**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 2016 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 57 of the Town and Country Planning Act 1990 (‘the TCPA 1990’) stipulates that planning permission is required for the carrying out of any development of land. ‘Development is defined in s55 as ‘operational development’ and a ‘material change of use’. This requirement is qualified by two orders called, respectively, the Town and Country Planning (Use Classes) (England) Order 1987 as amended (‘the UCO’) and the Town and Country Planning (General Permitted Development) Order 2015 (‘the GPDO’).

**Use Classes**

Section 55(2)(f) of the TCPA 1990 provides that no development is involved where there is a change of use from one purpose to another within a use class listed in an order made by the Secretary of State. The schedule to the UCO contains a list of 15 different classes of use of land. However, a change from one class to another, as distinct from a change within a class may, but not necessarily, amount to development if the change is material and the GPDO does not grant a general permission for a change of use between the classes in issue (see below).

There is often a problem in defining exactly the categories of use falling within each different use class and these problems come before the courts frequently. A typical problem is deciding what amounts to a shop. In *Kensington and Chelsea Borough Council ex parte Europa Foods* (1996) it was held that a ‘shop’ was a generic term which included activities carried on in a typical high street.
It should be noted that the UCO does not purport to cover all possible uses of land and there are uses which do not fall within its provisions, albeit the list is wide-ranging. In *Tessier v Secretary of State for the Environment* (1975) Lord Widgery CJ warned against trying to stretch use classes to encompass activities which clearly did not fall within them. Some uses are *sui generis* and are defined in Article 3(6) of the UCO e.g. a ‘theatre’ and a ‘casino’. Many uses, such as agriculture and transport depots are not mentioned at all.

A local planning authority (‘the LPA’) may exclude the provisions of the UCO (and the GPDO) by way of a condition attached to a planning permission. However, the Secretary of State is likely to regard such conditions as unreasonable unless there is clear evidence that the use excluded would have serious adverse effects on the environment or on amenity; that there were no other forms of control; and that the condition would serve a planning purpose. If such conditions are imposed they must be clear and unequivocal (*Dunoon Developments v Secretary of State for the Environment* (1992)).

**Permitted Development**

The GPDO is of general application and by Article 3 grants permission for a wide range of developments set out in Schedule 2 to the Order. This Schedule is divided into 42 parts most of which are, in turn, divided into different classes. Development within these classes can be carried out without the need to apply to ‘the LPA’ for express permission. However, these provisions do not affect the definition of development and, accordingly, nothing in the GPDO operates to permit development contrary to a condition imposed on a grant of planning permission (under TCPA 1990 Part III). However, Article 3(4) does permit the imposition of conditions which withdraw permitted development rights. It should be noted that permitted development rights do not operate in connection with unlawful development or an unlawful use e.g. of an existing building (*Arnold v Secretary of State for Communities and Local Government* (2015) EWHC).

Under the provisions of the GPDO the LPA and the Secretary of State may also make orders under Article 4 (‘Article 4 directions’) which withdraw in specific cases the benefit of a permission granted by the Order. This power has been used extensively to withdraw permission under the Order for certain types of development, for example in conservation areas; the consequence is that planning permission has to be sought specifically for such development. The National Planning Policy Framework (‘NPPF’) states that the use of Article 4 Directions to remove national permitted development rights should be limited to situations where it is necessary to protect amenity or the well-being of the area (paragraph 200). The LPA must give notice of its intention to make an Article 4 Direction by means of local advertisement or site notice and neighbour notification. Representations must be taken into account in deciding whether or not to confirm the direction which must not be earlier than 28 days from the date of the notification. The LPA must also notify the SoS of the confirmation.

In many cases permitted development is subject to limits; so, for example, Class A of Part I (development within the curtilage of a dwelling house) permits the extension of a house but only within certain limits. In other cases permitted development is subject to conditions which would authorise the LPA to take enforcement action. Also, there are certain other restrictions which apply to all permitted development rights such as access to a trunk or classified road or if the development would require an Environmental Impact Assessment or if it is subject to a restriction by the Habitat Regulations 2010.
Question 2

The concept of sustainable development is not new. Section 39 of the Planning and Compulsory Purchase Act 2004 requires bodies exercising functions in relation to local development documents to exercise that function with the objective of contributing to the achievement of sustainable development. However, the central emphasis placed on the concept in the National Planning Policy Framework (‘the NPPF’) is new. At the heart of the NPPF is a presumption in favour of sustainable development which the Government argues should be seen as ‘a golden thread running through both plan-making and decision-making’ (para 14). This has had implications for both development control and the production of development plans.

