

**LEVEL 6 - UNIT 11 – PLANNING LAW
SUGGESTED ANSWERS – JANUARY 2017**

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 2017 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(a)

'Planning gain' can be defined as the provision by a developer to include in a proposal projects beneficial to the community in exchange for permission for a commercially promising but potentially unacceptable development. Planning gain is secured in two principal ways: through s106 Town and Country Planning Act 1990 ('the TCPA 1990') and the Community Infrastructure Levy ('the CIL').

Section 106 Agreements

The enactment of s12(1) of the Planning and Compensation Act 1991 amending s106 TCPA 1990 and introducing s106A and s106B substituted 'planning obligations' for planning agreements'. Section 106 (1) provides that any person interested in land within the administrative area of a local planning authority ('LPA') may by agreement or otherwise enter into a planning obligation. Such obligations are in the nature of a contract between developer and local authority and are to be construed according to the ordinary principles of contractual construction (Stroude v Beazer Homes (2006) EWHC); accordingly, public law remedies are, for the most part, excluded.

An obligation can be indefinite or for specified periods in order to

- restrict the development or use of the land in a specified way;
- require specified operations to be carried out in on or over the land;
- require the land to be used in a specified way; and
- require a sum of money to be paid to the LPA on a specified date or periodically or indefinitely.

It should be noted that such obligations can contain positive as well as restrictive covenants and that a planning obligation is an obligation that could not be

imposed by condition as it would be regarded as unreasonable in terms of the judgment in Hall & Co Ltd v Shoreham-on-Sea UDC (1964).

Section 106 obligations do not replace simple agreements but are an alternative where it is not possible to secure a unilateral undertaking as in (South Oxfordshire Borough Council v SSE (1994) where the money offered was applied to a specific purpose rather than being paid to the local authority. However, unilateral agreements are sometimes difficult to enforce (Hertfordshire County Council and North Herts DC v SSCLG (2011) EWHC).

The latest Departmental advice comes by way of the National Planning Policy Framework ('the NPPF'), especially paragraphs 203-205. In essence they state that planning obligations should be imposed only where it is not possible to address unacceptable development through planning conditions. The NPPF sets out three preconditions, namely that the obligation

- should make the development acceptable in planning terms;
- should relate directly to the development; and
- fairly and reasonably relate to the scale and nature of the development.

These rehearse the provisions of Regulation 122 of the Community Infrastructure Regulations 2010 ('the CIL Regulations 2010').

It should not be forgotten that however prescriptive the NPPF may be it is not law. Thus the case of R v Plymouth City Council and South Devon Co-operative Society Ltd (1993) is instructive as to the issue of materiality. The grocery chain, J Sainsbury, offered very considerable benefits in connection with a grant of planning permission for a supermarket. The court had no problem with the benefits offered on-site or in deciding that off-site contributions designed to alleviate traffic problems had a planning purpose. The court found that all three Newbury tests applied to the issue of whether an obligation was material (Newbury District Council v SoSE (1981)).

Further authoritative guidance was given in the case of Tesco Stores Ltd v SoSE (1995), the 'Witney decision'. The court found that there has to be some connection between the obligation and the proposed development which is not *de minimis*, but the degree to which that matter affects the decision is a matter for the decision maker; there is a distinction between materiality and weight.

Following Tesco an obligation may be valid even if it fails the second Newbury test of fairly and reasonably relating to the development in issue. Thus an obligation will not be held invalid for lack of nexus with the development. Nor does it follow that if a condition is unreasonable the obligation is necessarily unreasonable. In R v South Northamptonshire District Council ex p Crest Homes plc (1995) the question arose as to whether an obligation to transfer land to provide open space for school was legitimate. It was held that it was valid provided it was restrictive in form i.e. 'restricting the development or use of land in any specified way' (106(1)(c) TCPA 1990).

Obligations are executed by deed and are registrable as local land charges. They may now be enforced by injunction to restrain or to enforce action provided damages are not an adequate remedy (s106(5) TCPA 1990 and see Waltham Forest LBC v Oakmesh Ltd, Family Mosaic Housing (2009) EWHC). Where a sum of money is payable it is recoverable as a debt not as damages. If the developer has not executed work specified in the obligation the LPA can carry out the work and recover the (reasonable) expense as a civil debt.

Planning obligations can be modified by agreement between the parties or by an application to the LPA (s106A & s106B TCPA 1990) with a right of appeal to the Secretary of State. Planning obligations should not be challenged if the planning permission has been implemented unless the obligation no longer serves a useful purpose (J A Pye (Oxford Ltd) v South Gloucestershire DC (2001)).

