Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2013 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other relevant points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

SECTION A

Question 1

The Framework replaces over one thousand pages of national policy (contained in Planning Policy Statements and Circulars) with around fifty.

The underlying assumption of the Framework is that the way in which the planning system has operated in the past has held back economic growth (though the evidence on which that assumption is based is widely regarded as controversial). The paper sets out how the planning system will be used to regenerate economic growth through fostering “sustainable development”. Heavy emphasis is laid on the need for investment in business which should not be “overburdened”. Solutions are to be found in the planning regime to overcome the problems which business encounters, so far as is possible.

LPAs are to work closely with the business community to assess its changing needs and to construct an “evidence base” to assess existing and future need for land for economic development. The Framework states that the Government is committed to ensuring that the planning system does everything it can to ensure economic growth.

The key to the new advice is the local plan, as the planning system is stated to be “plan-led” and the plan must achieve the objective of “sustainable development” so that “objectively assessed development needs” can be met. Plans are to be constructed on a fifteen year horizon. It should be noted, however, that the existing legislation already provides that the plan should prevail (ss70(2) TCPA 1990 and 38(6) Planning and Compulsory Purchase Act 2004 (“the PCPA 2004”)) unless there are material considerations which indicate otherwise.
Development proposals which accord with statutory plans are to be approved without delay and if the plan is out of date or indeterminate, development proposals should be approved. Consideration is to be given to imposing conditions on grants if thereby it is possible to approve development which otherwise would not be approved. The default answer to development proposals is ‘yes’”. This is the presumption in favour of “sustainable development”.

However, there is already a presumption in favour of development in that the effect of the legislation is that planning permission should be granted, with or without conditions, unless there are sound planning reasons against the development proposed. Nor is the idea of sustainable development new. It is enshrined in Planning Policy Statement (PPS) No 1 (2005) which affirms that sustainable development is the core principle underpinning planning, that is, “development that meets the needs of the present without compromising the ability of future generations to meet its own needs”.

Cooperation with the community is also emphasised in line with the duty to cooperate contained in the Localism Act 2011. Developers are urged to liaise with the community and to embark on pre-application discussions before submitting planning proposals.

LPAs are to assist development through local development orders and planning performance agreements and to use Article 4 directions and s106 agreements sparingly.

Along with the need to meet the needs of business comes the need to house the employees of expanding businesses. Local authorities are to make a Strategic Housing Market Assessment to assess their full housing requirements and to make a Strategic Housing Land Availability Assessment. This is coupled with a recognition that town centres need to be regenerated.

On the other hand the Framework also recognises the need to protect green belts and the historic and natural environment. It deals in some detail with the need to avoid building in the open countryside and the need to sustain the quality of life in rural areas. It also recognises that land released for development should be of a “lesser environmental value”.

The only innovations were those foreshadowed in the Localism Act 2011, namely Neighbourhood and Community Plans and the duty to cooperate. Neighbourhood and Community planning through Neighbourhood Development and Community Right Orders is quite radical, particularly as Neighbourhood and Community Plans are to take precedence over local plans so long as they are in conformity with the latter’s strategic policies. However, the mechanics of development control taking place outside the purview of the LPA could cause headaches.

Significantly, although the Framework relies on some statutory innovation in the Localism Act 2011, the Framework itself does not envisage further legislation for its implementation. It will undoubtedly figure prominently in planning appeals as well as litigation.

Much of the existing departmental advice has been summarised without change. But it follows that because the provisions of the Framework are sketchier than the existing advice, there will be greater freedom for local planning authorities (“LPAs”) to interpret it. That is intentional. Basically, what the Framework is doing is to encourage LPAs to use the existing statutory system positively rather than negatively. While the needs of business are emphasised throughout the
framework, little mention is made of the consequences for planning of the current population explosion.

For their part, the courts have, necessarily, paid much attention in the past to departmental circulars, Planning Policy Guidance Notes and Planning Policy Statements as "material factors". If the Framework is adopted as it stands there will be much less for the judges to consider, though much more to define.

