

PLANNING NEWSLETTER

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PLANNING LAW

DEFINING A TOWN CENTRE

The council granted permission for a store within the town centre just beyond the shopping area shown on the local plan. The definition of a town centre was flexible and the right factors had been taken into account when reaching the decision. Challenge rejected: R(Co-op) v Rushcliffe BC [2004]

WRONG INTERPRETATION OF PERMISSION

An earlier permission limited retail use to bulky goods but an extension to the building did not contain this condition. Another extension was permitted without a bulky goods restriction but this was wrong as the officer had misconstrued the earlier permission. Decision quashed: R(Legal & General) v Rushmoor BC [2004]

EXTENT OF RETAIL USE

A manufacturing and retail use had been carried on for many years but the council served an enforcement notice. The inspector considered the retail use was ancillary to the manufacturing but the notice was quashed as he had not given sufficient weight to the previous occupier's similar use of the property and should have enquired further into the matter: Singh v First Secretary [2004]

RETAIL PRECEDENT?

A condition banned extra floorspace and an appeal for a mezzanine was dismissed. The accumulative effect of this and others likely if it went ahead would harm the town centre. The inspector had rightly had regard to the precedent argument. Challenge rejected: Next Group Plc v First Secretary (11/10/04)

HEALTH OF OCCUPIER

A disabled person wished to site a caravan in the curtilage of her property to house a carer. The council refused a lawful development certificate as to that part of the curtilage required. On appeal the inspector came to the same conclusion and it was challenged on the basis that a handicapped person should have a degree of sympathy with regard to

LONDON OFFICE

Morley House
26 Holborn Viaduct
London
EC1A 2AT

Tel: 020 7583 6767
Fax: 020 7583 2231

CHELTENHAM OFFICE

Burlington House
Lypiatt Road
Cheltenham
GL50 2SY

Tel: 01242 259290
Fax: 01242 259299

NORTHAMPTON OFFICE

Wykes Farm
Allens Hill
Bozeat
Northampton NN29 7LW

Tel: 01933 666391
Fax: 01933 664861

the facts. Challenge rejected as the test was objective as to the extent of the planning unit
Stewart v First Secretary [2004]

HOUSING LAND SUPPLY QUESTIONED

An inspector found there was a deficit and recommended a housing site for approval. The Secretary of State disagreed but gave no cogent reasons for this. The decision was quashed. His further view that the site was not brownfield as there were open elements to it was not a “finding of fact” but an evaluation of facts where he differed from the inspector and thus not a ground for quashing the decision: George Wimpey v First Secretary [2004]

CHALLENGING AFFORDABLE HOUSING

An appeal was dismissed but a subsequent application approved at appeal. The council challenged this on the basis that the sequential test for housing in PPG3 had not been followed and part of the affordable housing as shared ownership was not appropriate. Held, that the inspector’s approach to PPG3 was flawed as he failed to differentiate from the previous inspector. Not decided whether shared ownership was affordable. Challenge upheld: Oxford CC v First Secretary [2004]

CONTAMINATION IN GREEN BELT

Contended that housing on a former mushroom farm would remove dereliction and contamination in the green belt. However the inspector said that contamination would not by itself be a very special circumstance but this was too onerous. He acknowledged seriousness of the situation. Decision quashed: Downmunt-Iwaskiewicz v First Secretary [2004]

GREEN BELT PREVIOUSLY DEVELOPED LAND

It was claimed that stables could be redeveloped for housing outside the village limits. An inspector dismissed the appeal and the claimant claimed that he had proceeded on a false basis. However the inspector had dealt with all issues. This was a sensitive unsustainable location. Challenge rejected: Withers v First Secretary (14/10/04)

NOISE ANNOYS NEIGHBOUR

Appeal allowed to extend hours of yoga class. Neighbour objected and contended that the noise report should have been disclosed and the hearing adjourned to consider this. Held: adjoining owner was not a statutory party and he could have asked for an adjournment at the hearing but chose not to do so. Challenge rejected: Hamsher v First Secretary [2004]

FAILURE TO PROVIDE GIPSY SITES

In allowing an appeal for caravans the inspector found the council had not provided adequate sites or make such provision in the development plan. This was a relevant consideration and the gypsies’ human rights had to be balanced and were correctly considered. The judge was wrong to quash the decision and the appeal was allowed: Chichester DC v First Secretary [2004]

