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 June 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 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

Section 70(1) of the Town and Country Planning Act 1990 (“the TCPA 1990”) permits the Local Planning Authority (“the LPA”) to grant planning permission subject to such conditions “as they think fit”. This might appear to be a broad power, but in practice it is limited.

Fawcett Properties Ltd v Buckingham County Council (1961) established the following principles. A condition:

(i) must serve some useful planning purpose (Newbury District Council v Secretary of State for the Environment (1981)). A condition under this heading might be regarded as void if it could be shown to serve some ulterior social or political purpose as in R v Bristol City Council ex p Anderson (2000) where, on appeal, a condition imposed relating to student accommodation was held to fulfil a planning purpose;

(ii) must “fairly and reasonably relate to the permitted development”. This goes further than the simple requirement that a condition must serve the broad purposes of the planning legislation. However, a condition which serves some useful planning purpose may still be held invalid if it is not relevant to the development permitted (Newbury); and

(iii) must not be manifestly unreasonable i.e. Wednesbury unreasonable (Hall & Co v Shoreham-by-Sea UDC (1964) and R v Hillingdon LBC ex p Royco Homes (1974)). For example, a condition which relates to land outside the application site and not within the control of the applicant will be viewed as unreasonable even if the applicant has indicated he will accept the condition (Bradford City Metropolitan Council v SoSE (1986)). Vires cannot be conferred by consent.
The principle of the negative condition was approved in Grampian Regional District Council v City of Aberdeen District Council (1983) even where there was no reasonable prospect of its requirements being fulfilled (BRB v Secretary of State for the Environment (1994). However, in Mouchell Superannuation Fund Trustees v Oxfordshire County Council (1992) the court held that a condition relating to land not within the application site or within the applicant’s control was unreasonable.

A condition may be unreasonable if it derogates from the grant of permission (Redrow Homes Ltd v First Secretary of State (2004). In addition, a condition cannot be imposed so as to as to deprive a landowner of existing use rights (MHLG v Hartnell (1965), though the judgment in Kingston upon Thames Royal LBC v Secretary of State for the Environment (1974) suggests otherwise.

Where a condition is unenforceable it will, by definition, be unreasonable (British Airports Authority v Secretary of State for Scotland (1979)).

(iv) may be imposed restricting the user of premises according to the personal circumstances of the occupier. The agricultural occupancy condition is illustrative of this, but it may be spent on implementation if it is too personal (Knott v SoSE (1997)).

(v) may be declared invalid on the ground that its meaning is uncertain. This involves more than ambiguity. It will be void only if it can be given no meaning or no sensible or ascertainable meaning (Fawcett). However, a condition may be so ill-worded that a court cannot resolve the doubt (R v Secretary of State for the Environment ex p Watney Mann (Midlands) Ltd (1976). A condition designed to give local people the first opportunity to buy housing fell into this trap (M J Shanley Ltd v Secretary of State for the Environment and South Bedfordshire DC (1982). However, in borderline cases the LPA will be given the benefit of the doubt.

Moreover, conditions must comply with the general law (A-G v Wilts United Dairies (1922)). Given that requirement, the LPA still has a wide discretion. Under s72(1) TCPA 1990 the LPA may attach conditions:

(i) regulating the development or use of any land under the control of the applicant, provided the condition reasonably relates to the development permitted; and

(ii) requiring the permitted works to be removed or the permitted use to be discontinued at the expiry of a given period.

Grant of planning permission is normally subject to a condition that the development must be begun within a period of three years from the date of the grant unless a shorter period is agreed. In the case of outline permission, reserved matters must be approved within three years and the development begun within two years from the approval of the matters reserved.

In imposing conditions it is now established that the LPA must state clearly and precisely in the decision notice all the reasons for imposing each condition (Hamilton v West Sussex County Council (1958)). Any summary of reasons must refer to the policies and proposals in any relevant development plan.

There has been interesting recent case law on the validity of “tailpieces” on planning conditions i.e. conditions which end with words such as: “unless otherwise agreed with the LPA”. The intention is to allow flexibility without the
need to submit a s73 TCPA 1990 application to vary the condition. In Mid Counties Co-operative v Wyre Forest (2009) the court objected to the tailpiece as “wholly uncertain” and unlawful.

