

PLANNING ISSUES FOR PROPERTY LITIGATORS

by

David Elvin QC and Tom Jefferies
Landmark Chambers

David Elvin was called to the Bar in 1983 and took silk in 2000. He is a Recorder and Assistant Boundary Commissioner, and he was one of the Attorney-General's junior Treasury Counsel from 1991-2000. He specialises in planning, environmental and public law (including most aspects of local government, compulsory purchase & compensation) as well as property related matters and the human rights and European Union law aspects of those areas of practice. He is recognised as a leading practitioner by *Chambers & Partners Directory 2008* & the *Legal 500*. David was named "Planning & Environmental Silk of the Year" at the 2007 Chambers Awards, Notable cases include *The Crossrail Bill* (currently before House of Lords' Select Committee), *Edwards* (2008, HL), *Barker* (2006, ECJ and HL), *Wells* (2004, QB and ECJ), *Alconbury* (2001, HL), *Pinochet (No.2)* (1999, HL), *Berkeley* (2000, HL), *Chapman* (2000, ECtHR) & *Dennis v. MOD* (2003, QB). He is advising and acting for Tesco on the planning and property aspects of the current Competition Commission inquiry into the Groceries Market. Major inquiries include the BSE Inquiry, the Windermere Inquiry & Dibden Bay inquiry. CPO regeneration inquiries include Oxford Westgate, Liverpool (City centre and HMRI), Derby, Darwen Academy and Guildford.

David is one of the editors of the Planning Encyclopaedia and author of a number of books and articles. For further information see: www.landmarkchambers.co.uk.

Tom Jefferies spent the first few years of his career at Freshfields, dealing with commercial property litigation and planning matters, including a number of large retail enquiries. He began practice at the Bar in 1990, where he has specialised in property litigation, including disputes with a planning aspect. Recent examples of such cases include a multi million pound claim against a pension fund for failing to use reasonable endeavours to obtain planning permission, enforcing a developer's obligation under a s106 agreement to pay £3m, and *Castlebay v Asquith* (2005, CA) on the meaning of "planning permission". Other notable cases include *Cadogan v Sportelli*, (2007, CA) on leasehold enfranchisement, *Hill v Transport for London* (2005) on adverse possession, *Royal Bank of Canada v Secretary of State for Defence* (2004) on break notices, and *Deakin v Corbett* (2003 CA) on sales by a mortgagee at an undervalue. He is recommended for property litigation in the *Legal 500* and *Legal Expert* directories. He was a founder committee member of the Property Bar Association, and is a CEDR accredited mediator. He is the contributor of the section on Mortgages in *Halsbury's Laws of England* (2005) and is co-author with John Male QC of the RICS Rent Review casebook.

LANDMARK CHAMBERS

180 Fleet Street
London, EC4A 2HG

Tel: 020 7430 1221

Fax: 020 7421 6060

Email: delvin@landmarkchambers.co.uk
tjefferies@landmarkchambers.co.uk

Part 1

by Tom Jefferies

INTRODUCTION

1. You are likely to encounter planning issues in connection with contracts or options conditional on the grant of planning permission. Typically the developer will agree to use reasonable endeavours to obtain planning permission, and has the right to withdraw if planning permission is not granted within a particular period of time. I will look at two common issues recently considered by the courts, or likely to arise very soon: what is meant by “planning permission”; and what happens where the option or contract period is extended by reference to the adoption of a local plan.

What is planning permission?

2. This may sound like a dumb question, but there is some misunderstanding about what planning permission is. Some think that it means the permission required to allow development to start. That is far from the case, and can give rise to confusion about the meaning of contractual provisions. Most sophisticated contracts provide in detail what constitutes an acceptable planning permission, but some simply provide that a contract is conditional on the grant of planning permission. What does that signify?
3. As a matter of planning law, the position is clear. Section 336 Town and Country Planning Act 1990 (“TCPA 1990”) defines “*planning permission*” as permission under Part III of the TCPA 1990. In Part III, Section 70 provides that the local planning authority may grant planning permission either unconditionally, or subject to conditions. Section 92 provides for the grant of outline planning permission, defined as “*planning permission granted ...with the reservation for subsequent approval ...of matters not particularised “reserved matters”*”. The form of an outline planning permission is the grant of permission

conditional on approval of reserved matters. “*Reserved matters*” are defined in Article 1 of the General Development Procedure Order 1995 (“GDPO”) as any of the details not given in the application for outline permission of siting, design, external appearance, means of access and landscaping.

4. The Act therefore draws a clear distinction between the grant of planning permission, and approval of reserved matters or of details required to be approved by a condition to the planning permission. An application for approval of reserved matters is not an application for planning permission.
5. The grant of planning permission, whether full or outline, establishes the principle of development. Its effect was described as follows in *R v Bromley LBC ex p Barker* [2002] 2 P&CR 8, CA at paragraphs 27 to 28:

“27. There is equally no doubt, again in domestic law, that the grant of outline permission gives to the developer a right to develop in accordance with the conditions attached to the permission, and subject to consideration of reserved matters, which cannot be used by a planning authority to frustrate that right. The authority is bound to act in accordance with the principle of development already established by the grant. 28. The right to develop established by the grant of permission is a valuable asset. By s. 75(1) of the 1990 Act it inures “for the benefit of the land and of all persons for the time being interested in it”. Further, although a planning authority has power to revoke or modify the grant of a planning permission, s. 107 of the 1990 Act entitles the person interested in the land to compensation if he has incurred expenditure which is thereby rendered aborted, or otherwise sustained loss or damage directly attributable to the revocation or modification of the grant.”

6. If planning permission is granted without any pre commencement conditions, development can commence immediately. More commonly however, what is granted is outline permission, conditional on approval of one or more reserved matters and subject to other conditions, which may need to be satisfied before development commences.
7. It is also not uncommon for local authorities to change its policies, its administration, or both, between the grant of planning permission and approval of reserved matters. This can lead local authorities to attempt to require significant changes to what was proposed by the developer in his application for planning permission.
8. The meaning of “planning permission” is clear as a matter of planning law, but not necessarily the same in a contractual dispute. In *Hargreaves Transport Ltd v Lynch* [1969] 1 WLR 215 the buyer entered a contract to buy a derelict site subject to the following condition:

"The said property is sold subject to the following further conditions:- (a) That the purchaser shall receive permission from the appropriate planning authority (i) to use the said property as a transport depot and (ii) to develop the said property by the erection of buildings, and carrying out such works and using the property in such manner as is appropriate for a transport depot and the carrying on of the purchaser's business of road haulage contractors in the manner in which it is customary according to modern practice in this type of business. For the purpose of this agreement planning permission shall not be deemed to be received if such planning permission is subject to a condition which the purchaser reasonably considers to be unacceptable."
9. The buyer agreed to use reasonable endeavours to obtain planning permission, and duly made an application to the Council. Outline planning permission was granted, subject to approval of reserved matters. Then, in the words of Lord Denning

“the local people got to know about it. There was an outcry by the residents in the neighbourhood. They complained bitterly of the prospect of having a transport depot next to them with great lorries coming in and out, and danger to the children running about in the street. The local newspapers came out with headlines such as "Planning decision a blunder" and "Benyon's folly." (Mr. Benyon was the chairman of the planning committee.) This campaign had its effect. On April 1, 1966, Hargreaves Transport, Ltd. submitted detailed plans for approval. On June 7, 1966, the details came up for approval before the council. The divisional planning officer reported in favour of them. The council engineer thought they were all right. But the council themselves would not have them. They refused to approve the details. On June 13, formal notices of refusal were issued, giving the reasons for the refusal:-

"(1) Development in accordance with the detailed plans submitted would be detrimental to the visual amenities of the occupiers of dwelling-houses in the vicinity of the site. (2) This is a permanent site at the junction of two busy classified roads and the detailed plans submitted do not show a satisfactory external appearance."

10. The buyer thereupon rescinded the contract, but the purchaser contended that the condition had been satisfied by the grant of outline planning permission. The Court of Appeal accepted that as a matter of planning law, the outline consent was the grant of planning permission, but nonetheless held that the condition was not satisfied, and that only detailed consent would be sufficient. Lord Denning held that

“In order to make the condition work sensibly it must mean that the purchasers are to receive detailed permission from the planning authority so as to be able to use the site as a transport depot and to develop it by putting buildings on it.”

11. Russell LJ considered that conclusion justified in the circumstances of the case, namely

“the urgency, known to both parties, for the purchaser to start to use the site as its depot as soon as possible; the uselessness of the site to the purchaser until the work could be started on it; the fact that the purchaser could not lawfully start work until a condition requiring approval of detail was resolved - those circumstances seem to me enough and just enough to justify the construction of clause 9 in the sense of it being a reference to such planning consent - again I use an intermediate word - as would enable work to start on the site.”

12. The Court also rejected a submission that the buyer was in breach of its obligation to use reasonable endeavours to obtain planning permission because it failed to appeal against the refusal of approval of reserved matters. The Court considered it not unreasonable to refuse to launch an appeal which might take six or nine months to resolve, however good the chances of success.

13. The decision in *Hargreaves v Lynch* formed the basis of a similar attempt by the developer in *Castlebay v Asquith* [2006] 2 P. & C.R. 22 to extend an option. Castlebay had granted Asquith an option to purchase some land for £1m. Asquith covenanted to use reasonable endeavours to obtain planning permission for “the Development”, defined as

“the demolition of any buildings on the Property and the construction and erection of dwellinghouses apartments and flats on the Property (with or without any other property) as the Grantee may require together with any car parking access roads and such other facilities and/or development as the Grantee shall

reasonably require to facilitate the development of the Property and any other property for residential purposes.”