The change in departmental guidance will have the effect of loosening up the system so that development is encouraged and one can expect more land to be released and more pressure on the countryside to ensue. However, there will still be control (as well as "development management") while the existing statutory apparatus remains in place and unchanged.

**Question 2**

The best view is that a planning permission, capable of being implemented according to its terms, may not be abandoned (Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment (1985) HL). In that case Lord Scarman said that planning was a field of public law in which the courts should not introduce principles or rules derived from private law unless they were expressly authorised by Parliament or necessary to give effect to the purpose of legislation. It was held that the clear implication of s33(1) TCPA 1990 and s75(1) TCPA 1990 was that only the statute or the terms of the planning permission could prevent the permission enuring for the benefit of the land and of all persons interested in it for the time being.

However, in the subsequent case of Cynon Valley Borough Council v Secretary of State for the Environment (1986) the position was modified somewhat where the Court of Appeal held that a planning permission was "spent" upon implementation of a new use.

In Pioneer Aggregates Lord Scarman also stated that the abandonment of an existing use was a quite different matter and had nothing to do with the extinguishment of a planning permission. The judgment affirmed the principle that planning rights based on an existing use may be lost by abandonment.

The issue of whether existing use rights have been lost through abandonment arises where a use has ceased for a time and where, in the meantime, the land has not been used for any other purpose. If it is held that a use has been abandoned the land will have a "nil" use and the resumption of any previous use will require planning permission. A use is not abandoned where it is followed by a different use if that different use amounts to a material change of use but that it is unlikely that the previous use could at any point be resumed. There is, of course a right, contained in s57 (2)-(4) TCPA 1990 to resume a use following the service of an enforcement notice in respect of a subsequent unlawful use, or if planning permission has been granted for a limited period.

The judgment in Hartley v Minister of Housing and Local Government (1969) QB made it clear that in such cases the issue was simply one of fact i.e. what was the use of land at the date of resumption? The question of whether existing use rights have been abandoned is a difficult one and the principles were set out by Ashworth J in Hartley:

(i) If the sole use to which land is put is suspended and then resumed without any intervening user then, *prima facie*, the resumption does not constitute development. Some uses such as racecourses are by their very nature...
intermittent (Hawes v Thornton Cleveleys UDC (1965). The same may be said of seasonal uses.

(ii) However, in Hartley Lord Denning said that if land had remained unused for a considerable length of time, the reasonable man might conclude that it had been abandoned. His view was applied in Ratcliffe v Secretary of State for the Environment (1975) QB where a local authority had ceased using a quarry for tipping when its tenancy expired nine years previously. The intentions of the owner or tenant of land, while not irrelevant (Hall v Lichfield District Council (1979), are not decisive (Hughes v Secretary of State for the Environment, Transport and the Regions (2000) CA).

(iii) The issues are more complex where land is subject to composite uses. The cessation of a component use does not constitute development nor is the change from a dual to a single use material so long as the remaining use does not encroach upon land subject to the use that has ceased (Philglow v Secretary of State for the Environment and the London Borough of Hillingdon (1985) QB)).

(iv) Where a component use is discontinued and the remaining use does not intensify, but the discontinued use is subsequently resumed, it will be necessary to consider whether there has been abandonment. The issue will be whether, with the resumption of the use, there was a material change in the use of the land.

In M & M (Land) Limited v Secretary of State (2007) it was held that a use benefiting from a certificate of lawfulness of existing use or development could be abandoned. Domestic property has been held to be abandoned through non-occupation and dereliction (Trustees of Castell-y-Mynach Estate v Secretary of State for Wales (1985), though the property in Stockton-on-Tees BC v Secretary of State for Communities and Local Government (2010) had not deteriorated sufficiently to be regarded as abandoned. Tests in relation to dwellings indicate that a long period of non-use (e.g. 20 years) would be necessary to justify a finding of abandonment.