The Community Infrastructure Levy (CIL)

The CIL was introduced by the Planning Act 2008. It followed a review of the operation of s106 which was retained in statute. The overall aim is to ensure that costs incurred in supporting the development of an area can be funded wholly or in part by owners or developers of land so that the development is economically viable. Section 205(2) provides that local authorities, as charging authority, may charge CIL in respect of the use and development of the land within its administrative area. The funds so raised must be applied to fund the provision, improvement, replacement operation or maintenance of the infrastructure, defined to include:

- (a) roads and other transport facilities
- (b) flood defences
- (c) school and other educational facilities
- (d) medical facilities
- (e) sporting and recreational facilities; and
- (f) open spaces

However, s115 of the Localism Act 2011 specifically provides that the imposition of CIL must not make development economically unviable. The provisions now extend to Neighbourhood Development Orders and Community Right to Build Orders.

As mentioned above, Regulation 122 of the CIL Regulations 2010 provides that it is unlawful for a planning obligation to be taken into account in determining a planning application for a development that is capable of being charged to CIL if it does not meet the test of making the development acceptable, directly related to the development and reasonably related in scale and kind. This provision is designed to prevent overlap between the two statutory devices and the danger of double charging.

The legislation encourages landowners and developers to assume responsibility for the charge before the implementation of planning permission. However, an agreement to make such a 'land payment' must not form part of a planning obligation. Otherwise, once chargeable development is commenced the levy becomes due. The authority has the power to serve a 'CIL stop notice' in cases of non-payment and levy a surcharge. There is another option whereby the collecting authority may apply to the magistrates' court for a 'liability order' which, if granted, permits the charging authority to distrain the goods of the debtor.

1(b)

It is clear from the foregoing that s106 obligations and the CIL serve rather different purposes. Planning obligations are site specific whereas the CIL is more useful in respect of the development of areas. Planning obligations have no place where CIL is appropriate. There are other differences. Planning obligations are in the nature of private contracts between developer and local authority and

enforceable by way of private law remedies. CIL payments in contrast are a statutory levy and collection is enforceable by statutory means whether by stop notice or distraint. Of course, where local authorities have not elected to be CIL charging authorities planning obligations will be the primary means of controlling development which would otherwise be refused.

Question 2

Except in the case of special controls as, for example, in the case of listed buildings and tree preservation orders, it is not an offence to carry out development without the requisite planning permission. Instead, the Planning Acts provide rigorous means of enforcement, although it is only when an enforcement notice is ignored that the local planning authority ('the LPA') can prosecute.

While the enforcement notice, allied to a stop notice, is the most powerful tool to obtain compliance, the Planning and Compensation Act 1991 ('PCA 1991') provided additional powers in the form of a planning contravention notice (PCN) and a breach of condition notice (BCN) following the Carnwath review. In addition, sections 196A, 196B and 196C of the PCA 1991 modified the LPA's powers of entry so that there are specific powers of entry where a breach of planning control is suspected and for other related purposes.

Enforcement Notices

An LPA has a discretionary power to serve an enforcement notice where

- (a) development has been carried out without planning permission; or
- (b) there has been a failure to comply with a condition or other limitation.

A notice must not be issued unless the LPA considers it expedient to do so having regard to the development plan and any other material considerations. The service of the notice is discretionary but an LPA serving an enforcement notice may be penalised if it does not first make proper enquiries (R (otao Cobbledick) v First Secretary of State (2004) EWHC). Thus the LPA has first to ask itself whether it would have granted planning permission had an application been made to it and, in any case, the personal circumstances of the occupiers of the land are a relevant consideration Kent County Council v Brockman (1994). Moreover, the enforcement action should be proportionate to the breach. The NPPF at paragraph 207 suggests that LPAs should have an enforcement plan.

The notice must correctly "state" the matters which, 'in its opinion' constitute a breach of development control and specify the steps required to remedy the breach or to alleviate any injury caused by the breach (s173 TCPA 1990). These must be precisely defined or the notice will be void (Williams v Herefordshire Council (2010)) and the requirements should not be excessive (Mansi v Elstree RDC (1964)). Moreover, the Secretary of State can now correct defects and even fundamental mistakes so long as no injustice results in so doing (Tower Hamlets LBC ex p Ahern (London) Ltd (1989)). In addition, the date on which the notice takes effect and the period for compliance must be clearly stated.