Question 2 Planning Gain

(a) Planning obligations are often used as a means of achieving “planning gain”, particularly offsite infrastructure. The Planning and Compensation Act 1991 (“the PCA 1991”) substituted new ss106(1), 106A and 106B TCPA 1990 for the previous provisions. The TCPA 1990 now provides that any person interested in land in the area of an LPA may by agreement or otherwise (i.e. unilaterally) enter into an obligation (i.e. a planning obligation):

(i) Restricting the use or development of the land in any specified way;
(ii) Requiring specified operations or activities to be carried out in, on, under or over the land;
(iii) Requiring the land to be used in any specified way; and
(iv) Requiring a sum or sums to be paid to the authority on a specified date or dates periodically.

Subsection 106(2) provides that a planning obligation may:

(a) Be unconditional;
(b) Impose any restriction or requirement mentioned in (i) – (iii) above, either indefinitely or for such periods as may be specified; and
(c) If it requires a sum or sums to be paid, require the payment of a specified amount periodically or indefinitely or for a specified period.

R v Plymouth City Council ex p Plymouth and South Devon Cooperative Society (1993) CA equated the tests for materiality of a planning obligation with those for the validity of planning conditions, as in Newbury. However, in Good v Epping Forest District Council (1994) it was held that a requirement in a s106 agreement was not necessarily invalid if it could not have been incorporated in a valid condition. The two statutory powers were distinct. The House of Lords gave authoritative guidance in Tesco Stores Ltd v Secretary of State for the Environment (1995). Only two of the Newbury tests were relevant: i.e. whether the obligation was for a planning purpose and whether it had a more than minimal connection with the proposed development. Thus:

(i) A planning obligation may be valid even if it fails the second of the Newbury tests in regard to relating “fairly and reasonably”;
(ii) It is no longer tenable to argue that a planning obligation, if equating to an unreasonable condition, would also be unreasonable;
(iii) Failure to follow the Secretary of State’s (“the SoS”) guidance will not as matter of law invalidate a planning permission. It would not be acting unlawfully if it applied the “necessity test”.

Eventually, the issue arose as to whether a transfer of land could be the subject of a planning obligation. The ratio of the judgment in South Northamptonshire District Council ex p Crest Homes plc (1995) was that it could be, provided it could be seen to have a restrictive effect on the development of the land, but not to be a unilateral undertaking (Wimpey Homes Holdings Ltd v Secretary of State for the Environment (1993)).

The new provision to make unilateral undertakings was designed to break any deadlock which might occur at appeal stage and, once entered into in compliance
with the statutory requirements, is as binding as if it were bilateral. (R on the application of Millgate Developments Ltd v Wokingham Borough Council (2011) EWHC).

In terms of policy, the National Panning Policy Framework (March 2012) advises LPAs to avoid unnecessary conditions and obligations and states that s106 agreements must be:

- necessary to make the proposed development acceptable in planning terms;
- directly relate to the development; and
- fairly and reasonably relate in scale and kind to the development.

and advance the principle of sustainable development.

S106 agreements are made by deed and are subject to the ordinary rules of contract (Jelson Ltd v Derby City Council (2002)). The deed and must state that it concerns a planning obligation made under s106. It must identify the subject land, the person entering into the agreement and the local authority by which the obligation is enforceable. The deed is registrable as a local land charge. The General Development Procedure Order 1995 (“the GDPO”) provides that the details must be entered in the planning register.

(b) Enforcement, Modification and Discharge

So far as enforcement is concerned, it is now made clear by s106(5) TCPA 1990 that this is by way of injunction (Waltham Forest LBC v Oakmesh Ltd (2009) EWHC). It is also clear from the amended statute that positive covenants may be enforced as well as restrictive covenants, so there is no need now to rely on other legislation, as was the case before 1991. The decision whether or not to enforce a planning obligation depends on whether the LPA considers it “expedient or necessary” (R on the application ASDA Stores Limited and another v South Tyneside Borough Council (2010) EWHC). A beneficiary of an agreement who is not a successor in title to a party to the agreement cannot enforce it (Milebrush Properties Ltd v Tameside MBC and Hillingdon LBC (2010)).

