of
Peter Smith J not to recuse himself from hearing a Beddoe application (in which trustees seek directions from the court regarding the operation of a trust). H, who was a partner in a firm of solicitors (Addleshaw Goddard ("AG")), was a trustee and the defendants in the Beddoe application had made it clear that they would be seeking an order that the trustees would be personally liable for all the costs of the action. H applied for the judge to recuse himself from hearing that application on the basis that he had had personal dealings with another partner in
his firm involving unsuccessful discussions about the judge joining the firm that had taken place
only one month before the hearing of the recusal application. E-mails had been sent between the judge and the partner culminating with criticism by the judge of the firm.

51. Peter Smith J ordered that the material be kept confidential and not shown to the parties without his agreement. At the hearing the partner involved in the discussions gave evidence of
the truth of the material and the judge questioned him at length. The judge ruled that the short time between his discussions and the hearing was of no relevance and refused to recuse himself. H contended that the judge should have recused himself as there was a real danger of
bias if he heard the application. Some of Peter Smith J.'s emails to AG read as follows:

"I found your first email insulting and your second one condescending. I do not think the response should have been from you by such emails. You really should have had the courtesy to speak to me."

"I feel you have wasted my time for several months. I am extremely disappointed because contrary to your fine words you have allowed the bean counters to prevail. I am not very impressed with you or your firm at the moment and I do not think the tone of your emails enhances the position."

52. Extracts from the transcript of the recusal hearing show the following exchanges between Peter
Smith J and H's counsel:

"MR CRAMPIN: Having had an unsuccessful discussion or negotiation with Addleshaws, your lordship expressed yourself in strong – intemperate, almost -- anguish.

"MR JUSTICE PETER SMITH: Nonsense. I don't know what part of the country you come from, Mr Crampin, but it's about time you grew up. If you think that's intemperate, then you are on another planet from me. If you thought it was intemperate, then you should have seen the correspondence which didn't trouble Mr Twigden….

"MR JUSTICE PETER SMITH: I don't agree the e-mails disclose that at all. The e-mails simply disclose that, and Mr Twigden has confirmed it today, that the reasons they gave were not the same reasons when they introduced me, and that I was therefore unimpressed by their change of attitude, which bore no relation to our discussions. But I'm sorry, Mr Crampin, life goes on, I'm afraid. I accept that. I am somewhat surprised that your solicitors are unable to accept that, despite the fact that they were willing to take me into the firm, despite the fact that I had accused a partner on the management firm of negligence, in correspondence which went far beyond that. It was a point which was so trivial, in Mr Twigden's mind, not only did he forget it when he prepared his confidential statement, but he also forgot that he said he would ensure that he would put no objection if that person objected…"

"MR CRAMPIN: Your Lordship is in the process of, while listening to my submissions, giving evidence.

"MR JUSTICE PETER SMITH: I'm not giving evidence; I'm reminding you of what Mr Twigden said. I'm not going to decide this case on anything other than the answers Mr Twigden gave, and Mr Twigden confirmed that I did indeed raise those matters, and that they were not sufficient to lead him to believe I couldn't join the firm and that, if anybody objected, he would ensure they would be overruled. That is what his evidence was. Now given that, and given the seriousness of those

matters, it is extraordinary to believe, is it not, that Addleshaws are actually fearful on the basis of these emails?..."
"MR CRAMPIN: I don't think your Lordship is actually going to pay attention to anything further I say on this subject. Your conduct of the matter in the court today is remarkable. My submission to your Lordship …
"MR JUSTICE PETER SMITH: I'm not going to comment on that, Mr Crampin. It does not dignify a comment
"MR CRAMPIN: I'm making the submission that I am.
"MR JUSTICE PETER SMITH: If you're going to say that, you'd better say it with specificity, or you'd better withdraw it, or there might be professional consequences.
"MR CRAMPIN: Your Lordship can take whatever course you'd like to take.
"MR JUSTICE PETER SMITH: No, if are going to say my conduct in court is quite remarkable, you have to say why. In which way do you think my conduct has been remarkable?
"MR CRAMPIN: It is a remarkable proposition that a judge should cross-examine a witness in the basis of what is in the judge's head, which no-one else has seen.
"MR JUSTICE PETER SMITH: Forgive me, Mr Crampin, that's because of the nature of the application because it appertains to particular facts. I have already said to you that I will decide this issue not on things that were in my head, but solely on the evidence that Mr Twigden has given, and he accepted all of my points. So it's his evidence which decides it, and nothing else. Do you have any other, better criticisms of my conduct?"

53. The Court of Appeal (Sir Anthony Clarke MR, Sir Igor Judge and Buxton LJ) held that the judge ought to have recused himself because the ***Porter v Magill*** test for apparent bias was satisfied.

The Court of Appeal felt that the exchanges between the judge and the partner were quite extraordinary. It was clear that the judge was giving evidence and cross-examining the partner as if he were fighting his own case. It was one thing to test the evidence but a judge should not give evidence of fact. It was not appropriate for the judge to have cross-examined the partner as if he, the judge, was fighting his own case[3]:

"22…I am bound to say that those exchanges seem to me to be somewhat extraordinary. In my judgment, Mr Crampin was entirely justified in saying that the judge was in the process of giving evidence. The judge's approach was quite wrong. It is one thing to test counsel's submissions as a judge. It is quite another for a judge to give evidence of fact…
30. It may well be that the judge became somewhat carried away in the heat of the argument. But for the reasons I have given, I would hold that his attitude throughout, from the emails at the end of May, during the hearing on Friday and in his judgment show that the test for apparent bias is satisfied. As the reviewing court, this court is in a position to form its own view. I have concluded that in all the circumstances, a fair-minded and informed observer would conclude that the judge was biased against AG and its partners, including Mr Howell. It was for that reason that I concluded on Monday that the appeal should be allowed."

(6) Fairness: procedural fairness

54. In ***FH Cummings v Weymouth & Portland Borough Council*** [2007] EWHC 1601 (Admin), an objector to a local plan review had been prevented from relying on an expert report at the inquiry. The local plan review changed the local plan to inter alia designate part of the Claimant's land as outside the defined development boundary and within an important open gap or area of local landscape importance and effectively prevented residential development of the site. At the time of lodging evidence for the inquiry, the claimant was mistakenly of the opinion that the only issue was one of landscape and that there was no issue in relation to drainage. When the claimant realised its mistake it instructed a drainage expert who prepared a report that was given to the LPA and the inspector on the day of the hearing. The inspector ruled that the report could not be relied on.

55. HH Judge Hinkinbottom (sitting as a Deputy High Court Judge) held that an inquiry should be conducted in accordance with the rules of natural justice to ensure that an objector was

[3] The Lord Chief Justice, Lord Phillips, with the agreement of the Lord Chancellor, has referred Smith J to the Office of Judicial Complaints (OJC) to consider disciplinary proceedings against the judge.

afforded an adequate opportunity of meeting the case. Since the LPA was the proposer and the
decision-maker, the obligation to deal thoroughly with any objection was enhanced. On the facts, the inspector had failed to give the claimant an adequate opportunity to make its case and to respond to the LPA's case. The inspector failed to properly exercise his discretion as to
whether to admit the claimant's evidence and in doing so denied the claimant the opportunity to
rely on important evidence in relation to a crucial issue. The procedure as a whole was not fair
and the claimant had consequently been substantially and unfairly prejudiced in the hearing.

56. In ***R (Van Den Boomen) v First Secretary of State*** [2007] EWHC 554 (Admin), the LPA had
refused planning permission for a bungalow on a farm because it contended that, in addition to
the usual agricultural occupancy condition, the Claimants also ought to enter into a s 106 agreement to guard against the possibility of future severance of the proposed farm bungalow from the farmland. That was the sole issue at the informal hearing was whether an agricultural condition suffice, or whether the agricultural condition should be backed up with a s 106 agreement.

57. As part of the valuation exercise, the oast house on the farm was mentioned as being suitable
for residential conversion. The inspector accepted the claimants contention that a s.106 agreement was not required, but then reasoned as follows under the heading "other accommodation":

"(20) Both the Council and the Appellants consider the site of the proposed building dwelling to be the least obtrusive location that practical requirements of the enterprise could be added and catered for. I do not dispute the location chosen as far as the suitability for a new build dwelling is concerned. Undeveloped space immediately adjacent to the complex of farm buildings being somewhat limited.

However, my attention has been drawn by Smarden Parish Council to the existing oast house, at the centre of the farmyard, the use of which as agricultural workers' accommodation, could avoid altogether the need to need for a new build residential development on the farm.

(21) At the hearing, both parties dismissed the principle of adapting this building for residential occupation, on the basis that it is already used for storage associated with the agricultural business.

....

(23) Apart from the need to relocate existing storage, no reasons for the oast being unsuitable as a means for meeting the identified functional need for an additional worker's dwelling, either in terms of the condition or the location of the building, or the quality of accommodation required, was forthcoming from either party. It appears to me that at least some of the items currently kept in the oast house could be transferred to vacant space within the timber framed barn nearby. Others could be housed in the new storage building, which, due to its relatively limited function, could be considerably smaller, and sited far less obtrusively, than the proposed bungalow, perhaps as an attachment to one of the existing structures.

....

(25) Having received no convincing explanation as to why the oast house could not be functionally converted as a residential occupation, I am not satisfied that the proposed bungalow is essential in order to meet the identified functional need for additional agricultural workers' accommodation. I

consider, from the absence of the evidence to the contrary, that the significant harm to the countryside, and SLA would arise from the appeal's proposal could be avoided through the use of existing premises on the farm, which are suitable and available for occupation.

(26) I find this to outweigh my conclusions on the issue of severance accordingly I conclude that the proposed farm bungalow would be harmful to the character and appearance of the countryside, the SLA, and thus contrary to the general objectives as such their policies RS1, RS5 and EAP4, Local plan policies HD7, EN27, VP2 and RE10, the merging structure plan policies QO1, SS7, E3, E5, NHP6 and National Policy PPS7. I further conclude that the function and need for an additional agricultural accommodation on the farm does not outweigh the harm identified, or justify a departure from the relevant policies in this case."