The option was exercisable by notice by 22 December 2004 unless at that date "*a decision [was] awaited in respect of a planning application*", defined as "*an application for planning permission for the Development ...*". Asquith was granted outline planning permission on 15 August 2004 subject to 17 conditions, including approval of reserved matters. It applied for approval of the reserved matters on 17 December 2004, a few days before the option was due to expire. Castlebay contended that the option had determined on the ground that it had not been exercised within the time allowed and that the reserved matters application was not a planning application within the meaning of the agreement. Asquith argued that such an application was one for planning permission since it was one for permission without which the development could not proceed. It contended that "planning permission" should be construed widely and purposively.

14. The Court of Appeal held that there was nothing in the circumstances to justify construing "planning permission" in a wider sense than that used in the planning legislation. The drafting of the agreement showed that the parties had the provisions of the planning legislation fully in mind, and the words used should be given the meaning they bore as a matter of planning law.
15. In most well drawn documents, planning terms will usually bear their meaning in planning law. It is however important to bear in mind that both clients and some conveyancers can have misconceptions about what constitutes planning permission, and what is required before development can start. Whether a reference to planning permission includes detailed approval depends on the terms of the contract and sometimes the surrounding circumstances.

Development Plans

16. Even if the parties and conveyancers do understand the planning process, they may get caught out by changes in the planning system or legislation.

17. One topical example of this, which is bound to come before the courts soon, results from the changes to the development plan process. It is quite common for option periods granted to housebuilders to be extended either until the outcome of a planning application is known, or until the outcome of a local plan process is known. For example,

(a) One year after the date of formal adoption of the X Borough Council Local Plan following the review of the existing local plan adopted on [date]

18. The problem which arises is that the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”), which came into force on 28 September 2004, abolished the old development plan process. In order to explain the issue, I will outline the old development plan process, and the changes made by the 2004 Act.

The old regime

19. The reason for extending an option until the outcome of the local plan process is known is that the development plan is central to the planning process. Under section 54A of the 1990 Act, an application for planning permission was to be determined in accordance with the development plan unless material considerations indicate otherwise. This created a presumption in favour of development which was in accordance with the development plan (PPG1, para 25). The “development plan” consisted of the structure plan for the area and any alterations to it, prepared by the County Council, and the local plan for the area, and any alterations to it, prepared by the District Council.

These provisions were subsequently replaced by unitary development plans for London and other metropolitan areas, but it is not necessary to expand on that for the purposes of the issue I am considering.

20. The structure plan was required to provide general policies for the county over the plan period. The local plan was required to contain “detailed policies for the development and use of land in the area”, and a map illustrating them. See section 36 TCPA 1990. Thus for example, the West Sussex Structure Plan for the period 1993 to 2006 identified a strategic housing requirement for new dwellings over the period, of which a specified number were to be in the Horsham District. The Horsham District Plan for the period then identified specific sites allocated for new residential development, and showed them on the proposals map.

21. The local plan process was as follows. The Local Authority would deposit a draft local plan, and allow six weeks for objections and representations. A public enquiry would then be held by a planning inspector to consider objections. Typically, a local landowner or developer holding an option might seek to have its land allocated for housing. The Inspector would then report to the local authority, which would consider his conclusions, and amend the proposals as appropriate. It would then formally adopt the plan. The District Council could also alter or replace an adopted local plan under section 39 TCPA, following the same procedure as for adoption

22. Thus, in the example given above, there clearly was an adopted local plan, and a review (that is an alteration) was under way. The developer must have thought that there was a prospect of having the site allocated for housing in the reviewed local plan, in which case he could be confident that planning permission would be forthcoming for housing on the land.

The new regime

23. The Planning and Compulsory Purchase Act 2004 came into force on 28 September 2004. It introduced a new and substantially different system from the planning regime under the 1990 Act.
24. It remains the case that planning applications must be determined in accordance with the “development plan”, which unless material considerations indicate otherwise. See s38(2) of the 2004 Act. However, under s38, for any area of England outside Greater London, the “development plan” now consists of the regional spatial strategy (“RSS”) for the relevant region, and *“the development plan documents (taken as a whole) which have been adopted or approved in relation to that area”*.
25. Regional Spatial Strategies are, at present, interim continuations of former Regional Planning Guidance (“RPG”) ¹. These are intended to set policy at a more strategic, “spatial” level and will form the basis, together with national policy, on which DPDs must be formulated.
26. Subject to the saving provisions, there will be no single “local plan” under the new regime where the adopted policies, land allocation and proposals can be found. Local authorities are required to prepare a “local development scheme” (section 15) comprising different types of documents (s17), including core strategy statements, submissions proposals map, and area action plans. The 2004 Act provides for the adoption of “local development documents” some of which are “development plan documents”.
27. Schedule 8 to the 2004 Act contains transitional provisions. Adopted development plans were saved for 3 years, or until replaced by new policies if earlier, and for a longer period by direction of the Secretary of

¹ see Town and Country Planning (Initial Regional Spatial Strategy) (England) Regulations 2004 (S.I. No. 2206)

State. Different provisions applied to proposals for alteration and replacement, depending on the stage they had reached. If the LPA had not yet made proposals for alteration or replacement of a local plan available for inspection, they were required to take no further steps, whereas if the process had gone beyond that stage, the 1990 Act continued to apply subject to modifications. See Schedule 8 paragraphs 8 to 10 of the 2004 Act. During the transitional period, references to a development plan are treated as a reference to the RSS and the development plan under the 1990 Act. The initial 3 year transitional period expired on 28 September 2007, but the Secretary of State has saved some plans in whole or in part.

28. If there remains a prospect of adoption of an alteration to an adopted local plan, there might be no difficulty in applying the provisions of the contract I am considering. But what if there was, following the commencement of the 2004 Act, no prospect of the altered plan being adopted? Could one of the plans to be prepared under the 2004 Act be regarded as the “local plan”?

29. The first place to look is the local development scheme (“LDS”), which was the first document required to be prepared by each local planning authority. The LDS must specify (s15), inter alia, which documents are to be development plan documents (“DPD”s).

30. Section 37(3) defines a “development plan document” as a document which is (a) a local development document and (b) forms part of the development plan. In other words, a DPD is an LPD which has been approved or adopted. The local planning authority (“LPA”) must submit every DPD to the Secretary of State for independent examination (s20). No DPD may be adopted by the LPA unless the independent examination recommends that the document be adopted (s. 23). Adoption takes place by a resolution of the LPA (s. 23(5)), so the point in time at which a DPD is adopted is certain and easily ascertainable.

31. The regulations require² the preparation of

- (i) a core strategy document and
- (ii) an adopted proposals map.

32. If prepared, two other categories of documents must be DPDs (reg 6(1)):

- (i) area action plans and
- (ii) any other document which includes a site allocation policy.

33. Could any of these documents be regarded as equivalent to the Local Plan?

34. Core Strategies are defined in the Regulations at paragraph 6(1)(a) as

“any document containing statements of -

(i) the development and use of land which the local planning authority wish to encourage during any specified period;

(ii) objectives relating to design and access which the local planning authority wish to encourage during any specified period;

(iii) any environmental, social and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i);

(iv) the authority's general policies in respect of the matters referred to in paragraphs (i) to (iii)...”

35. For example, Horsham adopted a Core Strategy on 2 February 2007.

In relation to housing, it includes core policies such as

4 Housing Provision

Provision is made for the development of at least 10,575 homes and associated infrastructure in the District within the period 2001-2018.

² Regulation 6(1) of The Town and Country Planning (Local Development) (England) Regulations 2004 (“the Regulations”)

This includes:

- i. **1,810* completions between 2001-4;**
- ii. **1,395* homes already permitted or agreed for release;**
- iii. **at least a further 2,740 homes on previously developed land from 2004-2018;**
- iv. **the westward expansion of Crawley with 2,500 homes;**
- v. **the development of land west of Horsham for 2,000 homes; and**
- vi. **up to 314 homes as the small scale gradual growth of the smaller towns and villages in the District**

Policy 6

Strategic Location - West of Crawley

Development within the area west of Crawley north of the A264 will be permitted following the completion of studies to identify the precise form and nature of development and in accordance with the principles of development set out below, to be defined further in a Joint Area Action Plan for Land West and North West of Crawley. Development will be programmed in order to enable the completion of 2,500 homes and other uses, including employment provision, by 2018.

36. Horsham also adopted a Site Specific Allocation of Land document on 2 November 2007. It provides no specific allocation of the land west of Crawley, pending the Joint Area Action Plan. It does, on the other hand include specific allocations for housing elsewhere, such as

POLICY AL 4

Roffey Social and Sports Club, Horsham

Land amounting to 3.7 hectares is allocated for residential, recreation and leisure use. At a density of 70 dwellings per hectare, this site is expected to accommodate around 70 dwellings on 1 hectare of the site. Development will be subject to the following:

- a. **the provision of a significantly improved replacement social club building;**

- b. the provision of enhanced recreational facilities including the provision of a senior football pitch and further consideration of an all-weather pitch;**
- c. the provision of appropriate car parking;**
- d. appropriate accesses to be provided via Bryce Close and Honeysuckle Walk; and**
- e. enhanced boundary landscaping to protect the amenity of neighbouring properties and broaden the biodiversity of the site.**

37. In addition, Horsham has an adopted proposals map which is updated as and when new policies are approved and adopted.