There are two ways in which a planning obligation may be modified or discharged. First, by agreement executed as a deed and, secondly, by application to the local authority under ss106A and 106B TCPA 1990. In the latter case an application may be made after five years from the date of the deed or such other specified period prescribed in Regulations. In response, an LPA may determine:

(i) That the obligation shall continue to have effect without modification; or
(ii) The obligation shall be discharged as it serves no useful purpose; or
(iii) The obligation serves a useful purpose but would serve that purpose as well if modified (R on the application of Garden and Leisure Group) v North Somerset DC (2003)).

All with an interest in the land must be notified and the application publicised. Notice of the determination must be given within eight weeks. There is a right of appeal to the SoS. A planning obligation, having statutory status, cannot be discharged by breach (Patel v Brent LBC (2004) EWHC).

The Planning Act 2008 provides for a Community Infrastructure Levy (“CIL”), a form of local development land tax designed to ensure that the cost of providing infrastructure can be met wholly or in part by developers. It was brought into force by the Community Infrastructure Levy Regulations 2010. The CIL
supplements planning obligations, but the Government has encouraged local authorities to use the CIL instead of them.

**Question 3**

(a) Applications may be made for full (detailed) planning permission or outline permission. In the latter case a further application must be made for the approval of matters reserved on the grant of outline planning permission (“reserved matters”).

The Town and Country Planning (Development Management Procedure) (England) Order 2010 (“the DMPO 2010”) specifies a standard form (1APP) for making a planning application. An application has to be submitted in writing on the form approved by the SoS and include the particulars specified on the form. A new standard application form was introduced for all applications for planning permission from 6 April 2008 (Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2008. Similar changes were made in respect of listed building and conservation area consents.

Applicants must submit a plan identifying the application site and any other plans and or drawings and information necessary to describe the proposed development. The application must be accompanied by the following:

(i) A Certificate of Ownership.
   The applicant does not have to own the application land, but s65 TCPA 1990 provides that the applicant must certify to the LPA 21 days before the submission of the application that:

   (a) No other person has an interest in the application land (Certificate A)
   (b) All other persons having an interest in the land , including tenants of agricultural holdings, have been notified (Certificate B)
   (c) Some owners, but not all, have been identified and notified (Certificate C)

In principle, the LPA cannot entertain an application unless these requirements have been complied with. However, an error in a certificate does not deprive the LPA of jurisdiction (R v Bradford District Council ex p. Boulton (1964)) though the court could quash a permission for such a defect (Main v Swansea City Council (1985)).

(ii) A Design and Access Statement (Art 8 DMPO 2010).
   The content should explain how the applicant has considered the proposal and that he understands what is appropriate and feasible for the site in its context including:

   (a) the design principles and concepts that have been applied; and
   (b) how issues relating to access have been dealt with.

(iii) Any Particulars or Evidence required by the LPA.
   The statutory requirements for an application are contained in s63(3) TCPA 1990. S62(3)(a) states that the applicant must submit “such particulars as the local planning authority think necessary”. In addition, Art 20 GDPO defines a valid application and states that an application is valid only if it contains those matters considered necessary by the local planning authority under s62(3), provided those matters are consistent with Art 20(3A). Any challenge to the validity of the LPA’s requirements must be by way of judicial
review as there is no appeal to the SoS on this point (Newcastle upon Tyne City Council v Secretary of State for Communities and Local Government (2009)). Thus, the LPA is the arbiter of what is necessary and the test in judicial review will be whether the LPA’s requirements are Wednesbury reasonable and/or proportionate. The judgment stated that it would be difficult for the SoS to determine what is necessary in the light of local conditions.

(iv) The Appropriate Fee (s30 TCPA 1990).

Fees are specified by the SoS in Regulations (The Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989 as amended). Fees may also be charged for pre-application advice (s53 PCPA 2004).

(b) The LPA must acknowledge receipt of the application in standard form (Sch. 1 DMPO 2010) and has to validate applications for minor development within five working days and major development within 10 working days.

At this point the LPA has certain duties in regard to publicity. S65 TCPA 1990 and the GDPO 1995 provide for three basic categories of publicity:

(1) Display of a site notice;
(2) Publication of a notice in a local newspaper;
(3) Informing the owners and occupants of neighbouring property.