Sustainable development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. However, there is no statutory definition. Paragraph 212 of the NPPF states that its provisions were material considerations from the date of publication (27 March 2012). The NPPF reduced many pages of departmental advice to one document; the summarising has led to the issue of additional advice causing some confusion within local planning authorities as to what is official and what is not. Moreover, summarising policy advice has sometimes led to a lack of clarity (R (on the application of St Albans v Hunston Properties Ltd (2013) EWCA).

Development Plans

The NPPF states that in regard to plan-making sustainable development means positively seeking opportunities to meet the development needs of the area and meeting objectively assessed needs with sufficient flexibility to adapt to rapid change. Plans should make it clear that development which is sustainable can be approved without delay.

The aim of NPPF was to reinforce the importance of up-to-date plans. It recognised that plans would need to be revised to take account of its provisions (para 213) and that the revision should take place speedily. The transitional arrangements provided a period of 12 months during which decision-makers could give full weight to plans adopted since 2004 even if there was some limited conflict with the NPPF. The closer policies were to the provisions of NPPF the greater the weight to be accorded them. In the event some LPAs have been slow to update their plans and in 2015 some were still struggling to obtain approval of them.

Development Control

There is no statutory requirement in regard to development control (as there is in regard to plan-making) to have regard to sustainable development and it has always to be remembered that the NPPF has no statutory basis.

However, the NPPF at paragraphs 11-16 advises that in determining development proposals the decision-maker should apply a presumption in favour of sustainable development. It states that there are three dimensions to sustainable development – an economic role, a social role and an environmental role, all three of which are interdependent. Local Planning Authorities are to approve development proposals that accord with the development plan without delay. If the plan is absent or silent or the policies are out of date, they must grant planning permission unless the adverse impact of so doing would outweigh
the benefits or unless NPPF specific policies indicate that development should be restricted.

The consequence of slowness in updating plans has led to some appeals on the basis that the plans underlying a development control decision were inconsistent with NPPF. In the case of Tewkesbury Borough Council v Secretary of State for Communities and Local Government (2013) the NPPF requirement for housing supply was given more weight than the provision in an out of date development plan. Paragraph 47 of the NPPF requires an objective assessment of needs (‘OAN’) in regard to housing provision in plans (Solihull Metropolitan Borough Council v Gallagher Estates Ltd (2014) EWCA). In the case of Fordent Holdings Ltd v SSCLG and Cheshire West and Chester Council (2013) EWHC an appeal against refusal failed on the basis that all development in green belt was ‘inappropriate’ unless it fell within the specific exemptions in paragraph 90 of the NPPF. Moreover, the provisions of paragraph 14 have led Inspectors to withhold planning permission on the basis of adverse impact and other restrictive policies in the NPPF. Some appeals were delayed to enable parties to make representations on the impact of the NPPF.

In Dartford Borough Council v SoSCLG and Landhold Capital Ltd (2014) EWHC it was held that paragraph 14 applied to all appeals and that the proper approach to the provisions of the paragraph was to conduct a balancing exercise to determine whether the benefits of a proposal outweighed any harm and that if they did then the proposed development amounted to sustainable development.

The decision of the court in Barnwell Manor Wind Energy Ltd v Northants DC, English Heritage and the National Trust (2014) EWCA has clarified how the balancing exercise in paragraph 134 of the NPPF is to be conducted in regard to the weight to be given to harm to heritage assets; it also clarifies the relationship between the statutory tests and the relevant provisions of the NPPF.

Question 3(a)

Section 56 of the Town and Country Planning Act 1990 (‘the TCPA 1990’) provides that development will be deemed to have commenced when a start has been made in any one of the following material operations:

(i) any work of demolition of a building;

(ii) any work of construction in the course of the erection of a building;

(iii) the digging of a trench for foundations or any part of the foundations for a building;

(iv) the laying of any underground main or pipe to the foundations or part of them;

(v) any operation in the course of laying out a road or constructing part of a road;

(vi) any change in the use of any land where the change constitutes material development.

Previously it was thought that for there to be a material start the developer had to have the intention of commencing development rather than simply seeking to save the permission (Malvern Hills District Council v Secretary of State for the Environment (1983) i.e. not ‘colourable’ (Agecrest Ltd v Gwynedd Count Council
However, in *Riordan Communications Ltd v South Buckinghamshire District Council* (2000) the learned Deputy Judge found that there was no statutory basis for the ‘intention test’ and that the court had to consider only

(i) whether the work in question had been completed in accordance with the planning permission; and

(ii) whether it was more than *de minimis.*

Thus the test is objective; the intent of the developer is irrelevant on the question of whether the development has commenced.