58. Sullivan J described the claimant's objection as follows:

"12. On behalf of the Claimants, Mr Clay submitted that the Inspector's decision was procedurally unfair; whilst the issue of the use of the oast house had been raised by the Parish Council, that was under the mistaken belief that there was a planning permission for conversion. It was true that the

Inspector had looked at the oast house on his site visit, but the potential for converting the oast house, absent a planning permission, and for reorganising storage at the farm, were not raised, or not sufficiently raised, so as to give the Claimants a fair crack of the whip. He submitted that it was particularly unfair for the Inspector to rely on the fact that he had received "no convincing explanation as to why the oast house could not be partially converted for residential accommodation", when that had never been identified as a reason for refusal by the Planning Authority. The availability of other potential residential accommodation had been raised as an issue in only the most general of terms, and not until the Inspector produced his agenda at the beginning of the hearing. Even then it was identified not as a main topic, but simply as one of a number of other topics for discussion."

59. He held that:

"14… the Claimants did not have a fair crack of the whip. The Inspector approached the second main issue in a manner which they did not and could not reasonably have anticipated.

15. This is not a case of a Claimant who has failed to deal with an obvious point seeking subsequently to improve his case. This is a case where the Claimants have lost an appeal on a point which was very definitely not "fairly and squarely at issue"."

(7) Metropolitan Open Land and Green Belt

60. In PPG2 para. 3.6 states:

"3.6 Provided that it does not result in disproportionate additions over and above the size of the original building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

61. In ***R (Heath & Hampstead Society) v Camden London Borough Council*** [2007] EWHC 977
(Admin), the claimant sought judicial review of the LPA's decision to grant permission for the demolition of a two storey house and its replacement with a three storey house on Hampstead
Head – on land designated as Metropolitan Open Land. The floor space of the existing and proposed houses was 186 square metres and 626 metres respectively. The issues for Sullivan
J were (i) whether the planning guidance on green belt land was relevant to Metropolitan Open
Land; and whether (ii) the planning officer and consequently the local authority had applied the
correct test, in particular with regard to whether the new development was materially larger, in deciding to grant planning permission.

62. Sullivan J held that since Metropolitan Open Land had an equivalent status to green belt land,
the principles and guidance applicable to the former should also be relevant in the case of the 20

latter. Accordingly, there was a strong presumption that development on Metropolitan Open Land was inappropriate unless there were very special circumstances.

63. In considering whether a replacement building on Metropolitan Open Land was appropriate
development the key issue to be determined was whether the proposed structure was "materially larger" than the extant building, pursuant to PPG2 para.3.6. This had been the subject of an earlier judgment in ***Surrey Homes v Secretary of State & Mole Valley DC*** [2000] where Christopher Lockhart-Mummery QC had held:

"23. ... In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion. But I entertain no doubt that the concept of whether a dwelling is "materially larger" can be assessed by reference to matters such as bulk, height, mass and prominence. These are all matters going to the openness of the Green Belt. They are plainly all material considerations relevant to deciding on the meaning of the term in the context in which it arises, namely Green Belt policy.

24. Indeed, were it otherwise, absurd results could arise. One could have equivalent or possibly even reduced floor space, but disposed within a tower-like structure, having far more impact on the Green Belt. It would be a strange result, in my judgment, if an Inspector were debarred from concluding that the proposed structure harmed openness and was inappropriate development.

64. Sullivan J. held that the issue of "materially larger" was not to be determined by having regard

to whether the new building would be visually intrusive or whether its dimensions would be perceptibly larger to the public but rather by an arithmetical comparison of the actual size of the
replacement and extant buildings. Therefore, on the facts given that the new dwelling would be
substantially larger than the extant dwelling, the planning officer and the planning committee of
the local authority could not have properly concluded that the proposed new building was not materially larger than the extant one and the permission should be quashed:

"19. I do not accept the submission that *Surrey Homes* was wrongly decided. It follows that I do not accept the submission that when deciding whether the replacement dwelling is or is not "materially larger" than the dwelling it replaces, the local planning authority is solely concerned with a mathematical comparison of relevant dimensions.

20. However I do accept Mr Altaras's fall back submission that the exercise under paragraph 3.6 is primarily an objective one by reference to size. Which physical dimension is most relevant for the purpose of assessing the relative size of the existing and replacement dwellinghouse, will depend on the circumstances of the particular case. It may be floor space, footprint, built volume, height, width, etc. But, as Mr Lockhart-Mummery said in *Surrey Homes*:

" ..... In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion."

It is one thing to say that in a case where the increase in dimensions is marginal in quantitative terms, some regard may be had to other matters "such as bulk, height, mass and prominence"; it is quite another thing to set consideration of the physical increase in size to one side altogether, and, in effect, to substitute a test such as "providing the new dwelling is not more visually intrusive than the dwelling it replaces" for the test in paragraph 3.6: "providing the new dwelling is not materially larger than the dwelling it replaces."

21. Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact. There are good reasons why the relevant test for replacement dwellings in the Green Belt and Metropolitan Open Land is one of size rather than visual impact. The essential characteristic of Green Belts and Metropolitan Open Land is their openness (see paragraph 7 above). The extent to which that openness is, or is not, visible from public vantage points and the extent to which a new building in the Green Belt would be visually intrusive are a separate issue. Paragraph 3.15 of PPG 2 deals with "visual amenity" in the Green Belt in those terms: "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design." The fact that a materially larger (in terms in footprint, floor space or building volume) replacement dwelling is more concealed from public view than a smaller but more prominent existing dwelling does not mean that the replacement dwelling is appropriate development in the Green Belt or Metropolitan Open Land.

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22. The loss of openness (ie unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness, which will have to be outweighed by those special circumstances if planning permission is to be granted (paragraph 3.15 of PPG 2, above). If the materially larger replacement dwelling is less visually intrusive than the existing dwelling then that would be a factor which could be taken into consideration when deciding whether the harm by reason of inappropriateness was outweighed by very special circumstances."

65. The Court of Appeal has granted permission to appeal.

(8) Discontinuance

66. In ***Jeffery v First Secretary of State*** [2007] EWCA Civ 584, the Court of Appeal (Keene, Jacob and Hughes LJJ) considered a challenge to the validity of an order for the discontinuance of a planning use (use of land for the purpose of siting touring caravans and tents) that the First Secretary of State had confirmed. Following the grant of permission for the
use, the claimant had applied for permission to erect a permanent toilet and shower block. That
application was refused and the LPA had made an order that the use of the land for the siting of
caravans and tents be discontinued. It then issued an enforcement notice.

67. Following an inquiry, the Secretary of State agreed with the recommendations of the inspector
and confirmed the discontinuance order and quashed the enforcement notice. The claimant

argued that (1) the inspector had failed to apply the statutory test of asking whether it was "expedient" in the interests of the proper planning of the area to confirm the order, and that he had erred by dealing with the planning merits of the order and the enforcement notice together,
and so treating the order as an application for planning permission; (2) the resolution of the local authority to make the discontinuance order had not authorised the making of an order applying to caravan use; (3) the local authority had not properly considered the matters relevant
to making an order covering caravan use, with the effect that there had been no valid order for
the secretary of state to confirm.
68. The Court of Appeal dismissed the appeal. The inspector had expressly set out the statutory
test in his report and it was inconceivable that he had not applied it. In relation to the third ground of appeal, a challenge to the validity of a discontinuance order, confirmed by the secretary of state, on the ground that there was some defect in the way in which the LPA had handled the original making of the order should only be entertained where there was clear-cut evidence that the order was ultra vires as a result. If the order appeared to be good, there would need to be convincing evidence that the order was nonetheless defective, and if the alleged defect had not been ventilated at the public inquiry the court would normally require some good reason for that omission, such as the unavailability of the relevant evidence at that stage. As a result of the claimant not raising the argument about validity before the inspector and Secretary of State, the court had insufficient evidence available to it to demonstrate that the local authority had failed in their approach to the making of the order, and no good reason had been given for the failure to raise the point earlier. On the evidence available the claimant had failed to prove that the order was ultra vires.
69. A further point of interest in this decision is the obiter remarks of Jacob and Hughes LJJ in relation to ***I'm Your Man v Secretary of State for the Environment*** (1999) 77 P&CR 251. In that case, the High Court had to determine whether an implied power existed to impose limitations on planning permissions otherwise than by development order. Planning permission
had been granted in 1995 for the use of buildings for sales, exhibitions and leisure activities for
a temporary period of seven years, but no express condition was imposed which required that
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use to cease at the expiration of that period. Before the expiration of the seven years, however,
the owners applied for planning permission for the permanent use of the premises for those purposes. On appeal against the refusal of the local planning authority to grant planning permission for permanent use, it was argued that despite the fact that the 1995 permission was
expressed to be for a temporary period, the permission was in fact a permanent permission.
70. The High Court held that "limitation" had a restrictive meaning by reference to development
orders at pp. 6-7:
"The 1990 Act does not expressly provide a power for the imposition of limitations on the grant of planning permission pursuant to an application. … The omission of section 38 of the 1959 Act does not, in my judgment, provide ground for inferring that the definition of breach of planning control, which was introduced by the 1959 Act by way of amendment to the 1947 Act to include limitations on permission granted by a development order, should be construed as conferring a more general power to impose limitations on planning permission granted pursuant to applications under the Act. The framework of what is now the 1990 Act, including the provisions that I have set out above, strongly indicates to the contrary. That would include: (1) the provisions expressly dealing with the imposition of conditions (sections 70(1) and 72(1)); (2) the absence of any express right to appeal against a limitation imposed pursuant to an application for permission (section 78(1)(a)); (3) the provisions for the resumption of normal use (section 57(2)(3)); and (4) exceptions to the requirement for commencement conditions (section 91(4)). I accordingly reject Mr Singh's submission that there is an implied power for the planning authority or the Secretary of State to impose on a permission granted, pursuant to an application, limitations capable of enforcement under the Act. In my judgment, the reference to limitations in Part VII of the Act is a reference to limitations imposed under a development order, for which provision is expressly made under the

Act."

71. Jacob LJ (with whom Hughes LJ agreed), appeared to cast doubt on the correctness of the decision in ***I'm Your Man*** although it was not criticised by Keene LJ:

"36. I agree with the Judgment of Keene LJ. I would only add that it should be clearly understood that this case has been argued on the assumption that the 1999 permission had the legal effect of granting permanent permission for caravans and tents even though its express terms were for "change of use … to siting touring caravans and tents for [the solar eclipse weekend]" and that only use for that weekend had ever been sought.