There are time limits the efflux of which can prevent the LPA from taking enforcement action. In the case of operations this is four years (beginning with the date on which the operation was completed) and in the case of a change of use of a building to a single dwelling house. All other breaches are subject to the ten year rule including breach of condition. If the notice is defective or

inadequate in any way the LPA is entitled to a 'second bite' by serving a second enforcement notice, even if the matter enforced against has run into a time limit. However, the second bite must not specify a breach which is wider in substance than the first (Fidler v First secretary of State (2003) EWHC).

The right of appeal is to the Secretary of State for anyone with an interest in the land and is contained in s174(1) TCPA 1990. There are seven specific grounds specified in s174(2) of which the most important, perhaps, is the ground that planning permission should be granted for the development in issue. However, the onus is on the appellant to 'make good the grounds' (Nelsovil Ltd v Minister of Housing and Local Government (1962)).

Failure to comply with an enforcement notice is a criminal offence (s179(2) TCPA 1990). In addition, LPAs are increasingly invoking the provisions of the Proceeds of Crime Act 2002 to enforce compliance.

Stop Notice

This is a supplement to an enforcement notice and cannot be served unless an enforcement notice has been served but not after it has taken effect. It can prohibit the activity which the enforcement notice states to be in breach of development control. However, it cannot be served in respect of an activity which began more than four years earlier. There is no appeal against a stop notice.

Planning Contravention Notice (PCN)

A PCN (s171C and 171D TCPA 1990) can be served on an owner or occupier of land or anyone carrying out operations there or using it if the LPA considers there may have been a breach of planning control and it requires more information about the activities in issue in order to obtain the cooperation of the developer. It supplements the power to obtain information under s330 TCPA 1990 and serves the purpose of sending a warning to the developer. It is a precondition to the service of a PCN that a breach of planning control has taken place in terms of a failure to obtain planning permission or to comply with a condition or any other limitation (R v Teignbridge District Council ex parte Teignbridge Quay Co Ltd (1995)). In that case the mere refusal of the landowner to cooperate was insufficient to satisfy the preconditions.

There are five specific heads, which are exceptionally wide, under which the LPA can require information in connection with a PCN:

- (a) Whether land is being used as alleged in the notice
- (b) When the activity began
- (c) Particulars of the person carrying out the activity
- (d) Any information about existing planning permissions or established uses
- (e) The interest of the recipient in the land

Failure to comply within 21 days constitutes an offence and there are specific powers of entry onto the land.

LPAs have a general power to apply under s 187B TCPA 1990 to seek injunction to restrain any breach of planning control to be restrained. (South Bucks v Porter (2003) EWCA).

Breach of Condition Notice (BCN)

A BCN (s187A TCPA 1990) is used where a developer has failed to comply with a condition or limitation attached to a grant of planning permission. This notice may be served on the person carrying out the development or in control of the land and must specify the steps to be taken to secure compliance with the conditions set out in the notice. The period for compliance is 28 days. If the notice is served on the person in control of the land the condition must relate to the land over which he has control. Failure to comply is an offence (Davenport v Hammersmith and Fulham LBC (1999)).

Unusually there is no right of appeal against the service of a BCN although a decision would be reviewable judicially. The position if the condition is invalid is somewhat unclear, but in Dilieto v Ealing LBC (2000) Sullivan J (as he then was) held that the breach of condition took place more than 10 years earlier and was outside the limit for enforcement. However, a BCN can be served if there is a valid enforcement notice in place although it can be overtaken by a subsequent planning permission.

The BCN power means that developers need to take conditions more seriously than in the past and need to take care when volunteering conditions or acquiring land so burdened. It has led to an increase in s73 applications i.e. for permission to develop land without compliance with conditions attached to a previous permission.

There is also a Temporary Stop Notice (TSN) which enables an LPA to take immediate action for a period of 18 days without the need for the service of an enforcement notice.

Since the reforms introduced by the PCA 1991 the statutory enforcement system is very effective.

Question 3

Following the publication of a White Paper on the protection of heritage assets (Heritage Protection for the 21st Century) the then Government had intended to consolidate the relevant legislation into one statute. A bill was presented to Parliament but withdrawn in the session 2008-9. Instead, the Government issued Planning Policy Statement 5 (PPS5) which introduced the concept of 'heritage assets'. This advice has now been superseded by the National Planning Policy Framework ('the NPPF') and Historic Environment Good Practice Advice in Planning Nos 1-3. Although the NPPF withdrew PPS5 it retained the concept of 'heritage asset' which does not appear in statute.