38. As appears from Core Strategy Policy 6, Horsham envisages a Joint Area Action Plan, but none has been prepared so far. An Area Action Plan is defined by regulation 6(2)(a) as:

“any document which-

- (i) relates to part of the area of the local planning authority;*
- (ii) identifies that area as an area of significant change or special conservation; and*
- (iii) contains the authority's policies relevant to areas of significant change or special conservation...”*

39. There are therefore several differences between the old system and the new:

- (i) there used to be a “Local Plan”. Now there are Local Development Documents, some of which are Development Plan Documents, which taken together set out the policies;
- (ii) the Local Plan included all the policies, general and specific. Policies are now to be found in different documents;
- (iii) LDDs can be prepared and adopted at different times;
- (iv) some LDDs, such as the AAP, are optional.

40. Whether adoption of one or more of the DPDs can be regarded as the adoption of a Local Plan depends, of course, on the wording of the contract. The more specific the reference to a particular Local Plan, the less likely it is that it could be construed as a reference to a DPD.

41. Draftsmen try to guard against this problem by reference to, or inclusion of a term similar to that found in the Interpretation Act 1978:

s17 Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears,—

(2)(a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;

s23 “.. in the application of [section 17\(2\)\(a\)](#) to Acts passed or subordinate legislation made after the commencement of this Act, the reference to any other enactment includes any deed or other instrument or document.”

42. This provision will not assist because

- (i) the reference is to a Local Plan, not to an enactment;
- (ii) section 17 is directed to consolidating legislation. The Planning Act 2004 did not repeal or re enact the 1990 Act, but introduced substantially different provisions;
- (iii) the two systems have been, and in some cases still are running in parallel.

43. In a slightly different context, the courts have held that user clauses in a lease restricting use to that within a particular class of a particular use classes order cannot be construed as referring to the equivalent use class in a replacement use classes order. See *Brewers Company v Viewplan* [1989] EGCS 78; *Worcester City Council v AS Clarke (Worcester) Limited* (1995) 69 P&CR 562.

44. Issues to consider in a particular case may be

- (i) whether a term can be implied as to what would happen if the reviewed Local Plan could no longer be adopted;
- (ii) whether the parties are estopped by convention from disputing that the option continues pending the adoption of a DPD;
- (iii) whether the contract is frustrated.

45. Finally, do not get too used to the system introduced by the 2004 Act.

The government is already consulting on changes to it. But more of that another day.

Part 2

by David Elvin QC

1. Issues can arise which relate to a wide variety of concerns under the planning system and which have potentially serious implications for those with an interest in the land - whether it be the terms, and proper construction, of a permission applying to the land, whether lawful rights may have accrued over time, whether there are any enforceable breaches of planning control and, indeed, whether the authority may enforce against them. What follows is an attempt to gather together some specific issues which give rise to frequent difficulties without in any way being comprehensive³.

A. Conditions and obligations

2. All planning permissions are granted subject to conditions which define and limit their scope and impacts. Some conditions are mandatory, deemed to have been imposed even if overlooked, and some are imposed to meet the requirements of the specific proposals and the need to both define in sufficient detail the scope of the development and to mitigate any adverse effects which the development may have on the local environment, infrastructure or amenity.
3. Conditions can give rise to dispute in terms of their meaning or whether they have been complied with, in the most serious case, non-compliance may lead to the conclusion that the development is without permission.
4. In some cases, planning obligations are required (whether unilateral or multilateral) to perform similar tasks or secure necessary payments which cannot easily be dealt with by the imposition of conditions (conditions cannot require the payment of money, for example).
5. Conditions may be positive or negative in form and can be imposed:

³ It omits, for example, the entire EU dimension in terms of matters such as environmental impact assessment, the requirements of the Habitats and Wild Birds Directive through the Habitats Regulations 1994, waste and strategic environmental assessment. Human rights are less of an issue, since the planning system is inherently concerned in the balancing of the public interest and the interests of individuals: see *Lough v. First Secretary of State* [2004] 1 W.L.R. 2557 and *R (O'Brien & Others) v. Basildon DC* [2007] 1 P. & C.R. 16. See also *R. (Alconbury Developments Ltd.) v. Secretary of State* [2003] 2 A.C. 295 on human rights and the planning system generally.

- (1) On land within the application boundary (whether owned by the applicant or not);
 - (2) On land within the control of the applicant (s. 72(1)(a));
 - (3) In the case of negative (or “Grampian”⁴) conditions, there is no specific restriction since they are conditions which prevent e.g. the commencement of development, or its continuation beyond a certain point, or its occupation, in order to secure compliance with some essential prerequisite to the development (e.g. the opening of new highway) which cannot be secured by positive condition. In policy terms, the Secretary of State will not regard such conditions as acceptable if they are unlikely to be fulfilled within a reasonable period of time.
6. Planning obligations, positive and negative, run with the land through the statutory mechanism provided in s. 106 TCPA.
 7. Both conditions and planning obligations are enforceable by a variety of measures available to the planning authority: see below.

(i) Planning conditions

8. S. 70(1) TCPA provides

“(1) Where an application is made to a local planning authority for planning permission -

- (a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
- (b) they may refuse planning permission.”

9. A number of conditions are mandatory:

- (1) A standard condition limiting the time in which the permission may lawfully be implemented (s. 91 TCPA). The general rule is that implementation of permission should be commenced within three years from grant, but this is subject to enlargement or reduction if the development plan and circumstances so justify (s. 91(1), (2)). If such a condition is omitted, a three year time condition is deemed to have been imposed by virtue of s. 91(3). The three years must run from grant and not from any future contingent date.

⁴ See **Grampian Regional Council v. City of Aberdeen** [1984] J.P.L. 590 and **British Railways Board v. Secretary of State for the Environment** [1994] J.P.L. 32.

- (2) On outline permissions⁵, or those partly in outline, “reserved matters” conditions must be imposed to require the details of the development which have not been defined by the outline permission to be submitted and approved prior to commencement of development (s. 92 TCPA). The general rule is a condition should be imposed on the outline permission that
- (a) the application for approval of reserved matters must be made within a period of three years from the date of grant of the outline and
 - (b) development must then be begun not later than the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved (s. 91(2)).
 - (c) Those periods may be amended if the planning authority considers it to be justified(s. 91(4)). If such a condition is omitted, it will be deemed to have been imposed in the general terms set out in s. 91(2) TCPA (s. 91(3)).

10. “Reserved matters” are defined by Art. 1(2) of Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) as follows:

“in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect of which details have not been given in the application - (a) access;(b) appearance;(c) landscaping;(d) layout; and (e) scale, within the upper and lower limit for the height, width and length of each building stated in the application for planning permission in accordance with article 3(4

11. S. 70(1) and 72 TCPA 1990 allow the imposition of conditions and, in practice, it is usual for there to be a number of conditions. It is generally good practice for planning authorities to define with sufficient precision the parameters of the development which has been permitted and, where definitive plans and elevations have been submitted, to condition the development to those plans (perhaps save where they otherwise approve in writing).

⁵ Defined by s. 92(1) as “planning permission granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority or the Secretary of State of matters not particularised in the application (“reserved matters”)” and Article 1(2) of the Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) as “a planning permission for the erection of a building, which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters”.

12. Where environmental impact assessment is required⁶ prior to the grant of permission, even in an outline case, the conditions must set the parameters of the development (including the parameters of such flexibility as may otherwise be permitted by an outline permission) to ensure that the final form of the development lies within the range of impacts which have been environmentally assessed and consulted upon⁷.

13. Conditions are subject to both policy and legal limitations:

- (1) As a matter of law⁸, conditions must
 - (a) be imposed for a "planning" purpose and not for any ulterior purpose⁹;
 - (b) fairly and reasonably relate to the development permitted by the planning permission; and
 - (c) not be so unreasonable that no reasonable planning authority could have imposed it.
- (2) In policy terms, the Annex to DOE Circular 11/95 sets out a series of detailed policy guidelines for the imposition and drafting of conditions which are generally adhered to by planning decision makers.
 - (a) They include the general requirements that conditions must be necessary; relevant to planning; relevant to the development to be permitted; enforceable; precise; and reasonable in all other respects (Annex, paras. 14-35).
 - (b) Conditions should be tailored to meet the reasonable requirements of the specific development and not simply impose unjustified and arbitrary controls. Where a condition is not appropriate it may be necessary to require a planning obligation as a precondition to the grant of permission.

⁶ See Town and Country Planning (Environmental Impact Assessment) (England & Wales) Regulations 1999 (1999/293) and European Council Directive of 27 June 1985 "on the assessment of the effects of certain public and private projects on the environment" 85/337/EEC (as amended).

⁷ See e.g. *R v. Rochdale Metropolitan Borough Council, ex p. Milne* (2000) 81 P & CR 365 and *R (Barker) v. Bromley LBC & Secretary of State* [2006] 3 W.L.R. 1209 and the ECJ decisions in *Commission v. UK* Case C-508/03 and *Barker* Case C-290/03 [2006] Q.B. 764. EIA is a complex subject and requires detailed consideration.