**Question 3(a)**

Permitted development is development specified in the Town and Country Planning (General Permitted Development) Order 1995 ("the GPDO"). The Order is of general application and by Article 3 grants permission for a wide range of development specified in Schedule 2. Schedule 2 is divided into 40 parts, subdivided into different classes of development which can be carried out without applying to the Local Planning Authorities ("LPAs") for express permission.

Section 40 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"), inserting new sections 61A-D into the TCPA 1990, introduced a new procedure whereby LPA’s may make Local Development Orders ("LDOs"). These permit LPA’s within their administrative areas to enlarge on the rights permitted by the GPDO. LDOs may grant planning permission for specific development or a class of development which may relate to a specific site or any part of the LPA’s administrative area, and different provision may be made for different descriptions of land.

**Special Development Orders (SDOs)**

Development may also be granted by Special Development Order (SDO) in urban development areas.
Simplified Planning Zones
In Simplified Planning Zones (SPZs) planning permission may be granted for a
specific development or a class of development specified in the scheme.

3(b)

Permitted development rights can be withdrawn in a number of ways.

Condition
The first is by condition. Article 3(4) of the GPDO stipulates that “nothing in this
order permits development contrary to any condition imposed by any planning
permission granted or deemed to be granted under part III of the Act (i.e. The
TCPA1990) otherwise than by this order”. In addition, Article 3(5) provides that
permitted development rights may not be exercised if:

(i) in the case of permission granted in connection with an existing building,
the operations involved in the construction of that building are unlawful;
and

(ii) in the case of permission granted in connection with an existing use, that
use is unlawful.

In some cases the development permitted is subject to conditions. While
infringement of a condition would not invalidate the permitted development the
LPA could take enforcement action in respect of the breach.

There are some further restrictions: (i) in regard to trunk roads; (ii) if the
development would require an Environmental Impact Statement; and (iii) the
GPDO is subject to regulation 60 of the Nature Conservation Regulations.

Class A of Part 31 is important in that it grants permission for any building
operation consisting of the demolition of a building, except those buildings
excluded from control by a direction of the Secretary of State. The Direction has
been reviewed in the case of R on the application of Save Britain’s Heritage v
Secretary of State for Communities and Local Government (2011). With certain
exceptions the permitted development rights cannot be exercised until the LPA
has determined whether it is required to give prior approval to the proposed
method of demolition. Where a determination is required the developer must
make an application to the LPA describing the proposed method of demolition
and the restoration of the site.

Article 4 Directions
Under Article 4 the LPA and the Secretary of State have the power to withdraw in
specific cases the benefit of permission granted by the GDPO. This power has
been used extensively, especially in regard to conservation areas and areas of
outstanding natural beauty. Article 4 directions often withdraw permitted
development rights in relation to temporary uses of land e.g. markets, caravan
sites and camping. The Article permits the Secretary of State or the LPA to direct
that all or any of the developments permitted by any Part, class or paragraph of
Schedule 2 shall not be carried out in a particular area without specific
permission or that any particular development shall not be carried out without
specific permission.

An Article 4 direction made by an LPA requires the consent of the Secretary of
State unless it relates only to buildings of special architectural or historic interest
and does not affect certain specified operations of statutory undertakers.
An Article 4 direction withdraws the permission granted by the GPDO and makes it necessary to apply to the LPA for permission. If permission is refused or granted subject to conditions the owner is entitled to compensation under ss-107-108 of the TCPA1990 in respect of loss “directly attributable” to the refusal of planning permission.

Local Development Orders (LDOs)
The Secretary of State may specify by development order an area or class of development for which an LDO must not be made, e.g. development affecting a listed building, development where an EIA is mandatory and development affecting natural habitats under Nature Conservation Regulations.