Section 12 of the NPPF is entitled 'Conserving and Enhancing the Historic Environment'. It defines the historic environment as 'all surviving physical remains of human activity' and a heritage asset as 'a building, monument, site, place area or landscape identified as having a significance meriting consideration in planning decisions...' The latter definition includes designated heritage assets and assets identified by local authorities. The heritage interest may be archaeological, architectural, artistic or historic.

In relation to plan making the NPPF stipulates that there must be a positive strategy for the conservation and enjoyment of the historic environment, including heritage assets at risk. In developing this strategy Local Planning Authorities ('LPA's') should take into account:

- The desirability of sustaining and enhancing the significance of heritage assets
- The wider social cultural and economic and environmental benefits of conserving the historic environment
- The desirability of new development making a positive contribution to the historic environment
- Opportunities to draw on the contribution made by the historic environment to the character of a place.

In determining planning applications LPAs are to require applicants to describe the significance of any heritage assets which might be affected and any contribution the proposed development might make to their setting. They are also to avoid or minimise conflict between the heritage asset and any aspect of the proposal. Great weight should be given to the asset's conservation and consent should be refused in cases where proposals present a danger of 'substantial harm or loss', unless public benefit outweighs the likely harm or loss or the following apply:

- The nature of the asset prevents the reasonable use of the site;
- No viable use of the site can be found in the medium term;
- Conservation through fund-raising or public ownership is not possible; or
- The harm or loss is outweighed by the benefit of bringing the site back into use.

These statements in the NPPF are important as Planning Inspectors are required to give effect to them. However, the wording is different from the legislation and in some cases so, it seems, is the intent. It sets out decision-making policies using different terminology to the statutes. For example it refers to 'conservation of significance', a qualification not found in the Planning (Listed Buildings and Conservations Areas) Act 1990 ('the LBA' 1990). The concern resides in the fact that the NPPF actually countenances harm or loss to historic assets in certain circumstances where harm may be offset by public benefit. There has been considerable judicial debate as to whether some of the advice in the NPPF runs counter to the relevant legislation.

A good example of the problem is the recent judicial interpretation of s66(1) and s72(1) of the LBA 1990 in regard to the NPPF. Where these provisions are relevant to planning applications a balanced judgment will be required. The importance of this exercise was referred to in Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council(2014) EWCA where the court emphasised that the provisions of the NPPF and the development plan could not prevail against the statutory provisions. The requirement to deal with planning applications according to the provisions of the development plan and any other material factors is subject to the provisions of the LBA 1990. It was held that s66 and s72 of the LBA 1990 do not allow an LPA to treat the desirability of preserving the settings of listed buildings as mere material considerations to which it can simply attach such weight as it sees fit. In Barnwell Sullivan LJ said that he accepted that 'the Inspector's assessment of the degree of harm was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise'.

This was reinforced in the case of R otao Forge Field Society v Sevenoaks (2014). Once harm is found in regard to a planning application affecting a listed

building or conservation area there is a strong presumption in favour of refusal. It was not to be balanced against the benefit of providing affordable housing.

Since it was decided, the judgment in Barnwell has been cited in many decisions on heritage assets. It was followed in Jane Mordue v SSCLG and South Northamptonshire Council (2015) where an Inspector's decision to permit the erection of a 60 metre-high wind turbine affecting the setting of a grade II* mediaeval church was overturned. However, Sullivan LJ granted the South Northamptonshire Council leave to appeal on the surprising basis that the learned Deputy Judge had misunderstood his (Sullivan's) judgment in Barnwell and that that case had been characterised by a lack of due regard for the law and the facts i.e. *per incuriam*.

The Court of Appeal upheld the appeal finding that the Inspector was entitled to assess that the harm he identified was outweighed by the environmental benefits provided by the turbine. The Court gave great weight to the speech of Lord Bridge in Save Britain's Heritage v Number 1 Poultry Ltd (1991) in which he said in regard to the giving of reasons that the test was 'Were they adequate' and, if not, was the Appellant substantially prejudiced as a consequence? It also placed weight on the development plan.

The state of the law appears to be uncertain and the relationship between the relevant legislation and the NPPF has yet to be settled.

Question 4

The relationship between planning control and natural habitats has been the subject of significant legislation since 1990, including the Environmental Protection Act 1990 and the Pollution Prevention and Control Act 1990. Of equal importance is the European Directive on the Conservation of Natural Habitats and the Wild Flora and Fauna ('the Habitats Directive'). The Directive aims to conserve fauna and flora in their natural habitats as part of the objective of ensuring biodiversity. In promoting biodiversity account is to be taken of economic, social, cultural and regional requirements in the European Union ('the EU').