⁸ *Newbury DC v. Secretary of State for the Environment* [1981] A.C. 578.

⁹ E.g. the ulterior motive of regulating housing supply - *R. v. Hillingdon LBC ex p. Royco Homes Ltd* [1974] 1 Q.B. 720.

(c) They also underline the fact that planning is generally concerned with the land use considerations of planning and with the use and occupation of land generally, and not with personal circumstances or matters particular to the developer. Planning permission runs with the land and is generally considered in that light. Only in exceptional cases will conditions be permitted to limit the occupation of land or to restrict the categories or potential occupier. Human issues are not wholly excluded from planning¹⁰, but they only rarely lead to permissions based on personal circumstances (often in cases involving hardship to gypsies lacking lawful sites) which are made personal to the occupation of the applicants.

(d) Conditions making permissions temporary are also not encourage except in limited cases where there is a genuine basis for a trial period or the sort of case where personal circumstances are so compelling that they lead to the grant of a short term permission.

14. Conditions may be varied either by a normal application for a fresh planning permission or by an application under s. 73 TCPA for permission to develop without compliance with one or more of the conditions currently attached to a permission. In the latter case, even the grant of a variation or deletion to an existing condition does not preclude the power of the planning decision maker to impose other conditions which may be seen as necessary to deal with the consequences of the relaxation. A successful application results in a fresh grant of permission, leaving the original intact¹¹.

15. S. 73 applications may not be used if the proposed variation would amount to a significant change to the nature of the planning permission which is proposed to be varied¹².

¹⁰ *Westminster City Council v. Great Portland Estates Ltd.* [1985] A.C. 661, at 669-671.

¹¹ Although inconsistent permissions cannot be implemented. If one of a number of inconsistent permissions is implemented, making the others physically impossible to carry out in accordance with their exact terms, this precludes the implementation of the others. See e.g. *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527 and *Staffordshire CC v. NGR Land Developments Ltd* [2002] EWCA Civ 856.

¹² See *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72, *R. v Leicester City Council Ex p. Powergen U.K. plc* [2000] J.P.L. 1037 and *R. v Coventry City Council ex p. Arrowcroft Group Plc* [2001] P.L.C.R. 7 (application to vary a condition requiring one large store to 6 smaller units held to be fundamentally different to the original permission and to fall outside the powers of s. 73)

(ii) Planning obligations – s. 106 TCPA 1990

16. S. 106 TCPA gives power to enter into obligations by deed to regulate the use and development of land or to require sums of money to be paid on a specified date(s) or periodically. Such obligations may be entered into unilaterally by the developer or with the planning authority and such other parties as may be necessary (e.g. mortgagees). This allows for a flexible and wide reaching power to regulate land, impose covenants in the public interest and to enforce them against the person entering into the obligation and anyone deriving title from that person.
17. Such obligations can be used to ensure the provision of a local bus service, improvements to local highways or other infrastructure, contribute to the provision of local education for new housing, provide affordable housing and similar. Often the subject of lengthy negotiation between developers and planning authorities, if agreement is not reached and permission is refused, a developer can seek the Secretary of State's decision on appeal and there proffer what is considered to be a reasonable set of obligations.
18. In policy terms, planning obligations should not be used where conditions can properly be imposed¹³. Conditions are simpler to vary whereas the process for the variation or discharge of planning obligations, if not by agreement, is more complex¹⁴ and an application may only be made after 5 years¹⁵. An obligation may be discharged, for example, only if it no longer serves a useful purpose, though not necessarily the original purpose.
19. The legal requirements for a valid planning obligation have given rise to some difficulty in the past but are less prescriptive than for conditions and, in addition to being within the powers of the section, must be reasonable¹⁶.
20. In policy terms, obligations must be proportionate and must not be used for ulterior purposes or for securing unjustified planning gain. The policy tests are similar to those for conditions: obligations should only be required if they are: relevant to planning; necessary to make the proposed development acceptable in planning terms; directly related to the proposed

¹³ The policy guidance for obligations is found in ODPM Circular 05/05.

¹⁴ Ss. 106A and 106B. See **R (The Garden and Leisure Group Ltd) v. North Somerset Council** [2003] EWHC 1605 (Admin). S. 84 of the Law of Property Act 1925 which applies to agreements entered under the predecessors to this provision (introduced in 1991) does not apply: s. 106A(10).

¹⁵ Or within such other time as may be prescribed. None has been prescribed.

¹⁶ **Tesco Stores Ltd. v. Secretary of State** [1995] 1 W.L.R. 759.

development; fairly and reasonably related in scale and kind to the proposed development; and reasonable in all other respects¹⁷.

21. A fundamental principle, reflecting litigation over many years¹⁸ is

“that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms...”¹⁹

22. Obligations are enforceable by injunction, at the instance of the planning authority, and may be enforced (whether positive or negative in form) against anyone “deriving title” from the original party to the obligation. The only exception (barring a discharge from the authority) is that²⁰:

“The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.

23. Given the public interest character of the provision and its policy of binding all with some interest in the land bound by the obligation there is (contrary to the common assumption) a real probability that mortgagees are bound by planning obligations even when not in possession. As a matter of practice, mortgagees of the land to be bound are usually required by the authority to be a party to the obligation but provision is usually made to exclude them unless in possession. This might, if valid, allow them to escape having to make payment of sums of money stipulated by the obligation but there is doubt as to their efficacy given:

- (1) Such a clause does not fall within s. 106(4) (no longer has an interest); and
- (2) Such a clause is contrary to the mandatory provisions of s. 106(3) which make an obligation enforceable against parties to the obligation and persons deriving title²¹. There is no general right to be excluded other than on the limited s. 106(4) grounds.

¹⁷ ODPM 05/05 Annex B para. B5.

¹⁸ See *Tesco*, above, and e.g. *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240.

¹⁹ ODPM 05/05 Annex B para. B6.

²⁰ S. 106(4).

²¹ “Deriving title” is not exhaustively defined by s. 336(8) TCPA although it is provided at (c) that “references to deriving title are references to deriving title either directly or indirectly”. See *Escalus Property Ltd. v. Robinson* [1996] QB 231 at 250 (Nourse L.J.) for a view as to the meaning of this phrase in purely private law terms.

B. The construction and scope of planning permissions

24. Significant difficulty can be caused if the planning authority does not adequately define the scope of the development it has permitted. Sloppy and inadequate drafting may harm not only the party which has the benefit of the permission but it may harm the wider public interest if it does not properly control what should be controlled. Although powers exist for planning authorities to revoke or modify permissions, such powers are rarely invoked since they carry with them the obligation to pay compensation for the impact of the revocation or modification on the value of the land affected. While the courts have taken a pragmatic approach to construction of permissions, there are limitations on what the planning code can allow which arise from the public nature of permissions, the information available to the public on the planning register and the need for certainty and clarity.

25. Planning permissions should be given a common sense, and non-legalistic meaning: see ***Carter Commercial Developments Ltd. v. Secretary of State*** [2003] J.P.L. 1048 at para. 27, *per* Arden L.J. (“*this planning permission is not to be construed like a commercial document, but is to be given the meaning that a reasonable reader would give to it*”), and ***Northampton BC v. Secretary of State & Land Securities*** [2005] EWHC 168 (Admin) para.s 22 and 26, *per* Sullivan J.

26. Planning law leans strongly against the use of material extrinsic to the permission itself to construe the permission: ***R (Belgrave Land Ltd.) v. Secretary of State & Bedford BC*** [2001] EWHC Admin 1127, paras. 46-64²².

27. The principles of construction applicable to planning permissions were set out by Keene J. in ***R v. Ashford BC ex p. Shepway DC*** [1998] J.P.L. 1073:

“The legal principles applicable to the use of other documents to construe a planning permission are not really in dispute in these proceedings. It is nonetheless necessary to summarise them:

1. The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the

²² Here the issue was that of the scope of a planning permission for a district centre, and whether it contained a limitation upon any food store that might have been included in an application for approval of reserved matters to a “*supermarket... appropriate to satisfy only the needs arising from new development*”.

express reasons for those conditions: see *Slough Borough Council v Secretary of State for the Environment* (1995) JPL 1128, and *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196.

2. This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v Secretary of State* (ante); *Wilson v West Sussex County Council* [1963] 2 QB 764; and *Slough Estates Limited v Slough Borough Council* [1971] AC 958.

3. For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as "... in accordance with the plans and application ..." or "... on the terms of the application ...", and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: See *Wilson* (ante); *Slough Borough Council v Secretary of State for the Environment* (ante).

4. If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see *Staffordshire Moorlands District Council v Cartwright* (1992) JPL 138 at 139; *Slough Estates Limited v Slough Borough Council* (ante); *Creighton Estates Limited v London County Council* (1958) *The Times*, 20th March 1958.

5. If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see *Slough Borough Council v Secretary of State* (ante); *Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P&CR 223 affirmed (1981) 42 P&CR 1."