Categories (2) and (3) apply to planning permissions:

(i) accompanied by an environmental statement;
(ii) which do not accord with development plan;
(iii) provisions which affect a public right of way.

Major development requires publicity under categories (1) or (2). Minor development not falling within category (2) requires publicity under category (1). Development affecting a listed building requires publicity under both categories (1) and (2).

The Secretary of State has the power to “call in” for his own decision any planning application (s77 TCPA 1990).

Before determining the application the LPA may have to consult government departments and other agencies e.g. the Secretary of State where aspects of a planning application affect major highways (GDPO Art 15). Some consultations with other agencies are governed by Art 15 GDPO 1995, others by specific statutory provision e.g. English Heritage in regard to listed buildings (s8 Listed Buildings Act 1990).

The LPA must then determine the application within a set period as set out in Art. 29 DMPO 2010 which varies according to whether the development is major development (13 weeks) or not (eight weeks). The date from which the determination period begins is the day after the date of the LPA’s receipt of a valid application (Art 29(2) DMPO 2010). The LPA cannot unilaterally extend the determination period by refusing to register the application (Art 29(3) DMPO 2010).

In determining any application the LPA must have regard to the development plan and any other material considerations (s70(2) TCPA 1990. Among the latter, departmental guidance is important, particularly the National Planning Policy...
Framework (March 2012). It may grant an unconditional permission or a conditional permission; or it can refuse the application. A conditional permission may also be subject to a planning agreement under s106 TCPA 1990.

The LPA is required to maintain a register in prescribed form of prescribed information in respect of applications made to the LPA (Art 36 DMPO 2010). Part I of the Register contains copies of every planning application (including reserved matters) and Part II contains details of every planning permission. The Register is open to the public.

Question 4

The PCPA 2004 introduced a number of major changes to the development plan regime. There were two basic elements of reform: (a) regional planning and (b) local development planning.

(a) Regional Planning
Structure Plans and Unitary Development Plans were abolished and replaced (outside London) by Regional Spatial Strategies (RSSs) based not upon counties but on regions. RSSs were prepared by Regional Planning Bodies (RPBs) as specified by the SoS and set out policies for the use and development of land within the region based, initially, on existing Regional Planning Guidance (RPG). In Greater London the Mayor’s Spatial Development Strategy (SDS) assumed statutory development plan status under PCPA 2004.

Under s39 PCPA 2004 the RSS had to contribute to the objectives of “sustainable development” and provide a broad development strategy for 15-20 years and a “spatial context” for the formulation of sub-regional strategies and programmes. Certain issues had to be taken into account at regional level:

(i) the provision of new housing;
(ii) environmental protection; and
(iii) transport, infrastructure, economic development, agriculture, minerals and waste management.

The “local development documents” (LDDs) of LPAs in the region had to be in general conformity with the RSS. The RSS consisted of written policies supported by non map-based diagrams.

The RPB could periodically revise the RSS, for example where there were changes in national planning policy. A draft revision of the RSS had to be subjected to consultation and publicity requirements before submission to the SoS who could arrange for an examination in public before publishing the revised RSS.

Under 6 PCPA 2004 there had to be a “statement of community involvement” (SCI). The RPB in exercising its functions had to prepare, publish and keep under review the statement of its policies as to the involvement of the community in the exercise of those functions. The RPB is required to conform to the SCI.

The shift from counties to regions brought about by the introduction of the RSS has, arguably, enabled central government to push through national planning policy more easily than in the past. The requirement under PCPA 2004 that at least 60% of the membership of an RPB had to be members of specified local authorities, including district and county councils within the region, was an attempt to provide a counterbalance.
In May 2010 the new Government announced its decision to abolish RSSs as it considered they did not work and were not democratically accountable. The requisite legislation was effected under s109 Localism Act 2011. At the outset the Government stated that its decision to abolish RSSs was a material factor for planning purposes but the decision immediately ran into trouble. The judgment in Cala Homes v Secretary of State for Communities and Local Government (2011) meant that RSSs were reinstated until the provisions of the Localism Act come into force.

In its Second Report on the abolition of RSSs (February 2011) the House of Commons’ Communities and Local Government Select Committee expressed concern at the speed with which RSSs were to be abolished, the lack of transitional provisions and the apparent lack of a replacement system for infrastructure, economic development, housing and environmental protection at a strategic level.