37. This assumption was on the basis that ***I'm Your Man v SoS for the Environment*** (1999) 77 P. & C.R. 251 was correctly decided. We heard no argument on the point and, speaking for myself, I would reserve the question of whether that is so."

(9) Abandonment

72. It has now been established that a use of land that had received a certificate of lawful existing use under s.191 TCPA 1990 can be abandoned. In ***M & M (Land) Ltd v Secretary of State for Communities and Local Government*** [2007] EWHC 489 (Admin), HH Judge Mole QC heard a claim by a company (M) seeking to quash an inspector's decision upholding the refusal of planning permission to redevelop a site as a scrap yard. M had bought the site which benefited from a certificate of lawful existing use as a "scrap yard". The inspector held that the main issue was whether the use of the site for the buying and selling of scrap metal had been abandoned and, on the evidence, he concluded that it had been abandoned. M contended that it was not possible to abandon a use that had received a certificate pursuant to s.191 TCPA 1990.

73. Judge Mole QC held that s.191(6) TCPA 1990 only declared that at a particular point in time referred to in the certificate, a use was lawful. A certificate could not put M in a stronger position than a use pursuant to grant of planning permission which could plainly be abandoned:

"20. In my judgment, the Secretary of State's argument is the right one. It seems to me that section 191(6) does no more and no less than declare conclusively that at the point of time that the

certificate refers to, that particular use is lawful in that it operates like a planning permission for a change of use which enures for the benefit of the land and makes a particular use lawful and then is spent. However, as I have said, the authorities are quite clear that that does not stand in the way of a permitted change of use being abandoned. It would require the plainest words to compel me to find that the certificate of lawful use achieved a result that is substantially different from that which a planning permission achieves, and I simply do not find that degree of compulsion in the words of section 191(6). In my judgment, the position is the same for a certificate of lawful use as it is for a planning permission. A use permitted can be abandoned: a use that has been dignified with a certificate of lawful use can also be abandoned, notwithstanding the words of section 191(6)."

(10) Development Plan

74. In ***George Wimpey UK Ltd v Tewkesbury Borough Council*** [2007] EWHC 628 (Admin) a development plan was challenged on the basis inter alia that there was no real possibility that certain sites designated for housing development could be developed for housing within the five year plan period.

75. The claimant developer (G) owned land that it wished to develop for residential purposes, but its land was not allocated for housing in the LPA's draft plan. The inspector recommended that G's site should be included in a further assessment of potential new housing allocations and that other sites to which G objected should be deleted. When the plan was eventually adopted some years later G's site was excluded and two sites to which it objected had been included on the basis that they would be "phased to the latter part of the plan period". G contended that there was no real prospect of these other sites being developed within the plan period.

76. Wyn Williams J held that the LPA had not demonstrated that these sites would be granted planning permission in the near future nor that they would be developed within the plan period.
Accordingly its decision was *Wednesbury* unreasonable as it has failed to have regard to the clear policy guidance requiring the plan to include a five year's supply of land available for development. The parts of the plan including these sites was therefore quashed:
"67. I have reached the conclusion that the Defendant's judgment as to the implementation of the housing allocation on the Shurdington site was unreasonable or irrational in the Wednesbury sense. The Defendant failed to have regard to clear policy guidance contained within PPG3 and the draft policy guidance within PPS3. On balance, I think that the same is true for the M and G Sports Ground site. I say that since even though it is asserted that the Green Belt review has taken place and that there was no bar to implementation following that process the absence of reasons for including the site in the face of the Claimant's specific objections lead to the conclusion that bars to implementation do exist. PPG 3 paragraph 34 is very clear in its terms and I simply do not see how the Defendant can have taken account of it when it maintained these two allocations."
77. In relation to G's site, the LPA, following the inspector's recommendation, had re-assessed G's
site for inclusion and concluded that the allocation of the site would constitute unsustainable leapfrogging of the green belt. The authority had held that view consistently and had given adequate reasons for it. Finally, on the evidence the authority had had regard to all material considerations when it made its decision not to reopen the inquiry and that decision was not unlawful.

(11) Call-in

78. It is clear that a challenge to a decision not to call-in an application will rarely succeed. The
decision of the Secretary of State not to call in a planning application for a residential development was challenged in ***R (Persimmon Homes Ltd) v Secretary of State for Communities and Local Government*** [2007] EWHC 1985 (Admin). The claim was brought by
one house building company (P) against the decision not to call in the planning application by 24
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another house builder (H). H's application was for residential development on a site that would
comprise numerous dwellings and associated facilities. P had an option over an alternative site
which it maintained was a competitor for such development. P submitted (i) that the Secretary of State had failed to have regard to material considerations in coming to his decision, namely,
national policy on community involvement, national policy on prematurity and the impact of the
consequences of the decision not to call in on P's site; (ii) took into account immaterial considerations by paying regard to the planning merits of the application; (iii) came to a decision that was perverse and irrational.
79. Sullivan J rejected P's complaints, holding that the absence of explicit reference to particular
matters in the secretary of state's decision letter did not mean that he did not have regard to those issues. More-over, call-in decision letters were addressed to local planning authorities to
inform them whether or not the secretary of state had decided to determine an application himself: they were not fully reasoned judgments which were bound to deal with every aspect of
a dispute.
80. As to whether the secretary of state was entitled to conclude that the three issues identified by
P were not to be considered as main matters, regard had to be given to the wide discretion afforded to him under s.77 of the Act. In the circumstances, the instant court was satisfied that the secretary of state could reasonably conclude that none of the matters identified constituted
main matters for the purposes of his decision.

81. Sullivan J also explained that the proposition in ***Lakin Ltd v Secretary of State for Scotland***
1988 SLT 780 that the Secretary of State should not consider the merits of a planning application when deciding whether or not to call it in should not be applied literally or applied to
a different set of facts:
"34. The proposition that the Secretary of State "should not have been considering the merits of the application at all" should not be taken out of context and applied literally to the very different factual circumstances of the present case. When considering whether or not to call in an application for planning permission that has been referred to him (now her) under the Departures Direction, the Secretary of State must be entitled to carry out a preliminary assessment of what appear, on the papers submitted by the Local Planning Authority, to be the "planning merits" of the application to the extent that it is necessary to do so in order to enable a judgment to be made as to whether, for example, there may be a conflict with national policy and, if so, whether that conflict appears to be on "important matters", and whether in any event the application raises issues that are of more than local importance."

(12) Enforcement/Issue estoppel

82. In ***R (East Hertfordshire District Council) v First Secretary of State*** [2007] EWHC 834 (Admin),the claimant LPA sought judicial review of a decision to quash an enforcement notice issued by it on the ground that the notice was a nullity. The LPA had granted planning permission to the interested party (P) for the redevelopment of a barn to create bed and breakfast lettings. An enforcement notice was served on the ground that the barn had not been
erected in accordance with the permission. P had appealed against the enforcement notice contending that there had been no breach of planning control (s.174(c) TCPA 1990). Due to an
administrative error on its part, the LPA failed to submit any representations or statement of its
case in the written representations proceedings. The inspector allowed P's appeal because the
lack of factual information from the authority was so fundamental that he had no alternative.
83. Relying on s. 171B(4) TCPA 1990, the LPA issued another enforcement notice, and P appealed. The second inspector found that where an appeal had previously succeeded under s. 174(2)(c), it meant that those matters had been found not to constitute a breach of planning
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control, and that the inevitable consequence of such a finding had to be that the provisions of s.
171B(4) could not apply, there being no breach of planning control against which the authority could make a second attempt, which meant that the authority's second enforcement notice was
a nullity and would be quashed.
84. Sullivan J held that it was implicit in the concept of cause of action estoppel that a matter had
been adjudicated not that the court or tribunal had been unable to adjudicate upon an issue because of a complete lack of information, as had been the position in the instant case. In any event, justice might require the non-application of an inflexible cause of action estoppel rule in such special circumstances. In deciding whether there were special circumstances that might justify such a departure, the question of fairness to the public interest, in respect of the necessity for planning control, was a relevant factor. On the facts, no injustice would be caused
to P because it would be able to present the evidence, if it existed, which demonstrated that no
breach of planning control had taken place. In all the circumstances therefore, both of the authority's submissions had to be accepted and the second inspector's decision was quashed.

(13) Standing

The increasingly liberal approach that the courts are taking to the requirement of standing (see e.g. ***R***
(Edwards) v Environment Agency and another [2004] 3 All E.R. 21) is illustrated by Irwin J's

decision in ***Residents Against Waste Site Ltd v Lancashire County Council*** [2007] EWHC 2558
(Admin).

85. The claimant in that case was a limited company formed to represent the interests of local objectors to the waste technology plant. The company was incorporated only 2 days before the
claim was issued and could not therefore have been an interested party during the course of the application for planning permission. The company's website stated that

"... we need to raise up to £60.000. If/when we win it may be that some or all of our legal costs will be ordered to be paid by the other side, but we cannot take that for granted and need to raise all these monies in order to be able to pay our legal costs etc. We can limit our own liability by becoming a Company Limited by Guarantee."

86. Irwin J followed the decision of Richards J in ***R v Leicestershire County Council ex parte***
Blackfordby and Boothorpe Action Group Ltd [2001] Env LR 35:

"18. Mr Wolfe relies upon the approach taken by Richards J, as he then was, in the Blackfordby case cited above. In that case, the Judge dealt with an analogous situation to the instant case. Counsel for Leicestershire County Council submitted on the facts there that the company had been formed specifically "….with the intention that its members would not be liable in costs should the proceedings fail" and that in such circumstances as a matter of public policy, the Court should not accord standing to such a company. The learned Judge refused to draw the adverse inference in that case, but concluded that on the evidence there, the company had been formed to achieve a proper formal and legal structure to administer the funds of the action group in question and manage its affairs properly and to enable the group to represent the community in a more formal and acceptable way. The Judge went on to say this:

"In my view the incorporation of a local action group ought not to be a bar to the bringing of an application for judicial review. Technically, it may be said, the company does not have a relevant interest of its own; but in substance it represents the interests of local residents who, many of whom, do have a relevant interest. Incorporation has a number of advantages, some of which motivated the incorporation of the action group in this case. It is true that another advantage is the avoidance of substantial personal liability of members for the costs of unsuccessful legal proceedings. But that should not preclude the use of a corporate vehicle, at least where incorporation is not for the sole purpose of escaping the direct impact of an adverse costs order (and possibly even where it is for that purpose). The costs position can be

dealt with adequately by requiring the provision of security for costs in a realistically large sum. In the present case, security was ordered in the sum of £15000. Whether that was sufficient may be open to doubt, given the sheer size of the case ……it is, however, the right approach in principle."