Imposition of Restrictions by the LPA
In granting permission for development, such as a new house, the LPA may wish to restrict the right to extend under part 1 of the GPDO; or in a grant of permission for mineral working might wish to impose conditions as to the siting of any plant and machinery required for excavating and treating the mineral thereby restricting the operator’s rights under Part 19.

The legality of such limitations was recognised in Dunoon Developments v Secretary of State for the Environment (1992) provided the condition is worded in clear and unequivocal language. In Dunoon the condition made no express exclusion of the GPDO and no such exclusion could be implied from the words used.

Question 4(a)

Acquisition
Section 226 (1) of the TCPA 1990 as amended by s99 of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) provides that the Local Planning Authority (“the LPA”) may with the authorisation of the Secretary of State acquire compulsorily any land within its administrative area for the following reasons:

(a) if the LPA considers that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land; or

(b) the land is required for a purpose which it is necessary for it to achieve in the interests of the proper planning of the area in which the land is situated.

In making a CPO the local authority must specify which of the two powers it is exercising as (a) is intrinsically wider than (b).

In relation to (a) the LPA must not exercise its powers unless it considers the development is likely to contribute to the achievement of the promotion or improvement of any one or more of the (i) economic; (ii) social or (iii) environmental wellbeing of its area (the “wellbeing” criteria set out in Wolverhampton City Council (Sainsbury’s Supermarkets Ltd) (2010)) in which the Supreme Court held that only the wellbeing benefits accruing from the order lands can be taken into account.

In regard to (b) the local authority may acquire land only where it is required for a specific purpose and it is important to note that “required” has been held to mean “necessary in the circumstances of the case” (Sharkey v Secretary of State for the Environment (1992)).
Where land is acquired under either paragraph (a) or (b) the LPA may also purchase compulsorily:

(i) any adjoining land which is required for executing works to facilitate the development or use of the land which is the main subject of the purchase; or

(ii) land to replace common land and certain other special categories of land; and

(iii) acquire new rights, such as easements under s13 Local Government (Miscellaneous Provisions) Act 1976.

Where the LPA acquires land under s226 the local authority may itself develop the land or sell or lease the land for private development.

Where planning permission is required to develop land so acquired, under s226 the LPA has to demonstrate that there is no obvious reason for permission to be withheld; and that the development proposed is in accordance with the development plan under s38(6) PCPA2004, unless material considerations indicate otherwise.

The issue of planning merits was considered in Alliance Spring Co Ltd v First Secretary of State (2005) where it was held that the Secretary of State was entitled to disagree with his Inspector’s recommendation to confirm a CPO on the basis that there was a compelling case in the public interest for the order as part of a regeneration scheme in North London (the relocation of Arsenal FC’s stadium).

In confirming an order under s226 the Secretary of State is entitled to disregard any objection which is, in substance, an objection to the development plan. It is also open to the Secretary of State to use his powers under s90 TCPA 1990 to direct that planning permission be deemed to be granted. However, the mere existence of an alternative proposal does not in itself prevent there being a compelling case in the public interest. (Bexley London Borough Council v Secretary of State (2001).

There are legal pitfalls for local authorities when making CPOs. It is important for them to specify which particular power they are exercising as s 226(1)(a) is intrinsically wider than s226(1)(b). If a CPO is made pursuant to subsection (1)(b) the acquiring authority’s power is limited to the acquisition of land which is required for purpose necessary to achieve in the interests of the proper planning of the area. As noted above, the word “required” in subsection 1(b) has been given a restrictive interpretation by the courts.

4(b)

Procedure

The acquiring authority ("the AA") must first pass a resolution to acquire land under s226 TCPA1990. Under Part 2 ALA1981 the AA must make a CPO in the prescribed form with a statement of reasons. The AA must advertise the CPO and allow 21 days for representations. A notice explaining the effect of the CPO must be served on owners and others with an interest in the land. The CPO may be
challenged in the High Court under s23 of the ALA 1981 by “a person aggrieved” within six weeks of the publication of confirmation on the grounds of (i) ultra vires or (ii) procedural defect resulting in substantial prejudice. No further challenge is possible except possibly in cases of bad faith.