However, on 25 July 2012 Baroness Hanham, the Parliamentary Under Secretary of State, stated that the abolition of RSSs would be effected in two stages. The first stage, i.e. to remove the regional planning framework and prevent further strategies from being created, took effect when the Localism Act received Royal Assent on 15 November 2011. The second stage would be to abolish the existing regional strategies by secondary legislation. However, any final decision on this had to take account of assessments of, and consultation on, the possible environmental effects of revocation of each of the existing regional strategies. The Strategic Environmental Assessment process is set out in an EU Directive (Directive 2001/42/EC).

(b) Local Development Plans
The reform of local development plans has been less dramatic. The old style development plans were replaced with a “local development framework” (LDF). The LDF is a portfolio of documents setting out the LPA’s policies for use and development of land in the local authority’s area.

An LDF consists of “local development documents” (LDDs) which deliver the spatial planning strategy for the area, including “development plan documents” (DPDs). Only DPDs have statutory development plan status. There are also “supplementary planning documents” (SPDs) which expand on the policies set out in DPDs or provide additional detail.

The LDF must include the following DPDs: (i) the core strategy; (ii) site specific allocations; and (iii) action area plans (where appropriate). There must also be a proposals map on an Ordnance Survey base. As with RSS, there should also be an SCI.

In addition, the LPA must prepare and maintain a “local development scheme” (LDS) – this is a public statement of the LPA’s programme for the production of LDDs. The LDS must specify the LDDs; identify which are LDDs; and contain a timetable for their production and revision. Under reforms made by PA 2008, SCIs do need to be specified in the LDS as LDDs (or be subjected to independent examination); and SPDs will no longer need to be listed in the LDSs.

Before the LPA submits a draft DPD to the SoS it must comply with consultation and publicity requirements. Any representations made in accordance with the Local Development Regulations 2004 must be considered. The LPA must submit its draft DPD to the Secretary of State for “independent examination” by an
inspector appointed by the SoS. A test of soundness in PP12 is applied. The Inspector’s report is binding on the LPA.

After the coming into force of the PCPA 2004, the “development plan” in Greater London is the SDS plus the adopted DPDs for the area. The legal significance of the development plan is made plain by s38(6) PCPA 2004 (re-enacting with slight rewording s 54 of TCPA 1990 as s54A) which states: “if regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise”. Under a reform made by PA 2008, DPDs (and RSSs) must to include policies contributing to the mitigation of climate change.

With regard to the LDF, the introduction of the portfolio concept is designed to allow for parts of the plan to be updated without waiting for revision of the whole plan. One of the greatest difficulties with the old-style local plans was that they often became quickly out of date.

SECTION B

Question 1 Curtilage

(a) So far as concerns Ann’s argument of delay it is clear that John took action at the first opportunity and relief would not be refused under 31(6) Courts Act 1981.

The newly erected wall amounts to operational development within the meaning of s55(1) TCPA 1990 and is either a “building” or “other operation”. By virtue of Art 3 of the Town and Country Planning (General Permitted Development) Order 1995 as amended (“the GPDO”), the wall would normally be permitted as development falling within Part 1 Schedule 2 subject to certain height limits and does not have to be within the curtilage of a dwelling house. The provisions described as “Minor Operations” in Part 2 of Schedule 2 to the GDPO, Class A, include the words “The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure”. There are some limits in the public interest on the freedom to undertake minor operations such as the possible effect on listed buildings. Thus by Class A.1(d) class A development is not “permitted” if “it would involve development within the curtilage of, or to a gate, fence, wall or other means of enclosure surrounding, a listed building.”

The grant of a certificate under s192 TCPA 1990 does not require the LPA to give notice to anyone who might be affected by the development, though there is an argument that under Article 6 of the Human Rights Act 1998 there should be such a notification (Ortenberg v Austria (1995) ECtHR).

The issue here is whether the newly erected wall and gates are in fact within the curtilage of the listed building. Treetops. A-G v Calderdale (1982) CA is authority for the proposition that there should be some connection of the area in question with the principal building. In Dyer v Dorset County Council (1989) QB Donaldson MR said that the identification of the extent of curtilage was a question fact and degree for the trial judge. While in Skerritts of Nottingham v Secretary of State (2001) CA Walker LJ said that “this case demonstrates that not even lawyers can have a precise idea of what ‘curtilage’ means”.