28. Where a local planning authority has omitted to impose a condition which it intended to be imposed, it cannot rely on extrinsic material to introduce a limitation: ***Polhill Garden Centre Ltd v. Secretary of State*** [1998] J.P.L. 1070. In that case the High Court held:

"Even in a case where the permission does incorporate the application I have the gravest reservation as to whether the information, which is generally given on about page 3 of the application form, here called "Planning Application Form 2" can properly be treated as part of what is actually permitted or even used as an aid to construction save to resolve an ambiguity or mistake. It is usually, as here, merely

supporting information giving such detail as not only the proposed Floorspace areas but also the anticipated numbers of employees, hours of work and numbers of vehicles, usually as here on the same page. The latter definitely do not form part of the permission unless appropriate conditions are imposed. Accordingly, I have the greatest difficulty in understanding how the former, the Floorspace areas, can form part of the permission, that is unless an appropriate condition is imposed or the measurements are included in the description of the development which is permitted, or there are permitted drawings which show inter alia the Floorspaces. All this information is, in my view, no more than an attempt to show what is in mind at the time the application is made. Unless it is made to form part of the permission in one of the ways I have described, the developer is not "stuck" with it when he or his successor comes to implement the permission or a later phase of it, maybe years later, and maybe after realisation that there can be an improved implementation of the same permission."

29. If a planning authority wishes to impose restrictions on the quantum, proportion, disposition or distribution of uses when granting planning permission, it must do so by an express condition which sets out the specific restrictions or does so in a condition which in terms refers to a schedule or specific plan. Planning law, because of the importance of the public planning register (in which the details of all applications and permissions must be registered and available for public access), requires restrictions to be imposed in express terms by condition. The only exceptions to this are the terms of grant which describe the use permitted and the use implied by permission for operational development: see s. 75(2) and (3).

30. In ***Wilson v. West Sussex County Council*** [1963] 2 Q.B. 764, at 776-777, the Court of Appeal determined whether a cottage was subject to an agricultural occupancy restriction not by reference to the description in the grant of planning permission but by virtue of the incorporation of the terms of the planning application (emphasis added):

"The basis on which the member of the Lands Tribunal proceeded has largely, I think, disappeared from the case. He appears to have taken the view, which he expressed in the reasons which he gave for his decision, that the effect of introducing the word "agricultural" was to import into the planning permission an implied condition that the cottage should only be occupied by one employed locally in agriculture. If that were the right view, it would, of course, follow that the express condition imported by the modification order really made little or no difference. Mr. Megarry submitted with some force that it would not be right to imply conditions in a planning permission, where there is power under the Act to impose express conditions and that power has not been exercised.

But I need not pursue that matter because Mr. Ryan has not sought to defend the decision of the Lands Tribunal on the basis of any such implied condition...”

31. In ***R v. Newbury DC ex parte Chieveley Parish Council*** [1999] P.L.C.R. 51 the Court of Appeal held that if a planning authority wished to limit the quantum of development it should do so by condition and that it could not use the “design” or “siting” reserved matters to control floorspace in principle. Pill L.J. held (emphasis added):

“The procedure whereby application may be made for outline permission is a valuable one in that ... it enables the principle of development and land use to be established without the need to investigate detailed matters at that stage. If the planning authority wish to determine the scale of development at that stage, they may impose conditions for example as to the number of houses per hectare in a residential development or the permitted floor space of a building...

... Gross floor space cannot in my view be brought within the words “siting” or “design” ... especially when those words are read with the words “external appearance”, “means of access” and “landscaping of the site”. None of these words is appropriate to govern the scale of development in the statutory context. If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance...”

32. Even the general context of the permission will not be sufficient to imply a restriction. Sullivan J. held in ***R (Belgrave Land Ltd.) v. Secretary of State & Bedford BC*** [2001] EWHC Admin 1127 when considering whether a permission for a district centre had controlled the size of a foodstore within it (emphasis added) :

“33. The focus must be on the terms of the permission because it is at the outline planning permission stage that the scope of the planning permission is established. If the outline planning permission does not limit, for example, by way of a floor space condition, the role of the district centre in terms of its retail catchment, then such a limitation, beyond that necessarily implicit in term district centre, cannot be introduced at the reserved matters stage...

55. If the local planning authority wishes to limit the size of a district centre or any element within it, or a local centre, a retail warehouse, or a hypermarket, the time to do so is at the outline planning permission stage.

56. The imposition of floor space conditions on retail permissions is... a well established practice. If the council wished to limit the size of the supermarket to be provided within this particular district centre to one appropriate to serve any particular catchment population, it could easily have done so, by the imposition of a floor space condition, at the appropriate stage.

57. No such condition was imposed. It follows that... it is of no consequence that the supermarket may be appropriate to serve more than the needs arising from the new development in the loop.

58. The council's submissions provide a very good illustration of the reasons why the rule against considering extrinsic evidence should be strictly applied. It is wholly unsatisfactory to have to trawl through the local planning authority's file, back to 1994, and to look at notes of meetings, held over 7 years ago, in order to determine the meaning of a planning permission in 2001... ”

33. There is accordingly no scope in planning law for implying conditions. Summarising the law, in ***R (Hart Aggregates Ltd) v. Hartlepool BC*** [2005] 2 P. & C.R. 31 Sullivan J. stated:

“58. Going back to first principles, the starting point should be the proposition that there is no scope for implied conditions in a planning permission. If a local planning authority wishes to impose any obligation upon an applicant by way of a requirement or prohibition, it should do so in express terms, because failure to comply with the condition may, ultimately, lead to prosecution for failure to comply with a breach of condition notice and/or an enforcement notice; see sections 179 and 187(A) of the 1990 Act. The need for a local planning authority to spell out any requirement or prohibition in clear terms applies with particular force where the condition is said to prevent not merely some detail of the development, but the commencement of any development pursuant to the planning permission.”

34. Moreover, there is no scope for “limitations” on a permission even were there material to support some limitation or definition of the scope of a permission (e.g. in the words of description of the permission, but words not repeated by condition). In ***I’m Your Man v. Secretary of State*** [1998] 4 P.L.R. 107, the High Court held that “limitation” had a restrictive meaning by reference to development orders at pp. 6-7 (emphasis added)²³:

“The 1990 Act does not expressly provide a power for the imposition of limitations on the grant of planning permission pursuant to an application.

²³ This aspect of the decision was doubted, obiter, by members of the Court of Appeal in ***Jeffery v First Secretary of State*** [2007] EWCA Civ 584. Jacob LJ (with whom Hughes LJ agreed), reserved his view as to the correctness of the decision although it was not criticised by Keene LJ and it is not easy to discern the reason for the concern.

The argument for necessary implication of that power relies upon the reference to breach of condition or limitation in the context of the enforcement-related provisions, supported by the absence of any re-enactment of section 38 of the 1959 Act. In my judgment, the references in the enforcement-related provisions to breach of limitation as well as condition are equally consistent with a reference to limitations expressly authorised as part of the power to grant permission by a development order. That does not, to my mind, necessarily imply that the planning authority or the Secretary of State have a statutory power to impose limitations on permissions granted on an application that would be amenable to enforcement under the Act... 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."

35. In ***Eastleigh BC v. First Secretary of State*** [2004] EWHC 1408 (Admin)²⁴ Collins J. followed the approach in ***I'm Your Man*** and stated at para. 22:

"22. It was submitted that the planning permission originally, and indeed subsequently, was limited to whatever the relevant square footage then permitted was, and that that limitation means that there is a material change. It seems to me that it is wholly unnecessary for me to deal with that particular argument in the light of ***Brookes and Burton***. Suffice it to say that it seems to me that that argument simply cannot prevail. The fact is that limitations such as those do not amount to conditions -- indeed, the contrary is not and could not be argued -- and accordingly, they can have no effect when one is concerned with what otherwise would be a change of use, because change of use presupposes that there is a change between before and after, and the

²⁴ Summary at [2004] 24 EG 149 (CS).

use of the building is plainly for the purposes of shop. That approach is consistent with a decision to which my attention has been drawn, *I'm Your Man Ltd v Secretary of State for the Environment ...*”

36. Accordingly, for the moment and in accordance with the preponderance of authority, planning law in general requires the definition of a planning permission to be defined in express terms by its description and conditions, preferably by express conditions.
37. The approval of reserved matters must fall within the scope of the outline permission and does not provide an opportunity for revisiting the principle of the grant of outline permission. As Sullivan J. pointed out in the *Belgrave Land* case at para. 58 (emphasis supplied) –

“There may indeed be arguments that the supermarket is too large in design terms. If so they can be pursued before the Inspector. But, the existence of such arguments does not mean that the application for approval of reserved matters is outwith the scope of the outline planning permission.”

C. Implementation of planning permissions

38. Planning permissions are generally of financial interest in that they usually enhance the value of the land by establishing the parameters of lawful development, e.g. permission for a housing estate or for a supermarket may enhance the existing agricultural value of green fields or the value of a derelict urban site.
39. Issues arise concerning the lawful implementation of the permission within the timescale permitted by the conditions imposed on the permission. An attempt to implement following expiry of the time limit is development without permission, is in breach of planning control, and may be the subject of enforcement action.
40. An attempt to implement the planning permission in breach of a negative “Grampian” condition (which prohibits the commencement or use/occupation of development without compliance with some prior requirement) is generally development without planning permission and is in breach of planning control: see *Whitley & Sons v. Secretary of State for Wales* (1992) 64 P. & C.R. 296 and *Henry Boot Homes Ltd v. Bassetlaw DC* [2003] 1 P. & C.R. 23. There may be limited exceptions to this principle, but they are very limited e.g. carrying out work to keep a permission alive prior to approval of reserved matters (and thus in breach of the negative reserved matters condition) which are subsequently approved pursuant to an application validly made but after the time for

expiry of the permission.