19. I accept that formulation of the proper approach to this problem. If the true objection to the grant of standing to a company, formed in circumstances such as this, is the costs protection afforded to those who might otherwise have a starker choice as to whether to take legal action or not, then the proper approach must surely be to address the costs problem, rather than seek to undermine the standing of the company.

20. The question of costs was addressed in this case. Initially, a request for security for costs in the sum of £60,000 was made on behalf of LCC on 4 April 2007. Negotiations continued throughout that month and into May. Eventually on 6 May, the solicitors for RAWS confirmed that they were holding £25,000 towards costs liability and on 18 May, LCC accepted that offer of security for costs in the following terms: "To avoid the time and expense of making an application to the court, I am instructed to accept this offer without prejudice to our right to apply to the court at a later date for the security to be increased if there is any change in circumstances." No further application for security has been made.

21. The courts must retain capacity to prevent time-wasting or meddling applications for judicial review. Subject to that principle, on an application for leave (or as here, a rolled-up application) the court will look to the substance of the matter. Costs are a discrete question and it is perfectly open to a defendant in this situation to make energetic attempts for adequate security before costs.

22. In any event, on the facts of this case, there is no question that the claim is frivolous or meddling or spurious. Agreement was reached on security for costs and accordingly, it seems to me there is no basis on which this Claimant should be precluded from this claim by reference to standing."

87. Accordingly, the company was held to have standing – though it failed in its challenge (as described below).

(14) Waste planning: Article 4 of the Waste Framework Directive

88. The obligations arising from Article 4 of the Framework Directive on Waste (75/442/EC as

amended), now found in the new Waste Framework Directive 2006/12/EC (consolidating Directive 75/442/EC and its amendments), are given effect in England by Regulation 19 and Schedule 4 of the Waste Management Licensing Regulations 1994 ("the Regulations"). Paragraph 2(1) of Schedule 4 to the Regulations requires that:

"The competent authorities shall discharge their specified functions, in so far as they relate to the recovery or disposal of waste, with relevant objectives."

89. Paragraph 4(1) of Schedule 4 to the Regulations provides that:

"For the purposes of this Schedule the following objectives are relevant objectives in relation to the disposal or recovery of waste – (a) ensuring that waste is recovered or disposed of without endangering health and without using processes or methods which could harm the environment and in particular without – (i) risk to water, air, soil, plants or animals; or (ii) causing nuisance through noise or odours."

90. The application of this duty, which is not simply another planning material consideration to be

taken into account, was considered by the Court of Appeal in ***R (Thornby Farms Limited) v. Daventry DC*** [2003] Q.B. 503 where, at para. 53, Pill LJ held:

"An objective in my judgment is something different from a material consideration. I agree with Richards J that it is an end at which to aim, a goal. The general use of the word appears to be a modern one. In the 1950 edition of the Concise Oxford Dictionary the meaning now adopted is given only a military use: "towards which the advance of troops is directed". A material consideration is a factor to be taken into account when making a decision, and the objective to be attained will be such a consideration, but it is more than that. An objective which is obligatory must always be kept

in mind when making a decision even while the decision-maker has regard to other material considerations. Some decisions involve more progress towards achieving the objective than others. On occasions, the giving of weight to other considerations will mean that little or no progress is made. I accept that there could be decisions affecting waste disposal in which the weight given to other considerations may produce a result which involves so plain and flagrant a disregard for the objective that there is a breach of obligation. However, provided the objective is kept in mind, decisions in which the decisive consideration has not been the contribution they make to the achievement of the objective may still be lawful. I do not in any event favour an attempt to create a hierarchy of material considerations whereby the law would require decision-makers to give different weight to different considerations."

91. In ***Residents Against Waste Site Ltd v Lancashire County Council*** [2007] EWHC 2558

(Admin), the claimant sought judicial review of the grant of planning permission for a waste technology plant. It contended that the Council had failed to have proper regard to Art.4 of the Directive because the Development Control Committee made no mention of Art.4 not of the relevant provisions of the Regulations. The Council defended its decision in the following way:

"Thus, in summary, the position taken by the LCC is that the over arching plans and policies under which this planning application was prepared and considered, enshrined the relevant objectives. He was aware of them. Councillors had been educated about them. The fact that there was no further explicit mention of the relevant objectives in the detailed documentation was because that was unnecessary."

92. Irwin J refused the claim for judicial review, holding that:

"48. As I have already indicated, in my judgment this ground was just arguable and had it been considered in the normal sequence, I would have granted permission for judicial review proceedings. However, it is not made out. The question can only properly be determined by reference to substance. It is clear that the underlying plans and policies developed by LCC fully took into account the relevant objectives. It is also clear that Mr Perigo and the other senior officers of LCC were fully aware of these statutory provisions. Councillors had been taught about them, no doubt as one of a number of legal provisions, before they took up their duties of this Committee. In my judgment, the Claimant has failed to demonstrate that the LCC, its officers and members, paid no or no sufficient attention to the relevant objectives in reaching this decision. It might have been desirable for Mr Perigo to include a paragraph in his report to the Committee stating that specific consideration had been given by officers, and should be given by the Committee, to the relevant objectives. However, even that observation may in truth come perilously close to recommending lipservice

to the relevant objectives. The key here is: were they borne properly in mind? The Claimant has failed to show they were not.

49. Were it necessary to make a finding on the point, on the material presently before me, I would find that even a more concentrated explicit or extended consideration of the relevant objectives would have made no difference to the outcome."

(15) EIA and reserved matters

93. Following ***R (Delena Wells) v. Secretary of State*** Case C-201/02 [2004] 1 C.M.L.R. 31, the
ECJ in ***Commission v. UK*** Case C-508/03 and ***Barker*** Case C-290/03 [2006] Q.B. 764 and the House of Lords in ***R. v Bromley LBC Ex p. Baker*** [2006] 3 W.L.R. 1209[4] have worked a minor transformation on domestic development control. They have introduced the possibility of
EIA at stages in the planning decision-making after an in-principle decision granting outline planning permission. As ***Wells*** itself shows, the implications are not limited to reserved matters
alone but may also extent to cases where approvals under negative conditions, effectively conditions precedent to development proceeding, are required.

[4] In which judgment was given only a day after the last LGG Update.

94. Moreover, there are further considerations which a similar approach might suggest in the case
of subsequent stages in multi-stage decision-making in connection with the requirements of the
Habitats Directive and Regulations.

95. The circumstances of the judgments are well known, involving significant development projects
at Crystal Palace and White City, given they had been thoroughly litigated in the national courts[5]. The ECJ summarised the issue raised by the art. 234 reference from the House of Lords at para. 42 of its judgment in ***Barker***:

"Is EIA required to be carried out if, following the grant of outline planning permission, it appears at the time of approval of the reserved matters that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location?"

96. In ***Barker*** the ECJ held:

46. …it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a "development consent" for the purposes of Directive 85/337 (see, in this connection, the judgment delivered today in Case C508/03 Commission v United Kingdom [206] ECR I-0000 paragraphs 101 and 102).

47. Secondly, as the Court of Justice explained in Wells [2004] ECR I-723, at paragraph 52, where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

48. If the national court therefore concludes that the procedure laid down by the rules at issue in the main proceedings is a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, it follows that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved: see, in this regard, Commission v United Kingdom, paragraphs 103-106. That assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.

49. In the light of all of the foregoing, the answer to the second and third questions must be that articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location."

97. In ***Commission v UK*** infraction proceedings in relation to the determination of the White City
and Crystal Palace developments had been brought by the Commission alleging breaches of the EIA Directive by the UK. It raised similar issues to ***Barker*** and was heard at the same time.

The ECJ said:

""101. In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.

102. Therefore, the two decisions provided for by the rules at issue in the present case, namely

outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of Article 1(2) of
5 See e.g. ***R v. Hammersmith & Fulham LBC ex p. CPRE*** [2000] Env. L.R. 532 and 549 (Court of Appeal) and
[2000] Env. L.R. 544 (dealing with the White City development, now substantially under way) and ***Barker*** in the
Court of Appeal [2002] Env. L.R. 631. The ***Barker*** challenge was the second set of proceedings, the Court of
Appeal having previously rejected a challenge to the original grant of planning permission.
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Directive 85/337, as amended.
103. In those circumstances, it is clear from Article 2(1) of Directive 85/337, as amended, that projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before (multi-stage) development consent is given (see, to that effect, Case C-201/02 Wells [2004] ECR I-723, paragraph 42).
104. In that regard, the Court stated in Wells, at paragraph 52, that where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.
105. In the present case, the rules at issue provide that an environmental impact assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage.
106. Those rules are therefore contrary to Articles 2(1) and 4(2) of Directive 85/337, as amended.
The United Kingdom has thus failed to fulfil its obligation to transpose those provisions into domestic law." Challenges by the Commission to the decisions not to have EIA on the facts in both the White City6 and Crystal Palace cases were held to be admissible, but failed since the Commission had failed to provide evidence of appropriate failure in the light of detailed evidence from the UK. The ECJ rejected the complaint by the Commission on the facts that there had been "a manifest error of assessment" in determining that EIA was not required (see paras. 82-92).
98. Following the ECJ judgments, on 30 June 2006 DCLG issued interim guidance pending consideration by the House of Lords and amendments to the regulations, **Applications for Outline Planning Permission, Applications for approval of reserved matters and EIA procedure; The Effect of ECJ judgments in the cases of Ex parte Barker and Crystal Palace/White City**7. Although a replacement circular to DOE 2/99 has been consulted upon8, but not yet issued in final form, it did not deal with ***Barker*** although noted that it would have to be considered.
99. When the House of Lords heard further argument on 6 November the Claimant had abandoned
her claim for a quashing order (which would have revived the expired outline permission) and she sought declaratory relief which was not opposed in principle by the Secretary of State, although Bromley LBC still maintained that the reserved matters determination in that case was
not a development consent.
100. In the House of Lords9, Lord Hope (who gave the only substantive speech) held that the Secretary of State had been right not to oppose a declaration that the 1988 Regulations failed properly to implement the EIA Directive:
"21. It is clear that the effect of regulation 4(2) of the 1998 Regulations, read together with the definition of "Schedule 2 application" in regulation 2(1), was that any consideration of the need for an EIA was precluded at the reserved matters stage. The Regulations overlooked the fact that the relevant development consent may, as the Court of Justice said in ***Commission v United Kingdom*****,** para 102, be a multi-stage process. That situation is demonstrated by the terms in which outline planning permission was given in this case. In its notification of grant of outline planning permission the council stated that the grant was subject to conditions, which included the following:
6 Rejected by the High Court and Court of Appeal in ***R v. LB of Hammersmith & Fulham, ex p CPRE*** (2000) 81
P. & C.R. 61 and [2000] Env. L.R. 532.
7 See www.communities.gov.uk/index.asp?id=1501525.
8 See also the consultation paper (Dec. 2006, closed 12.3.07) *The application of the Environmental Impact*