In Sumption v Greenwich LBC (2007) counsel for the defendant and the LPA argued that the LPA’s decision could be upset only if it could be shown to have
been irrational in the Wednesbury sense. However, Collins LJ stated that one had to look at the factual situation created by the development at the time of the application. Land may be added to garden in an urban environment but at what time does it become part of the curtilage? Collins LJ said that once the wall was erected and the garden use confirmed, so that the land did indeed form part of the garden, it would be “well nigh impossible to contend that it was not within the curtilage”. It appears, therefore, that land does not have to be incorporated within the domestic curtilage for any specific time before the legal consequences of it being so defined take effect. On the basis of Sumption, Ann’s reference in her letter to “expanded garden” would be fatal to her case. It will not be relevant that a garden use for the Paddock was not in place.

So far as the gates are concerned, they have to be regarded as part of the means of enclosure.

The certificate will be quashed and Ann will have to obtain planning permission for the wall.

(c) So far as concerns the dovecote, the judgment in R on the application of Save Britain’s Heritage v Secretary of State for Communities and Local Government and Lancaster CC and Mitchells of Lancaster (Brewers) Ltd (2011) EWCA means that the proposed demolition is development, as the Development Direction 1995 was declared largely unlawful. It is not clear whether the Paddock lies within the Conservation Area but permission will be required not only for the demolition of the dovecote but also for its replacement with a modern dovecote as operational development. If the Paddock lies within the Conservation Area any proposed development will have to “preserve or enhance” (s72). There may also be an issue as to whether both the demolition and replacement affect the setting of the two listed buildings (s66 Planning (Listed Buildings and Conservation Areas) Act 1990).

**Question 2**

In the absence of planning permission there is no use to which Site A could lawfully be put. The unauthorised use as a haulage depot is not immune from enforcement and it fails to meet the ten year time limit (s171B TCPA1990) to secure immunity. The only option is to serve a purchase notice (s137 TCPA 1990). This is a course open to the owner or other person with an interest in the land after the refusal of planning permission or a grant subject to conditions, provided:

(i) the land has become “incapable of reasonably beneficial use in its existing state”;

(ii) if permission were granted subject to conditions, the land cannot be rendered capable of reasonably beneficial use by carrying out the development in accordance with the conditions; and

(iii) In any event the land cannot be rendered capable of reasonably beneficial use by carrying out any of the development for which planning permission has been granted or for which there has been an undertaking to grant planning permission.

In Adams and Wade Ltd v Minister for Housing and Local Government (1965). Widgery J said “the reference to ‘reasonably beneficial use’ must...be a reference to a use which can benefit the owner or the prospective owner and the fact that
the land in its existing state confers some benefit or value upon the public at large would be no bar to the service of a notice."

However, “beneficial use” is not necessarily synonymous with profit. In Colley v Secretary of State for the Environment (1999) the income from woodland was negligible and there would have been no income from the sale of timber for 50 years. The SoSE’s refusal to confirm the notice was upheld.

On receiving a purchase notice the SoS must decide whether or not to confirm it or revoke it or amend any condition so as to render the land capable of reasonably beneficial use. He may also grant planning permission for the development in question or direct that a planning permission be granted if a future application is made for some other form of development. There is a right of challenge in the High Court.

(b) The issue in regard to Site B is different and concerns the extent to which the unauthorised development which has taken place is immune from enforcement. The LPA has the power to issue an enforcement notice where there has been a breach of planning control i.e. where development has taken place without planning permission or a condition has been breached. The LPA must be satisfied that it is “expedient” to issue the notice having regard to the development plan and any other material considerations (s172(1)(b) TCPA 1990).

However, no enforcement action may be taken against an unauthorised material change of use once 10 years has elapsed from the date of the breach (s171B TCPA 1990). The Company’s parking of lorries has taken place for more than ten years and has, therefore, become lawful development.