41. S. 56 deals with the time when development is begun for the purposes of ss. 91 and 92 (among others):

“56. Time when development begun

(1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated -

(a) if the development consists of the carrying out of operations, at the time when those operations are begun;

(b) if the development consists of a change in use, at the time when the new use is instituted;

(c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b).

(2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. ...”

42. The key issue is therefore the carrying out of “material operations” and the date when they are carried out. However, the cases on commencement through “material operations” are not always capable of distillation into a simple set of principles. Although there has been a short-lived attempt to build in a concept of bona fides into the issue²⁵, the courts have apparently returned to the former view that the issue is determined by considering the nature of the steps actually taken to determine whether they amount to a “material operation” which can be said to have implemented the planning permission.

43. “Material operations” could amount to any operation to implement the permission which is something which can clearly be attributed to development in accordance with the permission²⁶. Operations of an ambiguous, or *de minimis* nature, clearly run the risk of not being considered to be sufficiently material for the purposes of the section.

²⁵ **Hillingdon LBC v. Secretary of State for the Environment** [1990] J.P.L. 575 and **R. v. Arfon BC, ex p. Walton Communications Group Ltd** [1997] J.P.L. 237.

²⁶ A related issue has arisen in recent years, where the introduction of a new requirement for planning permission to enlarge internal floorspace beyond 200 sq.m. (especially in retail units by the creation of mezzanines) led to a large number of retailers keeping their options open by carrying out works to begin the construction of mezzanine floorspace but without completing the works prior to the commencement of the new provisions. Here the issue turned on the wording of the transitional provisions, rather than s. 56, but it was similar to the material operations question.

44. At one extreme lies **Malvern Hills District Council v. Secretary of State for the Environment** (1983) 46 P. & C.R. 58 where “material operations” were held to have been carried out through the marking out of the line and width of a road with pegs. However, the principle explained by Eveleigh L.J. is a sound one:

"Sections [91 and 92] seek to ensure that land will not be held undeveloped for an indefinite period in the hands of speculators whose only intention is to sell the land at some future propitious date at the enhanced value that development permission attracts. Section [56] seeks some earnest of intention to develop. The specified operations are not necessarily very extensive. Very little need be done to satisfy the section. That which is done, however, must genuinely be done for the purpose of carrying out the development. Section [56] is a benevolent section which aims at avoiding hardship to a developer who is genuinely undertaking the development."

45. However, other than the question of *de minimis*, the issue is not on the amount of work carried out but whether it is related to the planning permission involved. In **Thayer v. Secretary of State for the Environment** [1992] J.P.L. 264 the Court of Appeal held that an inspector had been wrong to find that the opening of a 12 foot gap in a hedge and ground preparation did not constitute a specified operation in relation to a planning permission for the erection of a house and garage. On the other hand, and illustrating the very fact-intensive nature of the determination, the court in **R. (Connaught Quarries Ltd) v. Secretary of State for the Environment, Transport and the Regions** [2001] 4 P.L.R. 18 upheld an inspector's finding that works which "*solely comprised the scooping out of a section of hedge in the rough position of the new access*" were not material but were *de minimis*. What may appear to be an inconsistency arises from the fact that the Court is simply reviewing the lawfulness of the decision made on the facts of the case by the planning decision-maker. The Courts have repeatedly emphasised that their role is not to interfere on the merits of a planning judgment or to usurp the role of the primary, expert decision maker²⁷.

²⁷ As Sullivan J put it in **R (Newsmith Stainless Ltd) v. Secretary of State** [2001] EWHC 74 (Admin) at para. 6, an application to the Court "*is not an opportunity for a review of the planning merits of an Inspector's decision*". At para. 7 he added: "*In any case where an expert tribunal is the fact finding body, the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? Et cetera. Since a significant element of judgment*

46. The attempt, mentioned above, to introduce the concept of subjectivity and *bona fides* into the carrying out of material operations, appears inconsistent with the statutory code and was rejected by the Court of Session in ***East Dunbartonshire Council v. Secretary of State for Scotland*** [1999] 1 P.L.R. 53 (Lord Coulsfield):

“It would be particularly undesirable, in our opinion, to attempt to introduce into the statutory code requirements which were not capable of reasonably precise definition. As was submitted on behalf of the second respondents, a requirement that the specified operation should be undertaken with some sort of intention in regard to the carrying out of the development would be one extremely difficult to define and apply. A developer faced with the likely expiry of a planning permission may undertake a specified operation in the clear expectation that he will proceed to complete the whole development: on the other hand, he may undertake the specified operation with a more or less well-justified expectation of being able to raise finance which he does not currently have or to sell the site to a customer whom he expects or hopes to be interested. Again, a developer may have mixed motives for undertaking an operation. ... Where the developer has or may have mixed motives and purposes, the application of any test of genuine intention becomes even more complicated. If there were any such test, it might have been expected that it would, by this time, have been clearly defined by authority... the statute prescribes time limits and also prescribes the circumstances in which planning permissions are to continue in force beyond those time limits, and does so without any requirement as to intention. It seems to us therefore that to add a requirement as to intention would clearly go beyond what the statute prescribes.”

47. ***The East Dunbartonshire*** objective approach has now been followed in this jurisdiction by the Administrative Court in several cases²⁸ and by the Court of Appeal in ***Staffordshire CC v. Riley*** [2002] P.L.C.R. 5, paras. 26-28 (where the stripping of topsoil was held to be insufficient for the purposes of beginning a permission for the extraction of minerals).

D. Lawful development established by passage of time

48. In addition to lawful rights being obtained by express permission or development order (or even statute²⁹) it is possible to obtain lawful development rights by the passage of time and to have such rights

is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.”

²⁸ ***Riordan Communications Ltd v. South Bucks District Council*** (2001) 81 P. & C.R. 8, ***R (Ashfield & Others) v. National Assembly for Wales*** [2003] EWHC 3309 (Admin), ***Field v. First Secretary of State*** [2004] EWHC 147 (Admin) at para.s 32-34 and ***Aerlink Leisure Ltd. v. First Secretary of State*** [2005] 2 P. & C.R. 15 para. 17.

²⁹ See the provisions of the Crossrail Bill currently before Parliament.

certified by a formal application under s. 191 TCPA.

49. The time limits which govern the acquisition of lawful development rights are those which govern the time within which enforcement action for breach of planning control may be brought: see s. 171B TCPA. Where those limits have expired, s. 191(2) TCPA deems the development in question to be lawful:

“(2) For the purposes of this Act uses and operations are lawful at any time if -

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.”

50. The time limits are as follows (s. 171B(1) to (3)):

(1) For the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, 4 years from date on which the operations were substantially completed³⁰.

(2) For the change of use of any building to use as a single dwellinghouse³¹, 4 years from the date of the breach.

(3) For any other breach of planning control (development in breach of a condition which does not fall within one of the above categories³²), 10 years from the date of the breach.

51. There are, as might be expected, various complexities which disturb the apparently clear picture set by the above provisions. For example, identifying the precise date of breach can be difficult with a change of use which occurs over a period of time and, where there is such a change of use, it must have been continuous for the period of 10 years required by s. 171B: ***North Devon District Council v. Secretary of State for the Environment*** [1998] E.G.C.S. 72.

³⁰ For “substantially completed” see ***Sage v. Secretary of State for the Environment, Transport & the Regions*** [2003] 1 W.L.R. 983.

³¹ For cases of subdivision, see ***Van Dyck v. Secretary of State for the Environment*** [1993] 1 P.L.R. 124.

³² Where there is a breach of condition, which might otherwise attract the 10 year rule, brings the case within one of the other categories, it appears that the shorter period of the other category applies: ***First Secretary of State v. Arun DC & Brown*** [2006] EWCA Civ 1172

52. The procedure for obtaining a lawful development certificate (certificate of lawfulness of existing use or development, CLEUDs)³³ is found in s. 191, 193-196 TCPA and guidance is contained in DOE Circular 10/97 Annex 8.

E. The planning code and the subversion of formalities

53. Unlike private law concepts, planning law is entirely the creation of statute (with such judicial intervention as is necessary to make the statutory code operate), operated in the public interest, and should be approached as such. The position was explained by Lord Scarman in *Pioneer Aggregates Ltd. v. Secretary of State* [1985] A.C. 132 at 143-144 in terms which are the touchstone of the modern approach to planning:

“Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole ...”

54. For such reasons, Lord Scarman rejected the application of the concept of abandonment as understood in private law and restricted its effect to circumstances which arise out of the planning code itself:

“My Lords, on the question of abandonment I find myself in agreement with both courts below that there is no such general rule in the planning law. In certain exceptional situations not covered by legislation, to which I shall refer, the courts have held that a landowner by developing his land can play an important part in bringing to an end or making

³³ There is a similar procedure for establishing the lawfulness of a proposed use or development (CLOPUDs) in s. 192, but this is not concerned with lawfulness established over time but with e.g. the construction of permissions or the extent of development rights, or the requirement for permission.

incapable of implementation a valid planning permission. But I am satisfied that the Court of Appeal in the **Slough** case erred in law in holding that the doctrine of election between inconsistent rights is to be incorporated into the planning law either as the basis of a general rule of abandonment or (which the courts below were constrained to accept) as an exception to the general rule that the duration of a valid planning permission is governed by the provisions of the planning legislation. I propose now to give my reasons for reaching this conclusion. ... [see passage quoted above]

... Viewed as a question of principle, therefore, the introduction into the planning law of a doctrine of abandonment by election of the landowner (or occupier) cannot, in my judgment, be justified. It would lead to uncertainty and confusion in the law, and there is no need for it. There is nothing in the legislation to encourage the view that the courts should import into the planning law such a rule - recognised though it is in many branches of the private law (e.g. the law of easements, the commercial law, and the law of trade marks)..."