**Notice to Treat**

Once a CPO becomes operative the AA must proceed to acquire the land within three years of the date on which the CPO became operative. This is done by Notice to Treat (NTT) or a General Vesting Declaration (GVD). If neither is served within the time limit the CPO will lapse.

The extent of the land to be acquired is determined by the NTT and proceeds under normal rules for the transfer of land i.e. either by conveyance or assignment.

An NTT is served under s.5 of the Compulsory Purchase Act 1965. Once served the notice may be abandoned:

(i) The AA may within six weeks of receiving the claimant's notice of claim withdraw the NTT;

(ii) Where a counter notice of objection to severance is served the AA may either acquire the whole of the land or abandon the NTT;

(iii) The NTT may be regarded as abandoned where the AA evinces an intention to abandon the rights acquired by the notice e.g. on the grounds of inexplicable delay.

**General Vesting Declaration**

In contrast a General Vesting Declaration (“GVD”) provides for an expedited procedure. Under the Compulsory Purchase (Vesting Declarations) Act 1981 the AA may acquire the land without formal conveyance or assignment. A GVD is a deed poll vesting title to the specific interest in the AA on a specified “vesting date”. A GVD cannot be abandoned or withdrawn. GVD procedure applies in the case of freehold interests or leases with an unexpired term of one year. After two months’ notice of intention to use the procedure, and within the three years validity of the CPO the AA may execute a GVD. At end of a period of at least 28 days, as specified in the GVD, the AA becomes the owner of the land with right of entry.

The advantage of the NTT is that it may be abandoned or withdrawn whereas a GVD may be neither abandoned nor withdrawn. On the other hand the use of the GVD process means that only one declaration is required where there may be many interests affected by a CPO. Moreover, there is no need for a formal conveyance or assignment and the need for a large number of conveyances is avoided. It gives the AA the right to enter and take possession of the land within three months.

**SECTION B**

**Question 1**

The Local Planning Authority (“the LPA”) may impose such conditions on a grant of planning permission “as they think fit” (s70 TCPA 1990). For a condition to be valid it must, basically, comply with the “Newbury criteria” set out in Newbury District Council v Secretary of State for the Environment (1981) AC:

(i) the condition must serve some useful planning purpose;

(ii) it must fairly and reasonably relate to the development permitted;

(iii) it must not be unreasonable.
In addition a condition must not be uncertain or unenforceable.

So far as concerns the conditions, BDL should be advised:

**Condition (i)**
A condition is not necessarily unreasonable because it restricts existing use rights without compensation (*Kingston London Borough Council (1974) CA*). However, this condition is in negative form and that effectively removes doubts about its reasonableness. It is a so-called *Grampian* condition (*Grampian Regional Council v City of Aberdeen District Council (1984)*). However, such a condition would be invalid if there were no prospect of it being fulfilled (*Jones v Secretary of State for Wales (1990) CA*). In addition, s72 TCPA 1990 authorises the imposition of conditions that regulate land not included in the application site, provided the land is under the control of the applicant and the condition is expedient in relation to the development proposed. This condition is valid.

**Condition (ii)**
This condition appears, on the face of it to comply with the *Newbury* tests. However, it is unreasonable to require BDL effectively to dedicate land to the use of the public without compensation and, accordingly, this condition is void (*Hall v Shoreham-by-Sea Urban District Council (1984) CA*).

**Condition (iii)**
This condition falls foul of s72 TCPA 1990 as the land to which it refers is not within the control of BDL. In addition, it does not fairly and reasonably relate to the permitted development in terms of the *Newbury* criteria. This condition is invalid.

**Condition (iv)**
The restriction of permitted development rights referred to here is authorised by Art 3(4) of the General Permitted Development Order 1995, as amended. A valid reason is provided for the restriction and it is sufficiently clear and unequivocal (*Dunoon Developments Ltd v Secretary of State for the Environment and Poole Borough Council (1972) CA*). This condition is valid.