Assessment Directive to 'stalled' reviews of old mineral permissions and periodic reviews of mineral permissions
in England.
9 See article in JPL for May 2007 by Elvin & Maurici which considers the implications of the judgments.
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"01 (i) Details relating to the siting, design, appearance, access, landscaping shall be submitted to and approved by the local planning authority before any development is commenced." The effect of that condition was that the consent which would have entitled [the developer] to proceed with the project was withheld until the details referred to were approved by the local planning authority. Any grant of planning permission which contains a condition in these terms must be regarded as a multistage
development consent for the purposes of the Directive".
101. The reasoning plainly applies to the current Town and Country Planning (Environmental Impact
Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations").
102. Lord Hope interpreted the ECJ judgments so that it seems clear that the approach in the ***Rochdale*** cases is still generally applicable subject to the need now to consider EIA in some reserved matters cases. This appears consistent with the interim guidance issued by DCLG following the ECJ's judgments10. Lord Hope explained when further EIA might be required:
22. It does not follow however, where planning consent for a development takes this form, that consideration must be given to the need for an EIA at each stage in the multi-consent process. …. An application for outline planning permission should be accompanied by sufficient information to enable that question to be answered and an EIA, if needed, to be obtained and considered before outline planning permission is granted. The need for an EIA at the reserved matters stage will depend on the extent to which the environmental effects have been identified at the earlier stage.
23. If sufficient information is given at the outset it ought to be possible for the authority to determine whether the EIA which is obtained at that stage will take account of all the potential environmental effects that are likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In cases of that kind it will normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development: R v Rochdale Metropolitan Borough Council, Ex p Milne (2001) 81 P & CR 365, para 114, per Sullivan J.
24. As the European Court said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances.
...
28. In my opinion the answer to the question whether the outline planning permission and the decision to approve the reserved matters in this case constituted, as a whole, a "development consent" for the purposes of the Directive is now plain. It is conveniently set out in the court's judgment in Commission v United Kingdom, paras 101 - 102. L & R were told in condition 01 (i) of the outline planning permission that they were not entitled to proceed with any development until details relating to the reserved matters had been submitted to and approved by the local planning authority. That being so, the decisions to grant outline planning permission and to approve the reserved matters must be considered to constitute, as a whole, a multi-stage development consent for the purposes of the Directive.
29. It is no longer possible to challenge the grant of outline planning permission on the ground than an EIA was required at the outline stage, and we lack the information that would be needed for
10 This was provided to the House of Lords, though not commented on. The parties to the hearing did not criticise
or challenge the guidance.
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finding as a fact that an EIA was required at the reserved matters stage. These issues have in any event been rendered academic by the lapse of planning permission for the development. But the appellant is entitled to a declaration that the advice that the officials gave to the committee that an EIA could not as a matter of law be required at the stage of approving the reserved matters was wrong. Sullivan J's observation in ***R v Rochdale Metropolitan Borough Council, Ex p Tew*** [1999] 3 PLR 74, 97 that, if significant adverse impacts on the environment are identified at the reserved matters stage and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding must now be regarded as unsound. If it is likely that there will be significant effects on the environment which have not previously been identified, an EIA must be carried out at the reserved matters stage before consent is given for the development."

103. The main effect of the judgments is that:

(1) EIA may be required for subsequent stages in a multi-stage consent process in order to ensure that the objectives of the Directive are properly met. The principle was initially established in ***Wells*** in the context of the imposition of new conditions on an old mining permission under the procedure established by the Planning and Compensation Act 1991;

(2) The general approach, however, in ***R. v. Rochdale B.C. ex p. Tew*** [2000] Env. L.R. 1 and ***R. v. Rochdale B.C. ex p. Milne*** [2001] Env. L.R. 22 still holds good subject to the additional possible requirement for EIA in the context of reserved matters. This therefore does not justify a more relaxed approach to EIA at the outline permission stage and a failure to do so may lead to quashing of the permission if a challenge is brought in good time. A proper approach to EIA following those authorities will limit the possibility for EIA subsequently;

(3) EIA at the reserved matters stage may be required where likely significant effects are identified at the reserved matters stage which -

(a) Were not identifiable at the outline planning permission stage. This is likely to include those effects which were not identified as well; or

(b) Were present but simply not identified at the outline stage, through erroneous screening or failure to consider at all; or

(c) Were identified and assessed but which now require "a fresh assessment". This is likely to apply where there has been some material change of circumstances since the grant of planning permission.

(4) Where a reserved matters EIA is required, then the ECJ held that what was required was[11]

"This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment."

104. What is the scope of the cases where EIA may be needed? Lord Hope in para. 24 of his speech made clear that where the ***Tew*** and ***Milne*** approach is followed the need for EIA at the reserved matters stage will only arise if it is not until that later stage that it becomes apparent that the project is likely to have significant effects on the environment. He considered this was only likely to happen where "*the need for an EIA was overlooked at the outline stage*" or where

"*because a detailed description of the proposal to the extent necessary to obtain approval of*

[11] ***Barker*** judgment para. 48.

reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier".;

105. The cases appear to include the following:

(1) A "fresh assessment" may be warranted, for examples, where new evidence shows the existence of rare habitat, or a protected species, not previously considered, or there has been a new designation, or simply that new survey evidence plainly requires the reappraisal of one of more environmental impacts. It would, of course, be necessary that such effects would have to meet the threshold requirements of being likely and of significance before EIA would be necessary.

(2) The need for EIA may also arise because the decision to grant outline permission was flawed either because the need for EIA was incorrectly screened out or was overlooked altogether[12]. As the ***Barker*** case itself shows, given that the original challenge to the outline permission failed, it allows a second attempt to review the development consent on the issue of EIA. Indeed, although a failure to carry out EIA properly at the time of the

original grant of permission, as in cases such as ***R v. Cornwall CC ex parte Hardy*** [2001] Env. L.R. 26, will still justify an application to quash, judicial review may not be brought in good time and thus rule out an application to quash the permission. Nonetheless, if good ground existed for JR for failure to carry out EIA properly at the outline stage, this would be a strong indicator that there is likely to be a requirement to consider EIA at reserved matters or, possibly, for the approval of details under negative conditions precedent;

Procedure

106. Where EIA is required at reserved matters (or discharge of conditions), the question arises as to how this is to be carried out pending regulations to amend the EIA Regulations. The doctrine of direct effect[13] does not allow planning decision-makers to escape the effects of the new judgments until new regulations are made.

107. Pending amending The DCLG interim guidance advises as follows:

"(6) DCLG considers that when a LPA receives an application for approval of reserved matters, regardless of whether EIA was carried out at the OPP stage, it should screen the development again to determine whether all of the likely environmental significant effects have been considered in order to satisfy the requirements of the EIA Directive. Where the detail at reserved matters has revealed new or additional likely significant effects on the environment not identified and/or assessed at the OPP stage, the approval of reserved matters without obtaining the necessary environmental information is likely to be in breach of the Directive and thus unlawful. In determining whether EIA is required at the approval of reserved matters stage planning authorities should have regard to the guidance on screening in Circular 02/99 as applying to the approval of reserve matters until such time as the Circular and the EIA Regulations are amended.

(7) If it is determined by a LPA that EIA is required at the approval of reserved matters it should request the developer to provide such an EIA which, depending on the circumstances, could take the form of a supplemental EIA or addendum to an existing EIA. Whichever approach is considered most appropriate, the EIA must be "comprehensive". Until the EIA Regulations are amended the basis for such a request will have to be the EIA Directive itself which has direct effect.

(8) If a developer disagrees with a request for an EIA to be carried out at the approval of reserved matters stage then having regard to the obligations on LPAs to give effect to the EIA Directive and the ECJ's decisions it must either:

[12] It still occurs – see the ***John Catt*** case considered in the final section of this paper.

[13] See e.g. ***Wells*** and ***R v. Durham County Council ex parte Huddleston*** [2000] 1 W.L.R. 1484.

a. refuse the approval of reserved matters outright; or

b. defer determination of approval until such time as an EIA is provided.

On appeal where an EIA is requested but not provided the Secretary of State and Inspectors are likely to take a similar approach since the Directive is directly effective and binding on the Secretary of State (and Inspectors) to the extent it has not been transposed. In practice this means that the Secretary of State may notify developers either that EIA is or is not required at the reserved matters stage where an appeal comes before her since she must determine whether the conditions set out by the ECJ arise.

(9) Where an EIA is provided the LPA must have regard to it in determining whether to grant the approval of reserved matters."

What if subsequent EIA requires a reappraisal of the decision to grant permission?

108. The judgments do not address the tricky question of what happens if the additional environmental information produced at the reserved matters stage points towards an error in the decision to grant permission in the first place. Logically, applying the purpose of the Directive to produce an assessment at the earliest point in the decision-making process, it should be taken into account before the outline permission was granted and therefore the initial failure might not prevent the outright refusal of reserved matters in a manner which effectively amounts to a refusal of permission, by blocking its implementation. However, such an approach is inconsistent with domestic planning law which holds that a reserved matters decision may not derogate from the principles established by the outline permission[14].