The provisions of s56 are limited by the ‘Whitley principle’, namely that the works in question must not contravene any conditions attached to the permission (*Whitley and Sons Co Ltd v Secretary of State for Wales* (1992)). A typical condition could be that work should not be carried out except in accordance with a scheme to be agreed with the LPA. Works carried out in breach of the condition would amount to a breach of development control. There are some exceptions to the principle e.g. where the LPA has agreed that works can commence notwithstanding the provisions of the condition or where the condition has been substantially complied with but the formalities, such as written notice of approval, have not been complied with. (It remains to be seen how the deemed discharge of condition provision in the Infrastructure Act 2015 will affect this principle.) However, if works carried out unlawfully become immune from enforcement it may not be enough to save the permission (*Rastrum v Secretary of State for Communities and Local Government* (2010) EWCA).

The question has arisen as to whether the raising of a legitimate expectation could constitute a material start but in *Rastrum* the court stated that any expectation that a statutory requirement could be waived had only a ‘very limited scope in the planning context’.

3(b)

The powers of the LPA to control the implementation of a planning permission are considerable. The most obvious power is that of imposing conditions on any grant. Section 70(1) TCPA 1990 provides that the LPA may grant unconditional permission, permission subject to conditions or refuse permission altogether. In *Fawcett Properties Ltd v Buckingham County Council* (1961) the following principles for imposing conditions were established.

A condition

(i) must serve some useful planning purpose.

(ii) must fairly and reasonably relate to the approved development.

(iii) must not be manifestly unreasonable.

(iv) may restrict the user of premises according to the circumstances of the occupier.

(v) may be declared invalid for uncertainty.

The grant may be limited by inherent factors such as the grant for an ‘agricultural cottage’ effectively limiting use to someone engaged in agriculture and limitations specifically stated in permitted development rights.
The LPA may also limit the time within which a permission can be implemented but in the absence of any specific condition the duration is limited to three years (s51 PCPA 2004 now s91 TCPA 1990). Development must commence within two years of the approval of reserved matters which must be applied for within the three year period. The period for implementation may be extended by one year where there is a challenge to the validity of the permission (s 91 (3A-3C) TCPA 1990). Time limits may be extended upon application to the LPA but s73 TCPA 1990 cannot now be used to grant planning permission to change a condition subject to which a previous planning permission was granted. However, from 1 October 2009 it has been possible to replace a subsisting planning permission with replacement permission subject to a new time limit under Article 18 Town and Country Planning (Development Management Procedure) (England) Order 2010 provided

(i) the development has not yet begun;
(ii) the development was granted permission on or before 1 October 2009;
(iii) the time limit has not yet expired.

There is discretion under s70 TCPA 1990 to refuse to determine an application for retrospective permission where an enforcement notice is in place (Wingrove v Stratford-on-Avon District Council (2015) EWHC).

Completion Notice

If development has commenced within the specified time period but has not been completed within a reasonable period the LPA can serve a completion notice under s94 TCPA 1990 and if the development is not then completed within the timescale specified in the notice (not less than 12 months) the planning permission will be invalidated. The notice will take effect only if confirmed by the Secretary of State.

In addition to the powers mentioned above the LPA can take enforcement action in cases of breach of development control. This overarching power takes a number of forms.

Planning Contravention Notice (PCN)

The PCN was introduced under s 171(C)-(D) TCPA 1990 and permits an LPA to require a developer in contravention of development control to cooperate with the LPA.

Breach of Condition Notice (BCN)

This was introduced under s 187A TCPA 1990 to deal specifically with breach of conditions.

Enforcement Notice

An enforcement notice is the principal tool in dealing with breaches of development control (s171A(1) TCPA 1990) and stipulates the action a developer must take to rectify the breach of development control and the timescale within which it must be done. A notice may deal with contraventions of a planning permission where the development carried out is not in accordance with the permission granted.
Stop Notice

The LPA can use a Stop Notice to halt works pending an appeal against an enforcement notice and before the expiry of the period for compliance with a notice (s 183 TCPA 1990).

Temporary Stop Notice

Where the works need to be halted for a limited period a temporary stop notice (‘TSN’) can be deployed (s171 (E) - (H) TCPA 1990).

Question 4

This question involves an analysis of the powers of compulsory purchase contained in s226 of the Town and Country Planning Act 1990 (the TCPA 1990) and the associated procedures for land acquisition. Section 226(1) as amended by s99 of the Planning and Compulsory Purchase Act 2004 (‘the PCPA 2004’) provides that the local planning authority (‘the LPA’) on being authorised by the Secretary of State (‘the SoS’) may acquire any land within its administrative area compulsorily if

(a) the authority thinks that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land (s226(1)(a)); or

(b) the land is required for a purpose which is necessary in the interests of the proper planning of the area in which the land is situated (s226 (1)(b)).