A s106 obligation may be challenged if the LPA has had regard to matters which are not material. The court will not interfere unless the effect is *Wednesbury* unreasonable.

In *Tesco Stores Ltd v Secretary of State for the Environment (1995) HL* the House of Lords held that whether or not a planning agreement is material is a matter of law. Accordingly, it must

1. serve some useful planning purpose (see *Pyx Granite Co Ltd v MHLG (1960)*); 
2. have some connection with the development proposed which is not *de minimis*.

However, there is no requirement that the obligation should fairly and reasonably relate to the permitted development.

The judgment in *Hall v Shoreham* is authority for the proposition that invalid conditions that are “fundamental” may not be severed. The consequence is that the whole permission is invalid if a fundamental condition is invalid. Whether or not a condition is “fundamental” turns on whether it goes to the root of the permission or deals with an ulterior, trivial or collateral matter (*Kent v Kingsway Investments Ltd (1971) HL*) and whether the LPA would have granted planning
permission without the condition in question. In this case condition (ii) is fundamental and invalid and, therefore, it cannot be severed. BDL should be advised accordingly.

BDL should be advised that it may take the following steps to challenge conditions (ii) and (iii) imposed on the grant of planning permission:

(i) Appeal to the Secretary of State within six months of the LPA’s decision (s78 TCPA 1990). On appeal the Secretary of State can amend, omit or alter conditions. The appeal is not limited to legal validity. There is a further right of challenge to the High Court on a point of law (s288 TCPA 1990).

(ii) Submit a planning application under s73 TCPA1990 to develop the Site without complying with the conditions attached to the grant of permission. In that case the LPA can only consider the conditions and not the principle of the development.

(iii) The conditions could be challenged by way of judicial review in the High Court.

In addition, the s106 agreement could also be challenged by way of judicial review on the basis that the obligation is not a material consideration. A planning agreement may be discharged or modified by agreement between the parties or by an application to the LPA under ss106A and 106B TCPA 1990 within five years of entering into the obligation. If the obligation no longer serves a useful purpose it will be discharged. If it still serves some useful purpose it may be modified (see R (on the application of Renaissance Habitat Ltd) v West Berkshire District Council (2010)).

Question 2

Section 55(1) of the TCPA 1990 defines development as “the carrying out of building, engineering, mining or other operations in, on or under land, or the making of any material change in the use of buildings or other land”.

“Building operations” includes “demolition of buildings” (s55(1A)(a)TCPA 1990). However, s55(2) provides that certain “operations or uses of land shall not be taken for the purposes of this Act to involve development of land...(g) the demolition of any description of building specified in a direction given by the Secretary of State to local planning authorities generally or to a particular local planning authority”.

The relevant Direction (“the Direction”) is contained in Appendix A to Circular 10/95 Planning Controls over Demolition and provides that the demolition of certain descriptions of building shall not be taken to involve the development of land including “(d)...any building other than a dwelling house or a building adjoining a dwelling house.” On this analysis the proposed demolition is development and requires planning permission as the brewery adjoins a dwelling house.

There is a further issue i.e. whether the proposed demolition is caught by EU Council Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (“the Directive”). That sets out the circumstances in which an environmental impact assessment (“EIA”) is required (See Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999).
So, does the Directive cover demolition in this case?

In R (on the application of Save Britain’s Heritage) v Secretary of State for Communities and Local Government (2011) EWCA, Sullivan LJ, applying the judgment of the CJEU in Commission of the European Communities v Ireland (2008) (“Ireland II”) stated that the Directive had to be interpreted in a “purposive manner”. He said, further, that if it is accepted that works are capable of having significant effects on the environment, the definition of “project” should be construed to include rather than exclude such works. He went on to say that it did not follow that “project” had to mean something new as, in any event, demolition could lead to something new. Demolition was the antithesis of construction. Schemes other than the execution of construction works fell within the first limb of the Directive and there was no reason why demolition works should be excluded from the definitions of such schemes. On that analysis, an environmental impact assessment (“EIA”) will be required in this scenario.