The Directive provides for an EU-wide ecological network of special areas of conservation ('SACs') to be set up under the title 'Natura 2000'. The network includes special protection areas ('SPAs') classified under the Directive on the Conservation of Wild Birds ('the Wild Birds Directive'). Article 4 provides for the identification of priority habitats and species in danger of disappearance and for their designation as SPAs.

Under Article 6 member states must take action to avoid the deterioration of habitats and the implications of any proposed development likely to affect them significantly must be assessed properly. A proposal should be permitted only if it will not adversely affect the integrity of the site unless it is in the public interest that the proposal should nevertheless proceed (the Article 6(4) 'get out' clause). Such proposals include development but also activities excluded from development under national law, such as the change from one type of agriculture to another. In R (otao Woolley) v Cheshire East Borough Council (2009) EWHC a planning permission was quashed because the local planning authority failed to have regard to the Habitats Directive. It was a substantive breach of European law.

The provisions of the Habitats Directive are now contained in the Conservation of Habitats and Species Regulations 2010 ('the Habitat Regulations'). These require the Secretary of State and nature conservation bodies to exercise their functions so as to comply with the provisions of the Habitats Directive. These functions include powers exercisable under the National Parks and Access to the Countryside Act 1949, the Countryside Act 1968 and the Wildlife and Access to the Countryside Act 1990. Once the EU Commission has adopted a site as of EU importance ('European Sites') the Secretary of State must within six years designate it as an SAC.

One impact of the Habitats Regulations is that local development plans must include policies encouraging the management of features of the landscape which are of major importance for wild flora and fauna. Such features can include river banks, fences and walls, ponds or small woods which may be essential for the migration of wild species.

In certain circumstances there are restrictions on the granting of planning permission, both express and permitted, under development order. They also require a review of existing permissions with a view to possible revocation or modification or discontinuance of use (see below). There are special provisions relating to Simplified Planning Zones and Enterprise Zones.

Planning Permission

Under Regulation 61(1) local planning authorities (and the Secretary of State) before granting planning permission for a plan or project which

- (a) is likely to have a significant effect on a European Site; and
- (b) is not directly connected with or necessary for the management of the site.

must make an appropriate assessment of the implications for the site in terms of its conservation objectives. This does not correspond to an Environmental Impact Assessment ('EIA') although an EIA might be required as well. The appropriate nature conservation body must be consulted and, if appropriate, the opinion of the public sought. The LPA can agree to the proposal only if it is satisfied that the proposal will not affect adversely the integrity of the site in terms of the coherence of its ecology and its ability to sustain the habitat or the species, as the case may be. These provisions cannot be overridden by policies in a development plan or other material considerations.

If, notwithstanding a negative assessment, it is considered that the proposal must proceed for imperative social or economic reasons there is a derogation power, except that the reasons for derogation must relate to public health, public safety, 'beneficial consequences' or other imperative reasons which in the opinion of the EU Commission are sufficient in the public interest (Regulation 62).

Review

The review of existing planning permissions and deemed permissions likely to have a significant effect on a European Site is required under Regulation 69 but does not apply to permissions for development which have been completed. The review should consider whether any adverse effect could be overcome by a Section 106 agreement, revocation, modification or discontinuance and in that event compensation may be payable.

In the case of permitted development the Habitat Regulations provide that any permission so granted is subject to a condition that development shall not commence until the developer has received the written permission of the LPA if the development is likely to have a significant effect on a European site and the development is not connected with the management of the site. There is provision to seek an opinion as to the effect from the appropriate nature conservation body.

Article 12 of the Habitats Directive provides that LPAs must take 'requisite measures' to establish a system for the strict protection of the protected species listed in the Directive to prevent 'deliberate disturbance' (Magee v Hampshire County Council (2011) UKSC). The judgment in that case made it clear that the duty affected species not habitats directly; and it affected species not specimens of species. Disturbance could be greater at some times (such the breeding period) than others. The Supreme Court adopted a more relaxed approach in Magee than in Woolley.

SECTION B

Question 1

The issue in this scenario is whether there are any grounds for the Planning Inspector to depart from the provisions of the LPA's Local Plan. The LPA argues that the proposed development conflicts with policies contained in the Local Plan and that, therefore, it is not sustainable (Bloor Homes East Midlands v SSCLG (2014)).

The Planning Inspector has to consider the Company's proposal *de novo*. He stands in the shoes of the LPA as the original decision maker.

The determination of an application for planning permission is to be made in accordance with the development plan unless material considerations indicate otherwise (s38(6) Planning and Compulsory Purchase Act 2004 ('the PCPA 2004') and s70(2) Town and Country Planning Act 1990 ('the TCPA 1990')). The National Planning Policy Framework ('The NPPF') is a material consideration for these purposes but does not supplant the provisions of primary and secondary legislation.