109. The ECJ in accepting the consequences of a multi-stage process and that the subsequent stages were "implementing decisions"[15] might be taken to have accepted that the EIA at the

later stage would not impinge on the decision "". This assumption might be strengthened by the
fact that the point was drawn to the ECJ's attention, the Court included at least one member familiar with the UK planning system (Judge Schiemann) and the fact that EIA is a process which secures the provision of information to inform decision-making, and does not (unlike the Habitats provisions) directly dictate the outcome.

EIA and conditions precedent

110. In the light of ***Wells***, and Lord Hope's reasoning as to the application of the principles in ***Barker***
by reference to the form of a reserved matters condition which makes their approval a precondition of the commencement of development, it appears that EIA could be required in the
circumstances indicated by the ECJ where approvals are required under negative, ***Grampian***style,
conditions (i.e. preconditions to development proceeding).

111. As with reserved matters, the matters stipulated by such conditions need to be determined
before the development can proceed and are therefore fall within the principle in para. 101 in ***Commission v. UK*** (above) – i.e. "[u]ntil such approval has been granted, the development in question is still not (entirely) authorised".

(16) The Habitats Directive and Regulations

Does the Barker approach have any application to Habitats issues?

112. There is an issue, as yet unresolved, concerning the possible application of the approach in
Barker and ***Commission v. UK*** concerning the requirement to consider screening and

14 See e.g. Latham L.J. in the Court of Appeal in ***Barker*** [2002] Env. L.R. 631 at para. 27.

15 See ***Commission v. UK***, above, para. 104.

appropriate assessment under reg. 48 of the Habitats Regulations/Art. 6(3) of the Habitats Directive at subsequent stages in a multi-stage authorisation process e.g. reserved matters of a
development project which has implications for a European Site as defined in reg. 10 of the Habitats Regulations.

113. While it is undoubtedly the case that ***Barker*** and ***Commission v. UK*** cases were confined to a
consideration of the specific question under the EIA Directive of whether a reserved matters approval was a "development consent", what should be remembered is the importance which the ECJ attaches to giving full effect to the purpose of directives and of its willingness to take a
broad, protective stance in environmental cases.

114. The legislative policy is strong in the context of the Habitats and Wild Birds Directives, at least
as strong as in the context of EIA. Note the following from the Preamble to the Habitats Directive:

"Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;
Whereas, in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;

…

Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable;

…

Whereas sites eligible for designation as special areas of conservation are proposed by the Member States but whereas a procedure must nevertheless be laid down to allow the designation in

exceptional cases of a site which has not been proposed by a Member State but which the Community considers essential for either the maintenance or the survival of a priority natural habitat type or a priority species;
Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future…"

115. As the Commission states in **Managing Natura 2000**, Section. 1.1:

"Article 6 is a key part of the chapter of Directive 92/43/EEC entitled 'Conservation of natural habitats and habitats of species'. It sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. It is relevant to special protection areas under Directive 79/409/EEC as well as to sites based on Directive 92/43/EEC. The framework is a key means of achieving the principle of environmental integration and ultimately sustainable development."

116. Further, as ***Waddenzee*** and ***Commission v. Portugal*** both show[16], and the line of cases on designation[17], the approach adopted by the ECJ to habitats is strongly protective. In fact, when

16 See, e.g., the passages quoted above.

17 See, e.g., ***Commission v. Germany*** C-57/89[1991] E.C.R. I-883 ("Leybucht Dykes"), ***Commission v. Spain*** C-355/90[1993] E.C.R. I-4221 ("Santoña Marshes") and ***Commission v. France*** C-374/98[2000] E.C.R. I-10799 ("Basses Corbières").

examined, the language of Art. 6(3) of the Habitats Directive is even wider than that of the EIA Directive. In place of the "development consent" concept, Art. 6(3) states

"(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

117. The phrase "shall agree to the plan or project" is very wide, and to be read in the context that projects should only proceed if properly screened and, where necessary, subject to appropriate assessment. It is difficult to see how or why the ECJ would take in this context a significantly different approach to multiple stages of the planning authorisation process than it took under the EIA Directive.

118. Moreover, it could be said that the requirements of Art. 6(3) and (4) are stronger than the EIA provisions since they do not merely set out the appropriate procedure for the gathering of information and making an assessment, but dictate the outcome of the application. While both procedures prohibit the grant of consent until the relevant procedures are complied with, Habitats goes an important step further by requiring the refusal of authorisation in certain circumstances i.e. if there is an adverse effect on integrity and the exceptional requirements of reg. 49/53 and Art. 6(4) do not apply.

119. If they key consideration is, as it was in EIA, that in an authorisation process involving several stages more than one authorisation is required before the project can proceed, then this is a characteristic of the domestic system which also falls to be considered in the context of the Habitats provisions.

120. The opening sentence of reg. 48(1) is also potentially wide in its scope –

"before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project…"

121. The language of reg. 54(1) seems restrictive of the application of the procedure to applications which lead to planning permission of one form or another[18]. It is possible that the wording would be approached broadly taking the approach to sympathetic interpretation required by ***Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.*** Case 106/89 [1990]

E.C.R. I-4135, ***Duke v. G.E.C. Reliance Systems Ltd.*** [1988] A.C. 618, at 639-640, and ***Webb***
v. Emo Air Cargo Ltd. [1993] 1 W.L.R. at 59. However, the use of "planning permission" in reg. 54(1) may prove too much even for a flexible approach to interpretation.
122. In that event, if Art. 6(3) and (4) do apply to stages subsequent to the grant of permission, then
the Habitats Regulations would be in a similar position to the EIA Regulations in making no provision for reserved matters/subsequent stages in the authorisation process. In that event, direct effect would have to be given to the provisions and the Habitats Regulations would require amendment. The ECJ has already held that Art. 6(3) meets the requirements for direct effect, in ***Waddenzee*** at paras. 66-70.
123. If the Habitats provisions required an approach similar to that taken by the ECJ in ***Barker***, then
the need to follow the Art. 6(3) and (4) procedure would only arise where significant effects are
18 ODPM Circular 06/05 paras. 9 and 11, and Figure 1, deal with the Habitats Regulations procedure only in
terms of "planning permission":

identified at the subsequent stage (whether reserved matters, approval of negative conditions or s. 73 application) which were –
(1) not identifiable at the outline or original planning permission stage. This is likely to include those effects which were not identified as well, such as cases decided before the implications of designation may have been understood; or
(2) previously identified but which now require "a fresh assessment". As noted above, this could mean where there has been some material change of circumstances since the grant of planning permission. This could include the change of policy.
124. The effect of the Habitats provisions requiring screening and appropriate assessment is that if
the application cannot be screened out, and the authority is not convinced that there will not be
an adverse effect on the integrity of the site in question, then it must refuse the approve the reserved matters. The effect of this would be that, by a decision on a subsidiary element of a consent process, the project can be rejected. Although this runs contrary to the normal principle
of UK planning law, considered in Section (1) above, that a reserved matters decision cannot go back on the principle of outline planning permission, it seems a clear consequence of the specific legal duty in art. 6(3) and reg. 48(5), if applicable.

(17) Strategic environmental assessment

125. The judgment of Weathrup J. in the High Court of Northern Ireland in ***Seaport Investments***
Limited's Application [2007] NIQB 62 has called into question the correctness of the transposition of the SEA Directive (Directive 2001/42/EC of the European Parliament and Council on the assessment of the effects of certain plans and programmes on the environment)19 through the SEA Regulations.
126. That case concerned a challenge to SEAs purportedly carried out to the draft Northern Area
Plan 2016 covering the four administrative council areas of Ballymoney, Coleraine, Limavady and Moyle and the draft Magherafelt Area Plan 2015.
127. Firstly, it might be thought that given the more strategic nature of SEA in comparison to EIA,
which focuses on individual development proposals, it may prove to be even more difficult to challenge judgments of the authority in determining issues regarding SEA than in the case of EIA on the basis of unreasonableness of scope or content20. Indeed, this was the view of Weatherup J. who held (at para. 25):
"The responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information for environmental reports. The Court will not examine the fine detail of the contents but seek to establish whether there has been substantial compliance with the information required by Schedule 2…"

128. However, on the facts, all was not well. Weatherup J. proceeded to focus on *"whether the specified matters have been addressed rather than considering the quality of the address"*. On the facts of the cases before him, he held that there had not been substantial compliance with

19 The Regulations which transpose the Directive in Northern Ireland, Scotland and Wales are: The Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 (Statutory Rule 2004 No. 280); The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (Scottish Statutory Instrument 2004 No. 258), and The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 (Welsh Statutory Instrument 2004 No. 1656 (W.170)).

20 See e.g. see e.g. ***R. v. Rochdale MBC Ex p. Milne*** [2001] J.P.L. 470 and ***Smith v. Secretary of State*** [2003] J.P.L. 1316

the requirements of Annex I / Schedule 2. Parts of paras. 2, 3, 4, 6 and 8 had not been addressed and there was an inadequate non-technical summary (which to a large extent did not provide any summary of the information provided under the specified headings): see paras. 27-36 of the judgment.

129. The question also arose as to consultation on the draft plan alongside the environmental report assessing it. On the facts, the held as follows:

"[51] In the case of the Northern area a draft plan and "environmental appraisal" circulated in 2004. The draft plan was described by the respondent as "having reached an advanced stage" when the Regulations were introduced in July 2004. The "consultation body" had been involved in "environmental appraisal" from an early stage. The respondent referred to an early consultation report, an issues paper and a further consultation report dealing with environmental issues before the draft plan was circulated in 2004. A revised version of the plan and an environmental report issued for consultation in 2005. The respondent relied in on the earlier environmental work as the groundwork for the environmental report. However it remains the case that the requirements for an environmental report are greater than previous requirements and it is not contended that the added requirements would have influenced the development of the draft plan. It is apparent that when the development of the draft plan had reached an advanced stage before the environmental report had been commenced there was no opportunity for the latter to inform the development of the former. This was not in accordance with the scheme of Articles 4 and 6 of the Directive and the Regulations.

[52] In the case of the Magherafelt area, in effect the draft plan issued for consultation in 2004 and the environmental report issued for consultation in 2005 and there was no parallel consultation on the plan and the report. This was not in accordance with the scheme of Articles 4 and 6 of the Directive and the Regulations."