On the other hand the lorry repair business has not been in continuous use for 10 years. In Secretary of State v Thurrock Borough Council (2002) it was held that if an unlawful use ceases and then resumes, the 10 year period required for immunity starts afresh on the resumption of the use. Even if the interruption was not the landowner’s fault it will prevent immunity. Whether or not interruption has that effect is a matter of fact and degree and some types of brief interruption could be held to be de minimis and that may well be the case here.

So far as concerns the new office building, 171B TCPA 1990 provides that no enforcement action may be taken against operational development after four years from the date of its “substantial completion”. In Sage v Secretary of State (2003) HL it was held that the building had to be substantially completed both externally and internally even though the internal works would not require planning permission if considered in isolation. This holistic approach was applied in Fidler v Secretary of State (2010) where a dwelling house completed without planning permission was a concealed behind bales of straw and tarpaulins for over four years. It was held that time ran from when the shield was removed as only then was the building substantially completed (See also Secretary of State v Welwyn Hatfield District Council (2011) UKSC). At the point of removal the development became unlawful and could be enforced against.

At least one of the uses in respect of which the Council has taken enforcement action is lawful and so the Company should appeal to the SoS. The grounds of appeal in s174(2) TCPA 1990 on which the Company should appeal are:

(a) planning permission ought to be granted; and
(b) that at the date of issue no enforcement notice could be served because of the elapse of time. The burden of proof will be on the Company (\textit{Nelsovil v MHLG (1962)})

Notice of appeal suspends the operation of the Notice pending the final outcome of the appeal. The SoS may uphold, quash or vary the notice; or grant planning permission or a CLEUD; or correct any defect if so to do would not cause injustice to any party. Challenge to the SoS’s decision lies to the High Court (s289 TCPA1990).

\textbf{Question 3}

(a) Initially, Mary could have responded to the notice the LPA placed in a local newspaper (GDPO 1995 Art 8).

In applying for judicial review Mary is in a somewhat different position from a claimant under s288. In \textit{Eco-Energy (GB) Limited v First Secretary of State} (2004) EWCA it was held that to be a “person aggrieved” one had to be (1) the appellant in the planning process; or a substantial objector; or (2) someone who had a relevant interest in the land as a neighbour affected by the development. Mary will be entitled to apply for judicial review. In \textit{Ashton v Secretary of State for Communities and Coin Street Community Builders Ltd} (2010) EWCA it was held that a person who had been a member of a development group opposing the application could not apply under s288.

Development requiring an Environmental Impact Assessment (“EIA development”) is defined in Regulation 2(1) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (“the 2011 Regulations”) as:

1. Schedule 1 development; or
2. Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

A screening direction is defined in Art 2(1) of the 2011 Regulations as “a direction made by the Secretary of State as to whether development is EIA development”. A direction of the Secretary of State shall determine whether or not development is “EIA development” (Art 4.3). The nature of the proposed development falls within the description contained in Column 1 paragraph 10(b) of Schedule 2 to the 2011 Regulations (urban development projects). The description includes the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas. Moreover, the Site area exceeds the threshold and criteria set out in column 2 of the table to that Schedule i.e. 0.5 hectare. In principle, therefore, the proposed development required an EIA.

However, in this case the SoS, having taken account of the criteria in Schedule 3 to the 2011 Regulations, considered that the proposed development would not be likely to have a “significant effect” on the environment, taking account of matters such as its nature, size and location. Land less than five acres in extent which has not hitherto been intensively developed would not normally require an EIA and the proposed development is considerably less than the threshold of 1000 dwellings. Moreover, the Site would not appear to be in a sensitive area.
The SoS's direction would have been made under Regulations 6(4) of the 2011 Regulations and accordingly was not EIA development.

Mary has been advised that “significant environmental effect” means one that has a real prospect of influencing the outcome of the application for planning permission. In Loader v Secretary of State for CLG (2012) EWCA Pill LJ stated that a broad construction must be given to the expression “significant effects” and that the requirement was not confined to applications likely to have major environmental effects.

The EU Commission’s advice on what is “significant” states that a useful check is to ask whether the effect is one that ought to be considered and to have an influence on the development consent decision (the “precautionary principle” as in Waddenzee ECJ (2004)). In R (Bowen-West v Secretary of State (2010) Laws LJ stated that the issue was a matter of judgment based on a fact finding exercise and not a question of proportionality relating to the exercise of a discretion. Any challenge should, therefore, be based on Wednesbury principles. If the advice tendered to Mary were to be upheld it would mean that an EIA would be required in respect of almost every application for planning permission.