The Inspector must have regard to any relevant policy in the development plan and interpret it correctly (Tesco Stores Ltd v Dundee City Council (2012) UKSC). However, the decision maker is not itself free to determine the meaning of development plans from time to time even within the limits of rationality (per Lord Reed in Tesco Stores).

On the other hand, it is a matter for the decision maker to decide whether or not the development is sustainable (William Davis Ltd v SSCLG (2013)). The presumption in favour of a grant of permission (paragraph 14 NPPF) applies only if the development is sustainable (William Davis Ltd). Assessing sustainability requires a balancing judgment to be made of the factors for and against the proposed development (Dartford Borough Council v SSCLG (2014) EWHC).

Because the proposed development is for housing the housing policies in the Local Plan are in issue. Paragraph 49 NPPF states that if a local authority local plan cannot demonstrate a five year supply of housing based on 'objectively assessed needs' it will be considered as out of date (Hunston v SSCLG (2013) EWHC).

The provisions of the Local Plan in this scenario are clear and the proposed development conflicts with them. However, the Local Plan is out of date and in such circumstances the inspector will be entitled to give the policies less weight, particularly where they bear on housing supply. Accordingly, the provisions of the NPPF come into play as material considerations. Paragraph 49 NPPF states that where the development plan is out of date the presumption in favour of development operates unless the adverse impact would outweigh the benefits and unless the development is contrary to other NPPF policies.

Policy OC1 is a policy which restricts development in the open countryside and is a policy relating to the supply of housing within the meaning of paragraph 49. That paragraph states that policies for the supply of housing should not be considered as up to date if the LPA cannot demonstrate a five year supply of deliverable housing sites. That appears to be the case here and the Inspector would be entitled to discount its weight. In South Northamptonshire District Council v SSCLG (2014) EWHC Ouseley J distinguished general policies to restrict development and other policies to protect specific areas or features such as gaps between settlements. Policies OC1 and AG1 are such general policies and again the Inspector would be entitled to discount their weight on that basis.

However, a Green Wedge policy such as GW1 is a policy designed to protect specific areas or features and is not a policy for the supply of housing within the meaning of paragraph 49 NPPF (Cheshire East BC v SSCLG and Richborough Estates Partnership LLP (2015) EWHC). There is no basis for saying it is out of date. Paragraph 215 NPPF states that the weight to be given to policies in existing plans should be in proportion to their conformity to NPPF policies. In Cheshire East Lang J doubted whether it was ever intended that the NPPF should 'routinely by-pass local policies protecting specific local features and landscapes.' Were it to do so it would qualify the intention of Parliament.

The Company should be advised that its appeal will be rejected on the basis that the proposed development conflicts with Local Plan policy GW1.

Question 2

The issues in this scenario relate for the most part to the definition of the planning unit. The advertisement is a different matter and is considered below.

Whether there has been a material change of use will often depend very much on the definition of the planning unit. In East Barnet UDC v British Transport Commission (1962) the court was of the view that there were no hard and fast rules for the choice of unit and that in each case the problem had to be approached on common-sense grounds.

In Burdle v SoSE (1972) the court suggested three possible criteria for identifying the planning unit:

- (1) When there is an identifiable main unit with ancillary uses the whole unit of occupation should be considered;
- (2) That might also be the case where there are a variety of uses which are not ancillary e.g. where there is a composite use and the several activities are not confined to separate areas; and
- (3) In a single unit of occupation there may be distinct areas used for separate and unrelated uses. In that case each area should be considered as a separate unit.

So far as concerns the conservatory attached to the house, in the case of Wood v SoS for the Environment (1973) produce from a small holding was being sold from a conservatory attached to a house on much the same basis as Giles' operation. The court decided that it was not right to 'dissect' a dwelling house and regard one room as a separate planning unit. The proper way to consider the matter was to assess whether the uses altered the use of the house as a whole. On that basis Giles would succeed.

Again, in Fuller v SoSE (1987) the facts were much the same as here. The appellant farmed over 2,000 acres comprising a widely scattered number of farms. The LPA issued an enforcement notice requiring the discontinuance of the use of the land for the commercial storage of grain not grown on the appellant's own specified units. The High Court upheld the SSE's decision that the separate farms could not reasonably be regarded as a single planning unit.