(b) If the brewery does not adjoin a dwelling house it will not be caught by art. (g) of the Direction and so not require planning permission as “development”. However, even if the proposed demolition does not require planning permission it may, nevertheless, be caught by the provisions of the Directive and require an Environmental Impact Assessment. This is the effect of the judgment in Save Britain’s Heritage, where Sullivan J said that it was a “curious and thoroughly unsatisfactory feature of the Direction that those demolitions which are most likely to have an effect on the cultural heritage ….are effectively excluded from the ambit of the Directive”. The effect of the judgment is that much of the Direction is unlawful and overturns the view of the Secretary of State that demolition does not require an EIA because it is not a “project” for the purposes of the Directive. The learned judge saw no purpose in a reference to the EUCJ, presumably because of the judgment in Ireland II.

Arthur should be advised accordingly.

Question 3(a)

MRPL can argue as follows:

(i) the purpose of the designation was to prevent the demolition of the Exchange, not the statutory purpose of protecting the special character of the area.

(ii) the report leading to the decision to designate ignored relevant considerations and took into account irrelevant considerations;

(iii) MRPL had the legitimate expectation of being consulted before the decision to designate was made.

(i) The merits of the designation and the timing and manner of the officers’ decision seem to have been inextricably intertwined in the officers’ minds. The Planning Committee were also of that frame of mind. The judgment in Trillium (Prime) Property GP v Tower Hamlets LBC (2011) EWHC suggested that the Council’s approach may not necessarily have been unlawful. While the designation process was accelerated because of the threat to the listed building, the process was initiated with the whole area in mind. However, it should be noted that the judgment in Metro Construction Ltd v Barnet LBC (2009) EWHC following R (Arndale Properties Ltd) v Worcester City Council (2008) EWHC suggests a different outcome.

(ii) The officers’ report was misleading in significant respects in that it ignored relevant considerations and took into account irrelevant ones. The fact that
designation had previously been refused was withheld from Members as was the fact that local listing had been refused. Moreover, the report wrongly suggested that the recommendation had the support of English Heritage whereas that was only the officers’ surmise.

The reliance which the report placed on the natural environment was not a lawful consideration in the decision to designate. The report was unbalanced as there was no reference to the matters which might have been advanced by consultees, including MRPL, had there been proper consultation. These factors would justify quashing the decision.

(iii) MRPL had a legitimate expectation of being consulted. Consultation was advised by English Heritage and was part of the LPA’s normal policy. MRPL had been told that it would be consulted and the duty of “utmost fairness and good faith in handling planning applications was referred to in a planning performance agreement between MRPL and the LPA which stipulated that MRPL should be consulted. Probably, however, the Planning Committee was entitled to conclude that the consultation process would create a sufficient risk of harm to the potential conservation area through the demolition of Exchange and to make its decision without consultation.

MRPL should be advised to apply for judicial review to quash the decision on the basis of the misleading officers’ report.

3(b)

The preliminary issue turns on whether the Cottages are “structures”. The court will find that the terrace as a whole and each cottage are structures for the purpose of s1(5) of the Listed Buildings Act 1990 (“the LBA 1990”).

The next issue is whether the Cottages are “fixed” to the Mill and, if they are, whether they remained within the curtilage despite the division of ownership i.e. are the Cottages a single structure fixed to the Mill by the bridge and has the change of ownership removed the Cottages from the curtilage of the Mill?

The judgment in A-G (ex rel Sutcliffe) v Calderdale Borough Council (1982) CA, on all fours with this scenario, answered the questions in the affirmative. In that case Stephenson LJ identified three factors which determine whether a structure lies within the curtilage of a listed building:

(i) the physical layout of the building and the structure;
(ii) their ownership past and present;
(iii) their use and function past and present.