SUBSEQUENT CONDITIONS INVALID

Pursuant to a 1957 permission approval was sought for access points and at appeal further conditions were imposed restricting the type of traffic to use these. Held, this could not be done as the original permission only related to design of the access and not to its use: *Redrow Homes v First Secretary* [2004]

HOSTESS BAR BANNED

An inspector considered that the bar would not harm residential amenity but the clutter of advertisements around the door affected the locality. It was argued that advertisements were not part of the appeal and the council had agreed not to consider this. This was a misunderstanding. The question of impact was one for the inspector's professional judgement. Charge rejected: *Entertainu v First Secretary* [2004]

EXTENT OF SITE

A lawful development certificate was granted on appeal for stationing of caravans on a site occupied by chalets. This was because an earlier permission had been granted to continue the stationing of caravans under the terms of Caravan Sites Act 1960. However this only extended to caravans and not chalets site and the LDC was quashed: *Swalecliff Chalets Owners' Association v First Secretary* [2004]

A MATTER OF DESIGN

An inspector disliked the design of a dormer and dismissed the appeal. This was unfair said the owner as there were other similar dormers nearby. Challenge rejected as it was for the inspector to deal with the design merits: *Cottle v First Secretary* (22/9/04)

IMMUNE ROOF TERRACE

An inspector found that the roof terrace had been used for more than 15 years and the retrospective application to retain this plus decking and other changes should be allowed. The council challenged this and argued that the changes were more than incidental but the court held the inspector was correct and dismissed the challenge: *Westminster CC v First Secretary* (21/7/03)

LANDSCAPE PROTECTION UPHELD

Gateway site designated for protection in local plan but inspector recommended this be changed. The council declined to this. They were able to do so as they had given adequate reasons for their value judgement: *Cavanna Homes v Torbay C* [2004]

COUNCIL'S DISCRETION UPHELD

Allocating a site for industrial rather than residential as recommended by the local plan inspector was legitimate as the council had exercised their planning discretion. Challenge to the local plan rejected: *Secondsite Property Holdings v Poole BC* (28/10/04)

CROWN IMMUNITY CHALLENGED

It was proposed to construct an asylum centre on Crown land using a design and build contractor who would take a lease. Planning proceeded under the non-statutory basis and

it was held that this was perfectly correct and it was not necessary to apply for planning permission as the two regimes were similar: Cherwell DC v First Secretary [2004]

FAILURE TO GIVE REASONS

A permission was issued without reasons being given for this contrary to recent changes in the law. The council then issued an amended decision giving such reasons but it was held this was inadequate as being after the event did not reflect the true situation. Decision quashed: R(Wall) v Brighton and Hove CC [2004]

FALSE CERTIFICATE ISSUED

It was contended that splays were in the ownership of the applicant for permission. However they were not and when this was pointed out a fresh certificate saying that notice had been served was put before the council. This was untrue. Permission was granted but subsequently quashed at the behest of adjoining owners. The statutory procedures had not been complied with: R(Pridmore) v Salisbury DC [2004]

ILLEGAL GYPSY CARAVANS

In 2002 the council obtained an injunction requiring their removal but this was suspended when permission was applied for and appealed. Despite a refusal a challenge had been placed in the High Court and the injunction was further suspended until seven days after the hearing, or lifted if enforcement notice was quashed: Mid Bedfordshire DC v Smith (21/9/04)

PANELS TO BE REMOVED

Advertisement displays in a conservation area had been there since expiry of approval in late 1995. Refusal to continue this was legitimate because of their harm and challenge to inspector's decision rejected: Clear Channel UK v First Secretary (14/10/04)

AMENITY SPACE QUESTIONED

Six flats out of 19 did not have amenity space but the inspector said this was supported by PPG3. However he failed to explain why he was departing from local policy and went out on a "frolic of his own" which meant that the decision was quashed: Wycombe DC v First Secretary (28/7/03)

WRONG LOCATION

An appeal had been allowed on the basis of the site being within an industrial area but it was outside this and different policies applied. Decision quashed: Gateshead v First Secretary (5/10/04)

BREACH OF PLANNING POLICIES?