The question of the Lodge is rather different. The issue here is whether Giles has divided the planning unit i.e. Giles's house and grounds. The sale of the Lodge as a separate unit of accommodation prima facie required permission. Wakelin v Secretary of State for the Environment (1978). However Winton v Secretary of State (1982) took the matter a step further in holding that a subdivision of the unit did not in itself amount to a material change of use but would if it had 'planning consequences'. However, s55(2)(f) of the TCPA 1990 now provides that the subdivision of a unit into two or more units within the same use class will not constitute development. The position would have been otherwise had Giles decided to create a separate residential unit from the house itself.

The position in regard to the advertisement is governed by the Control of Advertisements (England) Regulations 2007. Giles's advertisement falls within the definition of such as a '...sign, placard, board notice...employed wholly or partly for the purpose of advertisement...'. The powers conferred on LPAs are to be exercised only in the interests of amenity and public safety (s220(1) TCPA 1990). Advertisements fall into three classes: excepted, deemed consents and express consents. Giles's board qualifies as having deemed consent as an advertisement on business premises with reference to the business carried on there (Regulations Schedule 3, Class 5); he carries out his business from the house including its curtilage (Dominant Sites Ltd v Berkshire County Council (1955)). The sign must not have letters exceeding 0.75 of a metre in height and the highest part of the board must not be more than 4.6 metres above ground level. Given the size of the board it is more likely than not that it complies.

The LPA has challenged the advertisement by issuing a discontinuance notice but Giles can apply for express consent and appeal to the Secretary of State if refused.

Giles should be advised that he can appeal against the Council's enforcement notices on the ground that the matters alleged do not constitute a breach of development control. Should the Council take enforcement action in regard to the Lodge he can argue that the use of it as a unit separate from the house and its curtilage does not constitute a breach of development control on the basis of s55(2)(f) TCPA 1990. As to the advertisement Giles should now apply for specific consent and appeal to the Secretary of State if it is refused.

Question 3 (a)

This scenario concerns uses within the same use class and whether over a period of ten years different uses within the same use class can build up immunity from enforcement action.

If a local planning authority ('LPA') wishes to enforce against unauthorised development, including an unauthorised change of use, it must take action within 10 years of the commencement of the unauthorised material change of use (s171B(3) Town and Country Planning Act 1990 ('the TCPA 1990')). The commencement of a new use is development and changes between different use classes also amount to development. However, what happens when over a 10 year period the use class remains the same but the property is used for different uses within that class?

Thus the first question to decide here is whether any of the uses to which Sally's Chapel has been put since 1996 do or do not fall within the same use class. The effect of Class D1 of the Town and Country Planning (Use Classes) (England) Order 1987 ('the Use Classes Order 1987') is that all the uses to which the building has been put since 1996 fall within Class D1.

The next question is whether those uses can be aggregated to achieve immunity under the 10 year rule or whether the fact that no single use continued for 10 years prevents the 10 year rule from operating. In other words, could immunity be acquired only by one specific use being continued in breach for 10 years; or could a sequence of different uses, all of which fell within the same use class, acquire immunity?. If so the result would be that the particular use which obtained after the expiry of the 10 year period was immune from planning control. If immunity was so obtained then any further change of use within the same use class would bring section 55(2)(f) TCPA 1990 into play so that the further change of use did not constitute development.

Section 55(2)(f) reads:

'(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land:-
(f) In the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or other land, for any other purpose of the same class.'

The reference to 'any class specified in an order' is a reference to the Use Classes Order 1987. The effect is that a change of use within the same use class does not constitute development and as such does not require planning permission.

The LPA argues that the Use Classes Order has no application to unlawful uses and that in order to acquire a lawful use it is necessary to show that a particular use (and not merely a use class) had subsisted for the relevant 10 year period. However, if the LPA's argument is to prevail it will be necessary to read the word 'lawfully' into the wording of s55(2)(f) so that it would operate only if the building was being used lawfully for a purpose of any specified use class.

In the case of Harbige v SSCLG (2012) EWHC Ouseley J was clear that the structure of the Act did not permit the interpolation of the word 'lawfully' nor did

he accept the argument that a single purpose within a use class has to be undertaken for 10 years before immunity is conferred on uses within that class. Thus he concluded that after 10 years of use within Class D1 no enforcement action could be taken.

3(b)

As to the proposed tea room it is doubtful whether this can be regarded as an ancillary use as it is not 'functionally related' to the current Class D1 use of the Chapel (Main v SoSE (1999)).

Sally should be advised that

(a) she can appeal under s174 TCPA 1990 to the Secretary of State against the enforcement notice and for the reasons outlined above she would succeed; and
(b) she should apply for planning permission for the tea room use.