However, in the later case of Debenhams plc v Westminster City Council (1982) CA the court decided that the definition of a structure within the curtilage of a listed building would be limited to a structure ancillary to the listed building itself. That does not necessarily mean that the Cottages in this case are not part of the curtilage, as when they were built they were probably ancillary to the Mill.

On balance, the court will find that the Council will have to comply with all the statutory requirements for the demolition of a listed building and for the proposed development within its curtilage i.e. listed building consent under s9 LBA1990. The Council will have to notify English Heritage of its intention as the Mill is listed Grade II*. The application will have to be advertised, following which the public will have 21 days in which to make representations as stipulated in the

The Residents’ Association should be advised accordingly.

Question 4

This case involves four legal principles:

- the breach of condition notice (“the BCN”)
- the general 10 year limitation period for enforcement action
- the principle that a use which is immune from enforcement action is “lawful”
- the right to apply for a certificate of lawfulness of use or development (“CLEUD”)

Miriam built the house without planning permission which, however, was granted retrospectively following enforcement action subject, inter alia, to condition 2. The occupation condition seems to be vague as to whether or not it related to the commencement of the construction of the equestrian facilities or their completion. So did Miriam breach the condition and, if so, when did she breach it?

In the event of a breach of condition time runs from the date of the breach i.e. in this case the date on which the offending use first began (s171B (3) TCPA1990), provided there has been a continuing contravention thereafter (Nicholson v Secretary of State of the Environment, Transport and the Regions (1998) EWHC, following North Devon DC v First Secretary of State and Stokes (2004) EWHC. It seems the LPA has taken no action in the meantime to enforce the condition, presumably because the equestrian facilities were incomplete until recently.

After the expiry of ten years from the date of his occupation of the house, Miriam applied for a certificate of lawfulness of existing use or development (“CLEUD”) under s191 TCPA1990, arguing that the condition had not been complied with for over ten years. By virtue s191 an unlawful use is made “lawful” for the purposes of the TCPA1990 provided the time for enforcement action has expired and the use does not constitute a contravention of the requirements of any enforcement notice or breach of condition notice then in force (s191(3) TCPA1990).

The LPA then served a breach of condition notice (“BCN”) under s187A(2) of the TCPA1990, which is available where planning permission has been granted subject to conditions and one or more of the conditions have not been complied with. The notice must specify the steps to be taken to remedy the breach. Failure to comply is a criminal offence, although breach of condition is not itself criminal. Moreover, its service prevents subsequent contravention becoming lawful by the efflux of time (s191(3) TCPA1990). There is no right of appeal against a breach of condition notice although it may be resisted in a number of other ways, set out in (i) below.

What should Miriam do?

(i) In regard to the BCN, while there is no right of appeal as such, it may be challenged by judicial review (R v London Borough of Ealing ex parte Zainuddin (1995)); or resisted in defence of a prosecution (Dilieto v Ealing LBC (2000) QB); or by an application to retain development without complying with condition (s73 TCPA1990). As the LPA has taken no action to prosecute Miriam for non-compliance with the BCN, defending a
prosecution is not an option, but if Miriam takes no positive action there will be great uncertainty hanging over his property.

(ii) Miriam could seek to discharge the condition on its planning merits under s73, though the LPA would surely refuse to do so and Miriam would have to appeal and probably lose. In any case it would be a tacit admission that the 10 year rule will not assist her.

(iii) She can apply for a declaration by way of judicial review on the basis that (a) the BCN was served more than 10 years after the breach alleged; and (b) her failure to comply with the BCN was lawful as no enforcement action could be taken as the time for such action had expired. That is her best course as the LPA’s argument that the breach of condition occurred only when the equestrian facilities were completed is highly questionable.

Miriam should not seek a declaration in a private law action as it would be struck out for abuse of process (Trim v North Dorset District Council (2010) EWCA).

Miriam should be advised accordingly.