55. Since **Pioneer aggregates**, the courts have emphasised more strongly the relevance of the statutory code and the inappropriateness of importing doctrines of law not present in the legislation. See e.g. **Henry Boot Homes Ltd v Bassetlaw DC** [2003] 1 P. & C.R. 23 where Keene L.J. (giving the judgment of the Court of Appeal) quoted Lord Scarman in **Pioneer** and then added:

"48. The House of Lords was there dealing with the statutory code contained in the Town and Country Planning Act 1971. Since that time, as Sullivan J. noted in the present case (para.137), the code has become even more comprehensive."

56. In **R (Reprotech (Pebsham) Ltd) v. East Sussex County Council** [2003] 1 W.L.R. 348, para. 33, Lord Hoffman (dealing in that case with estoppel) noted the limited relevance which private law concepts (which include abandonment) have in planning:

"33. In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in **Newbury District Council v Secretary of State for the Environment** [1981] AC 578, 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone". (See also Dyson J in **R v Leicester City Council, Ex p Powergen UK Ltd** [2000] JPL 629, 637.)"

57. Lord Mackay added (in agreement with Lord Hoffman) at para. 6:

“6. I would also wish expressly to agree that where public authorities are fulfilling statutory duties or exercising statutory discretions, the public interest in their activities and the effect on members of the public who are not parties to the particular process which the authority is conducting requires the law to differentiate clearly between such activities and those in which interests only of those directly involved must be considered. I therefore respectfully agree with Lord Hoffmann that the time has come for public law in this area to stand upon its own two feet. If it does so, I believe greater clarity will result than if it is treated as standing upon some less discrete base.”

58. There is thus no general concept of abandonment in planning law, given the predominance of the statutory planning code and a permission or lawful use can only be lost in one of three ways, namely: abandonment in fact of an *existing* use (in circumstances which would no longer apply given the difference between former immune and current lawful uses³⁴), formation of a new planning unit or a material change of use (whether by way of implementation of a further planning permission, or otherwise)”

59. The ***Reprotech*** decision was also the death-knell of estoppel in planning³⁵. Its role, to the extent that this may be consistent the public interest, in particular the need for public consultation and transparency, is taken by the concept of legitimate expectations, breach of which may provide a basis for judicial review: see ***Henry Boot Homes Ltd v Bassetlaw DC*** [2003] 1 P. & C.R. 23, above, and (more generally) ***R. v North and East Devon Health Authority ex parte Coughlan*** [2001] Q.B. 213.

60. Although in many respects the public law concept of legitimate expectations resembles estoppel in that expectations of specific conduct or rights (procedural or substantive) may arise from representations or from a course of dealing which it may be regarded as unfair/unlawful from which to resile³⁶, its application does depend on the wider public interest.

³⁴ The case referred to in ***Pioneer, Hartley v. Minister of Housing and Local Government*** [1970] 1 Q.B. 413, concerned the supplanting of a mixed use with a single use. The mixed use did not have the benefit of planning permission nor had it even acquired established use/immunity from enforcement status. It was therefore wholly precarious, and could not found a defence to enforcement action, which is to be contrasted with an acquired lawful use under the current enforcement regime.

³⁵ Contrast the earlier approach in ***Western Fish Products Ltd v. Penwith District Council*** (1978) 38 P. & C.R. 7.

³⁶ See e.g. ***R. v IRC ex p. MFK Underwriting Agents Limited*** [1990] W.L.R. 1545, ***R. v Inland Revenue Commissioners ex p. Unilever plc*** [1996] S.T.C. 681, ***R v Devon County Council, ex p. Baker*** [1995] 1 All ER 73, and ***R v. Secretary of State for Education and Employment, ex p. Begbie*** [2000] 1 WLR 1115.

For example, in the **Henry Boot** case, the concept could not be used to allow informal variations to/departures from a planning permission where the planning code required that these should be the subject of public applications and consultation. In planning, legitimate expectations tend not to work well at the “micro” level of individual applications where there is a greater risk of subverting public consultation requirements although they may operate in limited cases e.g. where an approval to an application under a condition is given orally and not in writing as required by the Development Order: **R v. Flintshire County Council ex p. Somerfield Stores Ltd** [1998] P.L.C.R. 336.

61. The House of Lords has also made it clear that informal minor variations to planning permissions cannot lawfully be authorised by planning authorities informally. If a condition contains words such as “or as may otherwise be agreed in writing with the local planning authority”, then the only routes for variation are s. 73 TCPA or a completely new planning application. See **Sage v. Secretary of State for the Environment, Transport & the Regions** [2003] 1 W.L.R. 983³⁷. Even with those permissive words, serious doubts arise as to the ability of a local authority to approve variations which would have the effect of making a significant change to the planning permission or which, if the development was subject to environmental impact assessment, can validly be permitted without further EIA. Indeed, although the conditions attaching to the permission for Heathrow Terminal 5 allowed for some variation, there was an overriding condition imposed by the Secretary of State³⁸:

“PREAMBLE TO CONDITIONS

Wherever in this Schedule of conditions the Local Planning Authority is given power within a condition to approve a variation to a requirement imposed by that condition, it shall only do so if it is satisfied that the relevant variation would not have significantly different environmental effects from that which otherwise would be permitted by that condition.”

F. Enforcement of planning control

62. Breaches of planning control, whether in terms of development without permission, development carried out in breach of condition, or breaches of planning obligation, may be the subject of various forms of enforcement action.

³⁷ See Lord Hobhouse (with whom the other members of the House of Lords agreed) at para. 23.

³⁸ Decision issued in November 2001. See also para. 15 of the decision letter.

Apart from breaches of planning obligation, under s. 106 TCPA, which are enforceable by the planning authority by a statutory application for injunction under s. 106(5), there are a variety of means of enforcement. These are set out in Part VII of the TCPA 1990 and were the subject of comprehensive revision in 1991 following the recommendations of the then Mr Robert Carnwath QC in his report *Enforcing Planning Control* (HMSO, 1989).

63. Breach of planning control is not a criminal matter, not at least until a valid enforcement notice has been served and the time for compliance with it has expired: s. 179 TCPA.

64. It is fair to say that the technicalities of enforcement have been the cause of problems since the Town & Country Planning Act 1947, and the subject of frequent revision since, and led to at least one judicial outburst (Harman L.J. in ***Britt v. Bucks County Council*** [1964] 1 Q.B. 77 at 87):

“Hard indeed are the paths of local authorities in striving to administer the town and country planning legislation of recent years. It is a sorry comment on the law and those who administer it that between the years 1947 and 1960 they had succeeded in so bedeviling the whole administration of that legislation that Parliament was compelled to come to the rescue and remove a great portion of it from the purview of the courts. Not for nothing was I offered a book yesterday called *Encyclopaedia of Planning*³⁹. It is a subject which stinks in the noses of the public, and not without reason.

Local authorities, until they have been recently rescued, have had practically to employ conveyancing counsel to settle these notices which they serve in the interests of planning the countryside or the towns which they control. Instead of trying to make this thing simple, lawyers succeeded day by day in making it more difficult and less comprehensible until it has reached a stage where it is very much like the state of the land which this plaintiff has brought about by his operations - an eyesore, a wilderness and a scandal.”

65. The current system, which was comprehensively overhauled in 1991 (the fourth sets of major changes since the above case), is much less affected by technicalities than the old law. The widening of the power to correct or vary enforcement notices on appeal, under s. 176(1), provided a useful tool for decision makers and allows technical defects to be sensibly and proportionately dealt with. The only restriction on the power is that the Secretary of State must be “*satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority*”.

³⁹ Now an 8 volume loose leaf Encyclopaedia.

66. The methods of enforcement in Part VII TCPA can be summarised as:

- (1) **Enforcement notices** (ss. 172-182) (See below).
- (2) **Stop notices** (ss. 183-187)⁴⁰. This is a notice which a planning authority may serve where it considers it expedient that any relevant activity should cease before the expiry of the period for compliance with an enforcement notice (and the activity has not been carried out for a period of more than four years ending with the service of the notice⁴¹). Such a notice prohibits the carrying out of that activity on the land to which the enforcement notice relates, or any part of that land specified in the notice. Notices may be served by planning authorities on “*on any person who appears to them to have an interest in the land or to be engaged in any activity prohibited by the notice*”. It is a criminal offence to contravene the notice (s. 184) and there is no right of appeal against such notices, since they are dependent on a parallel enforcement notice. They may, however, be subject to judicial review and compensation may be awarded in cases where the stop notice or enforcement notice is withdrawn or the enforcement notice is quashed or varied to exclude the subject matter of the stop notice⁴². It is a criminal offence to fail to comply with a stop notice⁴³.
- (3) **Breach of condition notices** (s. 187A). Where conditions have not been complied with, notice may be served on a developer or person having control of the land requiring compliance with those conditions. The notice must specify⁴⁴ the steps to be taken to secure compliance with the condition in question and must give at least 28 days for compliance. Non-compliance with the notice is a criminal offence. There is no right of appeal so any challenge must be by way of judicial review.
- (4) **Planning injunctions** (s. 187B). Where a planning authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, it may apply for an injunction (whether or not other enforcement powers

⁴⁰ For temporary stop notices see s. 171E-171H, where the authority considers “it is expedient that the activity (or any part of the activity) which amounts to the breach is stopped immediately”. This notice is not available against the use of dwellings. Such notices expire after 28 days, or an earlier specified date. They allow the authority breathing space in urgent cases to prepare and serve enforcement notice and stop notices.