Question 4

The first issue in regard to this scenario is whether lawful development ever commenced at the Site.

If development did not commence within the period specified in the planning permission it is no longer authorised (s93(4)(a) Town and Country Planning Act 1990 ('the TCPA 1990')). The terminal date in issue here was 30 November 2016. The Company had carried out development within the meaning of s55(2) TCPA 1990. The question is whether, despite that, there were other factors which rendered the development unlawful and invalidated the permission.

Development begins 'on the earliest date on which any material operation comprised in the development begins to be carried out' and includes any work in the course of erection of a building (s 56(4) TCPA 1990); on the face of it the Company's operations at the Site met that test.

However, operations carried out in breach of condition cannot be relied on as material operations. This principle, sometimes referred to as the Whitley Principle, can be found in judgments as early as Etheridge v SoSE (1984) (see Whitley and Sons v Secretary of State for Wales (1992)). In Etheridge Woolf L J formulated the question: 'Are the operations permitted by the planning permission when taken with the conditions?' In this case the Company was in breach of a number of conditions which had to be satisfied 'before development commenced' and the works could not, therefore, amount to a valid commencement. Accordingly, the permission was no longer extant once the terminal date had passed. The view eventually adopted by the Council was correct.

The second issue is whether the Company had a legitimate expectation that it could regard the permission as having been implemented. On a number of occasions the Council had stated that the permission had been implemented, notably by the Head of Legal Services and also in the Council's submission to the Local Plan inquiry. Moreover, the Council had taken no action in respect of the houses that had already been built and did not tell the Company until 20 September 2016 that it considered lawful development had not commenced. On the face of it this could be regarded as an abuse of power. It should be mentioned that there is no argument for invoking the law on estoppel following the judgment in Western Fish Products Ltd v Penwith District Council (1981).

Furthermore, the Company can argue that the approval of conditions contained in the approval of reserved matters did not raise any matter of public interest. Approval of such a condition does not constitute a planning permission and there is no requirement for publicity (see Town and Country Planning (General Development Procedure) Order 2015, Article 22). The only requirement is that applications for approval have to be in writing (Tesco Stores v North Norfolk District Council (1999)). Moreover, the Company may argue that the local planning authority ('the LPA') has a power to waive the need for compliance with such conditions as the planning system has to be practical and flexible (Agecrest v Gwynedd County Council (1998)); indeed, there can be exceptions to the Whitley Principle (Leisure Great Britain v Isle of White Council (1999)). Moreover, there is authority for saying that an LPA can deal with a development for which it has granted permission in a phased way in regard to reserved matters (R v SSE ex parte Percy Bilton (1975)).

On the other hand it has long been regarded that planning law represents a comprehensive code (Pioneer Aggregates Ltd v SoSE (1985)) and has gradually become more comprehensive. In particular s73 TCPA 1990 now provides a statutory mechanism for seeking a variation of a condition or discharging it; and because this section attracts publicity and consultation and the application has to be entered in the register it provides safeguards for the public. On that basis it has been argued that the scope for non-statutory variation or discharge or bilateral agreement is diminished (R v East Sussex County Council ex p Reprotech (Pebsham) Ltd (2002) UKHL.) Indeed, Agecrest (see above) was decided before what is now s73 was enacted. It is probably the case that there is no authority today for the non-statutory variation of a condition. Moreover, it should be noted that whether or not there has been a start' for the purposes of 92(2) TCPA 1990 is a matter for the courts not the LPA.

It is possible that circumstances might arise where a court would take the view that a legitimate expectation could have been formed from an LPA's conduct or representations, but these will be rare because of the public nature of planning.

On the basis of Henry Boot Homes Ltd v Bassetlaw District Council (2002) EWCA the court would probably take the view that the Company should have been aware that there were problems about the validity of the permission long before 30 September when the Head of legal Services told it in terms that she considered the planning permission had lapsed. The Company appeared to have saved the permission by securing the approval of reserved matters but lawful development was not carried out within the five year period.

However, the Henry Boot case rather brushed aside the expressed view of the Head of Legal Services that the permission had been saved especially in view of her comments to counsel that the LPA had been in the habit of not requiring compliance with conditions before permitting development to go ahead. Since the judgment in Reprotech there is no opportunity for arguing estoppel in planning cases but it is interesting to speculate how the House of Lords would have approached the Henry Boot case, from the point of view of legitimate expectation or even abuse of power, had it come before the Lords on appeal.

The Company should be advised to apply for retrospective permission for the 40 houses built and to submit a new planning application for the development of the rest of the Site.