130. The issue was whether consultation on the two documents should be carried out in parallel.

Although the SEA Directive and Regulations are not crystal clear, it seems to be a reasonable interpretation that they do require the two to be consulted upon at the same time. The principal applicable guidance21 is sufficiently clear in its view that the two documents should be consulted upon together and at the same time:

(1) The Commission Guidance at para. 5.7 states that "the process of preparing the report should start as early as possible and, ideally, at the same time as the preparation of the plan or programme" although this is strictly dealing with the preparation of the plan and ER;

(2) Para.s 5.4 and 5.5 contemplate that the environmental report could be part of the plan documentation;

(3) Para. 7.1 states (in terms which accord with the need to have both documents)

"The consultation provisions of the Directive oblige Member States to grant an opportunity to certain authorities and members of the public to express their opinion on the environmental report and the draft plan or programme. One of the reasons for consultation is to contribute to the quality of the information available to those responsible for the decisions that are made concerning the plan or programme."

(4) Para. 7.2 and Box 1 at p. 34 sets out an overview of the stages in the SEA process in

terms which makes it clear that the draft plan and the ER should be consulted on together. See the third stage which refers together to "Environmental report and draft plan

21 The national authorities of all parts of the UK jointly published guidance in September 2005: "*A Practical Guide to the Strategic Environmental Assessment Directive*" ("the UK Guidance"). In 2004 the Commission issued "*Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment*" ("the Commission Guidance").

or programme". This is reproduced in almost identical form as Fig. 3, para. 7.2 p. 17 of the UK Guidance;

(5) In Section 5 of the UK Guidance, Stage D deals with the consultation on the draft plan and ER and is unequivocal in its requirements at para. 5.D.1 p. 37 -

"The Environmental Report must be made available at the same time as the draft plan or programme, as an integral part of the consultation process, and the relationship between the two documents clearly indicated."

131. Indeed, as a matter of common sense, it might be thought obvious that the two should be consulted on together since the report and the draft both impact upon and influence each other and those consulted are bound to be concerned as to the relationship.

132. Weatherup J. at paras. 47 ff endorsed the parallel consultation approach:

"[47] The scheme of the Directive and the Regulations clearly envisages the parallel development of the environmental report and the draft plan with the former impacting on the development of the latter throughout the periods before, during and after the public consultation. In the period before public consultation the developing environmental report will influence the developing plan and there will be engagement with the consultation body on the contents of the report. Where the latter becomes largely settled, even though as a draft plan, before the development of the former, then the fulfilment of the scheme of the Directive and the Regulations may be placed in jeopardy. The later public consultation on the environmental report and draft plan may not be capable of exerting the appropriate influence on the contents of the draft plan.

[48] Then there is the public consultation period. Article 4.1 continues to apply. Article 6.2 provides that consultees shall be given an early and effective opportunity within appropriate timeframes to express their opinion "on the draft plan or programme and the accompanying environmental report before the adoption of the plan." Regulation 12(1) refers to the draft plan and its "accompanying" environmental report as "the relevant documents". Regulation 12(2) provides that as soon as reasonably practical after their preparation the responsible authority shall send a copy of "the relevant documents" to the consultation body. Regulation 12(3) provides that the responsible authority shall publish a notice that includes inviting expressions of opinion on the relevant documents.

[49] Once again the environmental report and the draft plan operate together and the consultees consider each in the light of the other. This must occur at a stage that is sufficiently "early" to avoid in effect a settled outcome having been reached and to enable the responses to be capable of influencing the final form. Further this must also be "effective" in that it does in the event actually influence the final form. While the scheme of the Directive and the Regulations does not demand simultaneous publication of the draft plan and the environmental report it clearly contemplates the opportunity for concurrent consultation on both documents.

[50] The interim measures provide a "feasibility" test for environmental assessment when the development of a plan had commenced before the operative date. Clearly it would be a matter of fact and degree as to whether the plan had reached the stage where an environmental assessment was required. It must be borne in mind that there should be parallel development of the plan and the environmental aspects and that the stage has not been reached where elements of the plan may become sufficiently settled without being subjected to the appropriate environmental examination."

133. Thirdly, an issue arose concerning the length of the consultation period. As in the case of EIA, the SEA Directive does not prescribe specific forms of consultation and leaves the choice to the Member States. Article 6 ("Consultations") provides[22]:

"1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

22 Directive 2003/35/EC on public participation applies the Åarhus Convention to certain plans and programmes not subject to the SEA Directive. See art. 2.

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2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.
3. Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.
4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant_non-governmental organisations, such as those promoting environmental protection and other organisations concerned.
5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States."

134. Although reg. 12(5) stipulates a 5 week period for consultation with the relevant consultation
bodies on the scope of the environmental report (which Weatherup J, held to be sufficient), reg.
13 does not stipulate the period for consultation on the report itself but expresses itself in general terms of "an effective opportunity" to express opinions. Reg. 13(2) and (3) state (emphasis added):

"(2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall –
(a) send a copy of those documents to each consultation body;
(b) take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority's opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under the Environmental Assessment of Plans and Programmes Directive ("the public consultees");
(c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained; and
(d) invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent.
(3) The period referred to in paragraph (2)(d) must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents."

135. Weatherup J. held that it was not consistent with the requirements of proper transposition and
legal certainty that the UK legislatures should not specify the precise consultation period:

"[22] The transposition of the Habitats Directive was considered by the European Court of Justice in Commission of the European Communities v United Kingdom (Case – 6/04 20 Oct 2005). The ECJ found that –
"It is important in each individual case to determine the nature of the provision, laid down in a Directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States."
The ECJ stated that the UK's argument that the most appropriate way of implementing the Habitats Directive was to confer specific powers on nature conservation bodies and to impose on them the general duty to exercise their function so as to secure compliance with the requirements of that Directive could not be upheld. The UK legislation implementing the Habitat's Directive was found at paragraph 27 to be –
"…. so general that it does not give effect to the Habitat's Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the Directive and allow harmonised and effective implementation of the rules which it lays down."
[23] The nature of Article 6.2 is such that it requires consultation with environmental authorities and

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the public in circumstances where appropriate timeframes are set that admit of sufficient time for consultation including the expression of opinion (recital 15). To achieve sufficient precision and clarity to satisfy the demands of legal certainty requires Member States to set the appropriate timeframes and not to pass to a public authority the responsibility for setting timeframes from case to case. Accordingly the requirement in Article 6.2 of the Directive for consultation within appropriate timeframes has not been transposed by Regulation 12 which does not set appropriate timeframes."

136. Support exists for Weatherup J.'s analysis in 7.9 of the Commission Guidance of the SEA
Directive:
"**7.9.** The time frame needs to be laid down in legislation. Member States are free to determine its duration so long as it meets the requirement to give an 'early and effective' opportunity for responses..."
137. However, the approach could still be questioned:
(1) Much of environmental assessment leaves important judgments to the national authorities e.g. the screening and scope of the obligation to assess, the contents and detail of the environmental statement/report;
(2) The Commission's Guidance accepts the scope for judgment in SEA generally e.g. at paras. 6.4, 7.9-7.10;
(3) Unlike the argument rejected in the ***Commission v. UK***, the SEA Regulations do not simply set up a general duty to comply with the SEA Directive and do not set a specific period, applicable in every case, for consultation on every type of plan or programme;
(4) Certainty would be provided in SEA cases by the time scale being indicated at the relevant time. The judgment criterion is stipulated i.e. the "early and effective" opportunity just as broad parameters of the contents of an ES are stipulated by Schedule 4 to the EIA Regulations 1999[23] (following the equivalent Annex of the EIAD);
(5) The SEA Regulations cover a wide variety of plans and programmes and it might be said that it would be difficult to set a single consultation period to cover all possibilities. However, this is done for EIA for all planning applications by reg. 14 of the 1999 Regulations. A minimum period could be set, with scope for an extension in appropriate cases.
138. Until the issue is resolved definitively in this jurisdiction (which must be a matter for the Courts,
the Commission and the national authorities), plan making authorities should act cautiously and
make clear to the public the time provided for consultation, ensuring that it does meet the requirements of reg. 13(3) in the light of the UK and Commission Guidance, and ensuring that the ER and SEA/SA are consulted upon in close parallel.

(18) Åarhus and the Public Participation Directive in EIA and decision-making

139. After some delay, DCLG transposed in 2007 the planning aspects of the Public Participation
Directive 2003/35/EC ("PPD") implements the Åarhus Convention and provides for increased public participation/consultation with regard to the drawing up of certain plans and programmes
relating to the environment and amending Directives 85/337/EEC and 96/61/EC. Significant amendments are made to the EIA Directive (85/337/EEC) including to the publicity and consultation requirements of Articles 6, 7 and 9 and to remove the absolute exemption of

[23] Town & Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999
S.I. No. 293.

national defence projects, replacing it with a qualified exemption reliant on case by case screening. The PPD required the amendments to be transposed into national law by transposed by 25 June 2005
140. In part, the PPD amendments fall to be made by Defra in the context of pollution control regimes, but they also fall to DCLG to make amendments to the planning EIA regime.
141. An ODPM consultation paper was issued in March 2005 (consultation ended 6 June 2005) *The*
draft Town and Country Planning (Environmental Impact Assessment) (England) (Amendment)
Regulations 2005: A Consultation Paper, with new draft regulations. The new regulations were
not made until The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006 S.I. 3295, coming into force on 15 January 2007.
142. The changes made are not major, but improve the role of consultation for projects. Strictly,
since the planning EIA Regulations were not amended by 25 June 2005 the UK was in breach

of the PPD from that date until 15 January 2007 and, on general principles of EU law public authorities were required to give direct effect to the provisions of the PPD regardless of the 19 month absence of amending UK legislation[24]. Since the changes were not major, it does not appear that any practical problems have arisen.