A resident has been given leave to challenge a decision for a hotel in a country mansion citing breach of listed building policies and those for development in the countryside. There was an arguable case despite delays and it should be brought to trial as soon as possible: R(Davey) v Aylesbury Vale DC (23/9/04)

RESERVED MATTERS AND EIA

There was a challenge to reserved matters approval of a leisure scheme but an EIA was not required at this stage as the outline approval did not require one: Noble Organisation v Thanet DC (12/11/04)

STATUS OF PERMISSION QUESTIONED

A new mining permission had been granted. As it replaced an old one no environmental assessment was required. However the European Court is held this was wrong and an assessment should have been put in despite the fact that several conditions required later approval: R(Wells) v Secretary of State (7/1/04 ECJ)

WRONG ENFORCEMENT NOTICE

The council proceeded upon a wrong factual basis regarding permitted development rights and when they found out agreed to withdraw the notice. It was decided that this could be done and that the notice would fall away rather than remitting it to the inspector for a further decision: R (Leeds CC) v First Secretary [2004]

ENFORCEMENT ENTRY UPHELD

A council has been granted permission to enforce its right to enter land to ascertain if enforcement notices are being complied with. There was no breach of human rights: Keeley v Canterbury Magistrates (9/11/04)

RURAL LOCATION REJECTED

In recommending an appeal for approval the inspector said structure plan policies on tourism supported this. Secretary of State rejected this as he said a rural location was remote, the sequential test had not been applied and there was no need for this location. He was entitled to disagree on these matters as the inspector had not given detailed reasoning. Challenge rejected: Macepark v First Secretary [2004]

ENVIRONMENT LAW

BUILDING OVER CULVERT

Permission for a retail kiosk was obtained but the Environment Agency meant to object but failed to do so. A subsequent application was made for a larger building and the EA objected. The applicant took proceedings under the Water Resources Act 1991 but EA refused consent. Held, they were not entitled to do so as they had been out of time in their refusal: R(Amberley House) v Environment Agency [2004]

WINDFARM NOISE

Steps had been taken to reduce noise from a windfarm but statutory nuisance proceedings were instituted about this. Evidence could only be about prior six months harm. The expert evidence of the defendants was accepted as this was meticulously prepared as against the wider allegations of the applicants. Challenge rejected: Lainson v Powergen (20/1/04)

RESTORATION TAX IMPOSED

The backfilling of a site to secure restoration attracted landfill tax except for a top-capping layer which was exempt: *Customs & Excise v Ebbcliff* (30/7/04, CA)

LANDFILL LEAST PREFERRED OPTION

It was not a precondition of the grant of landfill permission that it should satisfy the policies of best practicable environmental option as incorporated in a waste management plan under European law. The council's approach was flawed as they had not taken fully into account the ranking of environmental options: *Blewett v Derbyshire Waste* (Times 12/11/04, CA)

LAND CONTAMINATION

A company was served a remediation notice but argued they were not responsible. They had developed the site and thus were responsible rather than the previous owner: *Circular Facilities v Sevenoaks DC* (6/10/04)

GENERAL LAW

PARKING BAN ON PRIVATE ROAD

Parking enforcement was placed on a road pursuant to a Harbour Act but it was held ultra vires as beyond the powers of the Act and not in accordance with its purposes. Further, it was likely that the road was private and not a highway. Thus it was a breach of human rights in taking away something without authorisation. Challenge upheld *R(Richards) v Pembrokeshire CC* [2004] (CA)

EXPERT WITNESS SHOCK

An expert witness has his main duty to the court and if he abuses this by being partisan, although he is immune from action, nevertheless a wasted costs order could be imposed: *Symes v Phillips* (20/10/04)

RESTRICTIVE COVENANT BREACHED

Erection of 24 houses on a plot which had a restriction to "a private dwellinghouse" meant that multiple houses could be erected but only for residential use: *Martin v David Wilson Homes* [2004] 39 EG 134 (CA)

ROAD INFRINGES COVENANT

A road on a plot to serve houses behind would not comply with a covenant for use of the plot "as a private residence only" as this extended to the entire plot: *Jarvis Homes v Marshall* [2004] 44 EG 154 (CA)

PLANNING APPEALS

HOUSING

PROVEN HOUSING SUPPLY.

Thirteen flats at Well Lane, Heswall would potentially add to the over-supply of plots

which was 1,800 against an RPG target of 160 per year. Preference should be given to inner urban sites and the appeal was dismissed. Wirral MBC (7/9/04)

THREAT TO PORT SECURITY

A bland building in a gateway location at Edward Albert Dock, Newcastle upon Tyne would not be suitable for the area. Further it was adjacent to a deepwater port and overlooking this might give rise to terrorist activities. Appeal dismissed. (21/9/04)

STUDENT HOSTEL DENIED

This facility in Central Nottingham was acceptable despite arguments that this would result in a large number of students in the area. However, without an S106 appellant restricting occupation specifying management, the appeal was dismissed.