Assessment of the impact of an environmental consideration on a particular planning decision poses a different question from assessing whether the same consideration is likely to have significant effects on the environment (Loader). There must be a degree of freedom in appraising whether or not a particular project must be subject to an assessment (Commission v United Kingdom (2007) ECJ. It invariably involves an element of prediction (Catt v Brighton and Hove CC (2007) EWCA). The test to be applied is:

“Is this project likely to have significant effects on the environment? (Loader per Pill LJ).”

Mary should be advised that, if granted leave, she will fail on the substantive issue.

**Question 4**

(a) The Wharf

The appeal against the enforcement notice will be made under s174(1) TCPA 1990. The ground will be that the resumed use of the wharf does not constitute a breach of planning control as the use of the wharf is established and has not been abandoned.

The abandonment of an existing use is a different matter from the abandonment of a planning permission (per Lord Scarman in Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment (1985) which involved a continuing use. The issue is simply one of fact (Hartley v MHLG (1970) i.e. what is the use of the land at the date of resumption? Absent any intervening different use, the test seems to be whether the reasonable man would consider that the use had been abandoned. On that basis the Company would succeed. However, it should be noted that in M & M (Land) Ltd v Secretary of State for Communities and Local Government (2007) the court observed that most uses are not of a continuing nature (as in Pioneer Aggregates), that they can only be implemented once and are susceptible of abandonment. On that basis the position might seem to be open. However, however, M & M concerned alleged abandonment following the grant of a CLEUD and that is not the case here. The Company should be advised
that in the absence of clear judicial authority there is certainly a chance of success.

(b) The TPO

Appeal against refusal of consent lies to the Secretary of State under s78 TCPA 1990.

Section 1998 TCPA 1990 provides for the making of orders to preserve trees, groups of trees and woodlands in the interests of amenity. “Tree”, “sapling” and “woodland” are not defined in the legislation and, accordingly, there is no minimum size exemption. However, in conservation areas the exemption relates to works to trees of a diameter of 75mm at breast height. Under s210 TCPA 1990 breach of an order is a criminal offence of strict liability (Maidstone BC v Mortimer (1980) HC).

In Kent County Council v Batchelor (1976) Lord Denning said obiter: “I should have thought that in woodland it (a tree) ought to be something over seven or eight inches (178-201mm) in diameter”. In Bullock v Secretary of State (1980) a landowner applied to quash a Tree Preservation Order (“TPO”) on the ground that it related to a coppice. There Phillips J said that “…bushes and scrub nobody, I suppose, would call “trees”, nor indeed shrubs, but it seems to me that anything that ordinarily one would call a tree is a tree”. In R (Plimsoll Shaw Brewer and others v Three Rivers DC (2007) Sullivan J stated that a TPO protected all trees within woodland to allow for regeneration. Damaging tree roots can also fall within the purview of a TPO (Barnet LBC v Eastern Electricity Board (1973)).

Saplings of whatever size are protected (Palm Developments Ltd v Secretary of State for Communities and Local Government and Medway Council (2009) EWHC). In that case Cranston J saw nothing illogical in a woodland TPO applying to future trees, as a woodland TPO is designed to “protect an undifferentiated mass of trees in a specified area”, following Evans v Waverly DC (1995).

The Company claims:

(i) That the works were a “one off” exercise and that the remaining trees would provide for regeneration. If that was in doubt, suitable planning conditions (e.g. for replanting) could have been imposed to secure that result; and

(ii) Consent was required only for trees and not for shrubs, scrub or saplings below a certain size. Moreover, woodland Tree Preservation Orders did not protect trees which took root and grew after the TPO was made.

The Company should be advised that on the basis of Palm Developments its appeal on these heads will not succeed.

The Company also claims:

(iii) The LPA should not have concerned itself with the planning merits of the proposed works, only the scope of the TPO. That claim would appear to have some merit, but on the basis of the judgment in Palm Developments the Secretary of State, while he would be critical of the LPA on that head, would not go so far as to overturn the LPA’s refusal of consent.

The Company should be advised accordingly.