(19) National park designation

143. The Court of Appeal has upheld on limited grounds the decision in ***Meyrick Estate Management v. Secretary of State for the Environment, Food and Rural Affairs*** [2005] EWHC 2618 (Admin) (3.11.05) where Sullivan J. quashed part of the New Forest National Park designation order on grounds which included a flawed approach by the Inspector and Secretary of State to the test for designation in s. 5(2) of the National Parks and Access to the Countryside Act 1949. He held that the reference to natural beauty in s. 5(2) and the purposes of designation could not encompass cultural and other issues (see s. 114(2)), notwithstanding their inclusion in s. 5(1) and the use of the phrase "the provisions of this Part of this Act shall have effect for the purpose of…"

144. Sullivan J. held:

"45. Although the Assessor said in the final sentence of paragraph 3.8 of Appendix 1 that the weight to be attached to factors such as history and cultural associations "should be carefully considered" if they were "not to be given undue attention in reaching judgments on natural beauty under the Act", it is clear from paragraph 3.9 that she did consider that (subject only to the question of weight) such factors could be taken into account, and that she agreed with the Agency's approach to the factors mentioned in section 114(2):

"The strict terms of the designation criteria in section 5(2) should be informed by the extended definition of natural beauty in section 114(2) even if the latter only relates to the statutory purposes set out in subsection 5(1)."

46. [Counsel for Defra] submitted that in determining the extensive tracts of country to be designated under subsection 5(2) the Agency and the Secretary of State were furthering the purposes in section 5(1)(a), and hence the expanded meaning of "natural beauty" in section 114(2) was applicable also to subsection 5(2). He further submitted that it would be surprising if "natural beauty" had a wider meaning in subsection (1) than it had for the purposes of subsection 5(2).

47. I do not accept those submissions. Parliament could easily have made provision for an expanded meaning of "natural beauty" which would have been of general application throughout the Act:

"References in this Act to the natural beauty of an area shall be construed as including references

[24] ***R v. Durham County Council ex parte Huddleston*** [2000] 1 W.L.R. 1484 and ***Delena Wells***, 42

to its flora, fauna and geological and physiographical features."

48. If possible, subsection 114(2) should be interpreted in such a way as to give effect to all of the words used by Parliament, and not an interpretation which would, in effect, render the two references to "the preservation or [as the case may be] the conservation of ..." otiose.

49. While at first sight it may appear strange that "natural beauty" is given an extended meaning in subsection (1) as substituted by the Environment Act 1995, but not in subsection (2) of section 5, I accept … that one does not have to look far for a sensible justification. Once an extensive tract of country has been designated as a National Park, that will have been not merely because of its natural beauty, but also because of the opportunities it affords for open air recreation, and the latter may well threaten not merely the natural beauty that those seeking open air recreation come to enjoy, but also the flora, fauna, geological and physiographical features within the area, even if those features do not contribute to the area's natural beauty. ...

50. It will also be noted that the ambit of what should be conserved and enhanced pursuant to section 5(1) (as amended) once a National Park has been designated extends beyond "natural beauty" to include the "wildlife and cultural heritage" of the areas in question. By contrast, the wildlife and cultural heritage of an area are not made relevant considerations for the purpose of deciding whether that area should be designated as a National Park under subsection 5(2).

….

59. The Assessor and the Inspector's approach effectively discarded the requirement for a high degree of relative naturalness and substituted a test of "visual attractiveness" or "landscape quality". ...

60. … the proper interpretation of subsection 114(2) (whether it extends the meaning of natural beauty in subsection 5(2) as well as in subsection 5(1)) is not the determining issue. The Agency was contending that a broader range of factors, including, for example, historical and cultural factors, could be taken into consideration in deciding whether the "natural beauty" criterion in subsection 5(2) was met. While such factors were relevant (as the Assessor said) to an

understanding of how a particular tract of countryside had evolved to its present state, they were not relevant when it came to deciding whether it possessed the necessary quality of natural beauty so as to justify designation as a National Park.
61. I realise that the defendant may well consider that this is an unduly restrictive approach to the ambit of her and the Agency's powers under section 5(2). However, it must be remembered that the question is not what factors should, as a matter of good countryside planning practice in the 21st century, be taken into consideration in designating a National Park, but what factors may lawfully be taken into consideration under an enactment that is now over 55 years old. It might well be the case that "more modern" legislation would not be satisfied with such a straightforward and simple concept as "natural beauty"…
62. The 1949 Act was a contemporary of the New Towns Act 1946 and the Town and Country Planning Act 1947. The new towns are no longer new, and a brief perusal of today's planning Acts would be sufficient to demonstrate the extent to which relatively simple provisions which sufficed in 1947 have been repealed and replaced by far more elaborate and sophisticated controls in response to the many changes that have taken place over the last 50 years. Views as to which tracts of countryside have the quality of "natural beauty" may (or may not) have changed over the last 50 years, but the "natural beauty" criterion in subsection 5(2)(a) of the Act has not been changed to embrace wider considerations such as "cultural heritage". If the "natural beauty" criterion in subsection 5(2)(a) is to be changed to reflect 21st century approaches to countryside and leisure planning then the change must be effected by Parliament, and not by administrative action on the part of the Agency in adopting a wider range of factors for the purposes of designation…"

145. Sullivan J. also went on to hold that "opportunities … for open-air recreation" in s. 5(2)(b) should not be watered down and considered against a vaguer test of "potential opportunities."

146. Before the hearing in the Court of Appeal, ss. 59 and 99 of the Natural Environment and Rural
Communities Act 2006 ("**the 2006 Act**") were enacted to ensure a reversal of the substance of
the decision of Sullivan J. As a result, the Court of Appeal only dealt with the approach of the Inspector on the facts of the specific estate which had challenged that part of the designation order relating to its land.

147. As amended by the 2006 act, s. 5 of the 1949 act now reads (amendments underlined):

"**5 National Parks**
(1) The provisions of this Part of this Act shall have effect for the purpose—
(a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and
(b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.
(2) The said areas are those extensive tracts of country in England . . . as to which it appears to Natural England that by reason of—
(a) their natural beauty and
(b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population,
it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.
(2A) Natural England may—
(a) when applying subsection (2)(a) in relation to an area, take into account its wildlife and cultural heritage, and
(b) when applying subsection (2)(b) in relation to that area, take into account the extent to which it is possible to promote opportunities for the understanding and enjoyment of its special qualities by the public.
(3) The said areas, as for the time being designated by order made by Natural England and submitted to and confirmed by the Minister, shall be known as, and are hereinafter referred to as, National Parks."

148. The 2006 Act received Royal Assent on 1 March 2006 and ss. 59 and 99 came into force on 30
May 2006: see s. 107(7)(a). S. 59(2) of the 2006 Act states that s. 5(2A) has partial retrospective effect and applies -

"... for the purposes of the confirmation or variation on or after the day on which this section comes into force of orders made before that day as it applies for the purposes of the confirmation or variation of orders made on or after that day".

149. S. 99 of the 2006 Act provides:

"**99 Natural beauty in the countryside**

The fact that an area in England or Wales consists of or includes-
(a) land used for agriculture or woodlands,
(b) land used as a park, or
(c) any other area whose flora, fauna or physiographical features are partly the product of human intervention in the landscape,
does not prevent it from being treated, for the purposes of any enactment (whenever passed), as being an area of natural beauty (or of outstanding natural beauty)."

150. Although s. 99 has effect in relation to "any enactment (whenever passed)", and hence applies to the 1949 Act, unlike s. 59 it does not purport to be retrospective. It presumably should be read together with s. 114(2) of the 1949 Act.

151. The Court of Appeal [2007] EWCA Civ 53 upheld Sullivan J's decision to quash the New Forest National Park (Designation) Order in part. Chadwick LJ, giving the judgment of the Court considered the 1949 Act as it was in force at the time of the Designation Order and he also considered the new provisions inserted, in response to Sullivan J's judgment, into the 1949 Act by the 2006 Act. He concluded:

"[55] …I would hold that the judge was correct to hold that the estate owner's challenge to the order was entitled to succeed on the basis that, on the material before the Secretary of State at the relevant time, the criterion in s 5(2)(b) of the 1949 Act - opportunities for open air recreation - had not been met.

[56] That conclusion makes it necessary to consider whether - on the basis that the law has been changed by the 2006 Act - this court should, nevertheless, vary the judge's order so as to delete the direction that the order dated 1 March 2005 be quashed so far as it concerns the area of land in contention in these proceedings. As I have said, the Secretary of State invites the court to take that course for the reasons set out in his supplementary skeleton argument dated 27 October 2006.

[57] If I were persuaded that, in applying s 5(2)(b) of the 1949 Act to the facts found by the inspector, the Secretary of State, taking into account the matters which s 5(2A)(b) now requires to be taken into account ('the extent to which it is possible to promote opportunities for the understanding and enjoyment of [the area's] special qualities by the public') would, necessarily, reach the conclusion that the statutory criterion was met, I would see much force in the submission that this court should recognise that a quashing order can now serve no sensible purpose. But I am not so persuaded. As I have sought to point out, the lacuna in the inspector's report, in the present context, is that he failed to explain why he took the view that the opportunities for open air recreation, in relation to Hinton Park, went beyond 'vague or unrealistic aspirations'. To my mind, it is far from self evident that that lacuna would no longer exist if the s 5(2)(b) test required consideration of 'the extent to which it is possible to promote opportunities . . .'. In that context, the question, as it seems to me, would be whether the inspector had explained how it is possible to promote opportunities for the understanding and enjoyment of the area's special qualities by the public in the absence of public access. Without seeking to suggest an answer to that question - which would be outside the proper scope of this appeal - I am satisfied that the estate owners are entitled to require that it be addressed before the Designation Order is varied by the Secretary of State.

[58] Given that I would dismiss the appeal - and uphold the judge's order - on the ground that that the judge was correct to hold that the estate owners' challenge was entitled to succeed on the basis that the criterion in s 5(2)(b) of the 1949 Act had not been met, I do not think that it would serve any useful purpose to extend this judgment by addressing the question whether the judge was also correct to hold that the challenge was entitled to succeed in relation to the natural beauty criterion in s 5(2)(a). On any future consideration of the question whether the Designation Order should be varied, the Secretary of State will be required to take into account the area's wildlife and cultural heritage -s 5(2A)(a) of the 1949 Act - and will have regard to s 99 of the 2006 Act. Without intending to prejudge any issues which may arise in that context, it seems to me that there is force in the submissions advanced in paras 21 and 22, and 26, of the Secretary of State's supplementary skeleton argument dated 27 October 2006."