⁴¹ S. 183(5).

⁴² S. 186.

⁴³ S. 187.

⁴⁴ This must be with some degree of accuracy, given the criminal penalty for non-compliance: **R. v. East Lothian Council, ex p. Scottish Coal Co Ltd** [2001] 1 PLR 1.

have been or are to be exercised). Applications may be made where the names of those in contravention of planning control are not known⁴⁵. Since the grant of an injunction lies within the primary jurisdiction of the court, it may defer to the planning authority as to the planning merits, and as the democratically-elected planning decision-maker, but does carry out a more wide-ranging consideration in exercising its discretion whether it would be appropriate to uphold planning control by this remedy, particularly having regard to the recent history of planning decisions and contraventions, whether other attempts at enforcement have been made and failed, the extent to which the authority has had regard to all material considerations and properly taken account of the human rights of those against whom action is sought⁴⁶. The Court's jurisdiction is a wide one and may, if justified, prevent be directed to prohibiting breaches of planning control on a district wide basis⁴⁷.

- (5) **Planning contravention notices** (ss. 171C-171D). Local authorities may serve such notices seeking details in respect of suspected contraventions of planning control, with criminal penalties for non-compliance.
- (6) Where enforcement notices have taken effect, **direct action** may be taken by the planning authority to execute the notice if this is not done by the owner/occupier within the time stipulated (s. 178) and/or it may **prosecute** such failure to comply as a criminal offence (s. 189).

The various powers of enforcement are not mutually exclusive⁴⁸.

67. The principal means of enforcement is the **enforcement notice**, the formal requirements of which are set out in ss. 172 and 173⁴⁹. These require that enforcement notices must:

- (1) Be served on the owner, occupier and any other person appearing to have an interest in the land materially affected by the notice;

⁴⁵ S. 187B(3). See also para. 20 of the CPR Part 8 PD "Application for injunction to prevent Environmental Harm" which sets out the requirements for such applications.

⁴⁶ See **South Buckinghamshire DC v. Porter** [2003] 2 A.C. 558 which approved in particular paras. 38-42 of the judgment of Simon Brown L.J. in the Court of Appeal [2002] 1 WLR 1359.

⁴⁷ **Wealden DC v Krushandal** [1999] J.P.L. 174. At p. 180 Chadwick L.J. held that the judge was entitled to conclude on the evidence that unless restrained in wide terms, the appellant "would seek to circumvent whatever order was made".

⁴⁸ See e.g. **R (O'Brien & Others) v. Basildon DC** [2007] 1 P. & C.R. 16 (concerning the use of direct action).

⁴⁹ Government guidance is found in PPG 18, *Enforcing Planning Control* (1992).

- (2) Be served within 28 days of its issue and not less than 28 days before it is intended to take effect;
- (3) Specify the nature of the breach and which category in s. 171A it falls into;
- (4) Specify the steps required to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the purposes of -
 - (a) remedying the breach by making any development comply with the terms of any planning permission which has been granted in respect of the land, by
 - (i) discontinuing any use of the land or
 - (ii) restoring the land to its condition before the breach took place,
 - (iii) remedying any injury to amenity which has been caused by the breach.
- (5) Specify the
 - (a) date on which the Notice is to take effect
 - (b) period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities

68. There is a right of appeal to the Secretary of State by any person “having an interest in the land to which an enforcement notice relates or a relevant occupier⁵⁰” and the making of the appeal suspends the requirement to comply with it and to take the specified steps. The grounds of appeal are set out in s. 174, namely that:

- (1) In respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be,

⁵⁰ “Relevant occupier” is defined by s. 174(6) as “a person who - (a) on the date on which the enforcement notice is issued occupies the land to which the notice relates by virtue of a licence; and (b) continues so to occupy the land when the appeal is brought.” The requirement for the licence to be in writing was removed in 1991. In ***Buckinghamshire CC v Secretary of State*** (2001) 81 P. & C.R. 25 the occupation of director and principal shareholder was held to be a sufficient licence within s. 174(6) to permit such a person to appeal the enforcement notice. Although this may seem to have involved piercing the corporate veil in particular instances, as the Inspector found (and the court rejected) this is in fact simply an application of the statutory provisions to the facts of the case.

the condition or limitation concerned ought to be discharged;

- (2) the matters alleged by the notice have not occurred;
- (3) the matters alleged in the notice (if they occurred) do not constitute a breach of planning control;
- (4) at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters (i.e. the time limits for enforcement in s. 171B have expired);
- (5) copies of the enforcement notice were not served as required by section 172;
- (6) the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
- (7) the time for compliance with any of the requirements of the notice falls short of what should reasonably be allowed.

69. On appeal to the Secretary of State the notice may be upheld, varied/corrected as to some or all of its requirements or quashed⁵¹. There is a right of appeal to the High Court under s. 289⁵² TCPA but this is on grounds of law only (equivalent to judicial review)⁵³ and there is a requirement to obtain the permission of the Court. On appeal to the High Court, the Court may order that the notice shall still take effect (wholly or in part) pending the final determination of the application (s. 289(4A)).

70. If a notice takes effect, whether with or without an appeal, it then becomes a criminal offence to contravene its requirements (subject to any new grant of planning permission, s. 180 TCPA). S. 189 makes it an offence for the owner, or any person who has control of or an interest in the land to which an enforcement notice relates,

⁵¹ Thereafter any notice which is upheld takes effect as specified on the appeal.

⁵² There is also a power for the Secretary of State to state a case to the High Court on a point of law under s. 289(2) and (3) but it appears never to have been used and no rules have ever been prescribed for making one.

⁵³ See **R. (Eid) v First Secretary of State** [2005] EWHC 3030 where Jackson J. held at paras. 75-6 that “*But the purpose of an appeal under section 289 is not to carry out a rerun of the original inquiry: see ELS Wholesale (Wolverhampton) Limited v Secretary of State for the Environment (1987) P&CR 69 at page 72 ... The purpose of an appeal under section 289 of the 1990 Act is to identify any errors of law made by the Inspector...*”.

to contravene the terms of the notice (subject to certain defences in s. 179(3) and (7))

G. Challenges to planning permissions or enforcement decisions

71. Where a local planning authority refuses permission, there is a statutory right of appeal to the Secretary of State for Communities and Local Government and judicial review would generally be refused since it is not an appropriate remedy to consider the planning merits, and given the existence of a statutory appeal on the merits.
72. If permission is granted, persons with a sufficient interest (*locus*)⁵⁴ may challenge the grant of permission on normal judicial review grounds i.e. they must bring an application for permission within 3 months, and promptly in any event, on grounds that the decision was granted unlawfully e.g. it was *Wednesbury* unreasonable, irrational, in breach of natural justice or breached some important substantive or procedural requirement (e.g. failed to carry out a necessary environmental impact assessment). JR also is available for those enforcement remedies for which there is no right of appeal. Even if grounds are made out, the Court has a limited residual discretion not to quash⁵⁵ e.g. if the grant of the remedy is academic, or the Court can genuinely say that the error could have made no difference to the outcome.
73. The time for challenge to a planning permission runs from the date of the grant of permission, not the date of any resolution or decision in principle by the authority – even if this means waiting for months, while a planning obligation is negotiated⁵⁶.
74. There is no right of appeal by third parties against the grant of permission: only judicial review is available.
75. There is a right of challenge to any decision on appeal under s. 288 TCPA, by a “person aggrieved” by it – generally a disappointed applicant, local planning authority, land owner, or some other person who has taken some active part in the appeal⁵⁷. The application must be made within 6 weeks of the date of the decision and there is no power to extend time.

⁵⁴ The standing rules are applied generously: see e.g. *R (Edwards) v. Environment Agency* [2004] 3 All ER 21.

⁵⁵ See *Bolton MBC v Secretary of State for the Environment* (1990) 61 P. & C.R. 343, *Berkeley v. Secretary of State for the Environment* [2001] 2 A.C. 603 and *R. (Edwards) v Environment Agency (No.2)* [2007] Env. L.R. 9.

⁵⁶ *R. v. London Borough of Hammersmith & Fulham ex p. Burkett* [2002] 1 W.L.R. 1593.

⁵⁷ See *Eco-Energy (GB) Ltd v. First Secretary of State* [2005] 2 P. & C.R. 5.

The grounds are generally the same as those available on judicial review. At present there is no requirement for permission to be obtained (in contrast to judicial review and challenges under s. 289) although there are signs that the Administrative Court is willing to consider the jurisdiction to strike out cases which are unarguable and which would not have obtained permission on judicial review.

76. As noted above, there is also the right to challenge a decision on an enforcement appeal under s. 289 TCPA, though in this case the court's permission is required. An application must be made within 28 days of the decision under challenge but, unlike applications under s. 288, the court's normal power to extend time applies.
77. There appears to be little sound basis for the distinctions between ss. 288 and 289 in terms of time limits, power to extend time or the requirement for permission.