DEVELOPMENT PLAN PREVAILS

Housing on a 1.7 ha site in South Wales would accord with the 10 year old development plan. However an emerging plan dropped this greenfield site but the inspector felt the extant plan should be followed and allowed the appeal.

LACK OF FAMILY HOUSES

A policy required 33% of units to be for families but only 10% fell within this category. The appeal in East London was dismissed.

INADEQUATE PARKING

Fifteen flats on top of existing flats at Chiswick Village W4 would not harm residential amenity but in a relatively unsustainable location the inadequate parking led to dismissal of the appeal despite introduction of a controlled parking zone which would not overcome problem (17/8/04)

KEY WORKERS HELPED

Thirty seven flats on an old PFS in a residential area with permission of offices and flats would be a new proposal over the affordable housing threshold. There were no particular economic costs to prevent this so 30% key worker condition imposed. Appeal allowed (18/8/04)

HOUSING SUPPLY OUTWEIGHED

Housing at a junior school in Green Chase, Ecklington would see a small football pitch replaced elsewhere which satisfied the recreational policies. Affordable housing outweighed the fact that there was over-supply of housing land leading to the appeal being allowed. NE Derbyshire DC (8/9/04)

NO RECREATION CONTRIBUTION

Twenty-six houses at a former packing station in Nether Stower were subject to an S106 draft agreement for recreational facilities. However these were not necessary and not justified by the situation in the wider district rather than the parish. Appeal allowed without contribution (16/9/04)

SPORTS FIELD SUCCUMBS TO HOUSING

A site was acquired for a school at Forge Way, Billingshurst but never used for this purpose and subsequently laid out as playing fields for the town. It was surplus to requirements and housing has been allowed as this would not erode the stock of pitches which was being augmented elsewhere. (29/9/04)

RETAIL AND SERVICES

CAR DEALERSHIP HITS HUMP

Relocation to a greenfield site on a roundabout would bring economic benefits and be in line with modern requirements. However, harm to the environment would be caused and a range of transport choices did not exist. Alternative sites had not been rigorously assessed. Application rejected.

DISPUTE OVER MEZZANINE

A condition restricted retail floor space at Nene Valley Retail Park but the inspector held this related to the original scheme and approval of reserved matters but did not limit floor space. Hence the mezzanine was lawful. (8/10/04)

RETAIL STORE REJECTED

A 2000m² store on a Glasgow industrial estate would be outside retail areas although permissions had been granted nearby in the past. Would form a precedent as the council had recently tightened up its policy. Appeal dismissed.

VITAL AND VIABLE TOWN CENTRE

A betting office in a newsagent's in Market Place, Thirsk would attract trade despite being near other non-retail uses. The town centre was attractive and this would add to the range of services. Appeal allowed. (6/10/04)

SUSTAINABLE SPORTS FACILITY

An indoor health centre and extensive sports pitches in the green belt at York have been permitted as there was a need for additional facilities in the area without sequentially better sites.

GREEN BELT

NO GREEN BELT PRECEDENT

In the green belt a house had been allowed instead of a caravan linked to a cattery. The cattery had never been opened but the house was built and after a long period the council applied for an injunction for its removal. The planning history together with the appellant's health meant this should not be enforced because of the personal circumstances. It did not therefore set a precedent: St Albans DC v Henderson (12/11/04)

GREEN BELT DWELLINGS

445 dwellings between Walsall and Birmingham would be on the site of a former mental

institution. It would replace derelict buildings and allow a grade II park to be brought back into use. Application approved.

MISCELLANEOUS

CHILDREN'S NOISE ANALYSED

A nursery in a house in south London would not cause more noise than a family living in the house because the children would be supervised. Although the rear garden was small with a limit on the number of children, the appeal was allowed.

MIXED USE AFFORDABLE

Development of an employment site in Yorkshire would be uneconomic because of gypsum in the soil and an element of housing or a DIY store was required to fund the extra cost. The inspector agreed because the housing was itself affordable and there was a need for additional retail floor space. Mixed use scheme allowed.

If you require any information about items in this new sheet please contact **Tony Bowhill** in the first instance, tel: 01702 551148, email: tony.bowhill@cgms.co.uk or your usual planning contact.

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