The authority must not exercise its paragraph (a) powers unless it believes the development is likely to contribute to the promotion or improvement of one of (any one or more of):

(i) Economic;
(ii) Social; or
(iii) Environmental wellbeing

of its area. These are the so-called ‘well-being criteria’.

It is important to note that the word ‘required’ in head (b) above has been held to mean more than ‘desirable’ and means ‘necessary’ in the circumstances of the case (Sharkey v Secretary of State for the Environment (1992)). The meaning of ‘necessary’ was considered in Hall v First Secretary of State (2006) where the court ruled that the ability of the acquiring authority to acquire land by other means did not invalidate the SoS’s decision to confirm.

Where land is acquired under either head (a) or head (b) the local authority may also purchase compulsorily

(i) any adjoining land required for executing works to facilitate the development or use of the land which is the main subject of the Compulsory Purchase Order (‘the CPO’); or

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

Under section 226 the local authority must show that where planning permission is required to give effect to the purpose of acquisition there is no obvious reason
for it to be withheld and that the development proposed is in accordance with the development plan under s38(6) PCPA 2004 unless material considerations indicate otherwise.

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

Moreover, the SoS is entitled in confirming an Order to disregard any objection which is, in substance, an objection to the development plan. It is also open to him to use his powers under s90 TCPA 1990 to direct that planning permission be deemed to be granted.

Procedure

Compulsory purchase procedure is governed by the Acquisition of Land Act 1981 ('the ALA’ 1981); the Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004 The Compulsory Purchase of Land (Vesting Declaration) Regulations 1990 and the Compulsory Purchase (Inquiries Procedure ) Rules 2007. The acquiring authority ('the AA’) must first pass a resolution to acquire land under s226. Under Part 2 ALA 1981 the AA must make a CPO in the prescribed form with a statement of reasons; it must advertise the CPO and allow 21 days for representations; a notice explaining the effect of the CPO must be served on owners, tenants, occupiers and others with an interest in the land; and a site notice must be posted.

Any objections must be submitted to the SoS in writing and if not resolved the SoS will hold a public inquiry before which every person who has submitted an unresolved objection may appear. Following receipt of his Inspector’s report the SoS may confirm, reject or modify the CPO or confirm in part while deferring his decision in part (s13C ALA 1990). (A confirmation must be given to all initially notified of the intention to make the CPO.) An acquiring authority may itself confirm a CPO where there is no objection (s14 ALA 1990).

The effect of confirmation is twofold:

(a) The AA can act on the CPO; and
(b) The CPO is open to challenge in the High Court by a ‘person aggrieved’ within six weeks of the notice of confirmation.

The AA must acquire the land within three years of the operative date in the CPO, failing which the power to acquire is lost. Acquisition is by service of a notice to treat or by a general vesting declaration. A vesting declaration is a deed poll vesting title to the interests specified in the declaration.

Once served a notice to treat can be abandoned in only very specific circumstances. There is an expedited procedure whereby the AA may execute a general vesting declaration after not less than two months’ notice of its intention to use this procedure.
Objectors

The CPO power is one of the most far-reaching available to public authorities. The examination in public where there are unresolved objections does present those with an interest in the land with an opportunity to be heard. However, provided the AA brings its case fairly and squarely within head (a) or head (b) it will succeed, although the latter is a more limited power than the former.

A second opportunity occurs for objectors once the CPO has been confirmed in that appeal lies to the High Court on a point of law. The High Court may quash an order on one of two grounds:

(a) That the authorisation in the CPO is ultra vires; or
(b) The interests of the person aggrieved have been substantially prejudiced by a failure to follow the procedures contained in the ALA 1990 (ss23 & 24 ALA 1990).

but the confirmation may not be questioned otherwise. In the case of R (on the application of Sainsbury’s Supermarkets Ltd v Wolverhampton City Council (2010) HWSC the CPO was quashed because benefits allegedly flowing from the associated development of another site not within the proposal itself failed the ‘well-being’ test.

Resort to the High Court is expensive and not an option open to the ordinary landowner.

SECTION B

Question 1

Where development has taken place without planning permission or where conditions attached to a planning permission have not been complied with local planning authorities (‘LPAs’) may take enforcement action. For example, in the case of a change of use of a building to that of a single dwellinghouse, once the unauthorised use has continued for four years without any enforcement action having been taken the development becomes immune from enforcement (s191 Town and Country Planning Act 1990 as amended by section 10 of the Planning and Compensation Act 1991). However, this four year limitation is not available where the breach of planning control has been concealed deliberately and revealed only after the four years has expired.

This was established in the case of Welwyn Hatfield Council v Secretary of State for Communities and Local Government (2011) UKSC where the Supreme Court ruled that the normal period for enforcement did not apply where persons deliberately and positively deceived the local planning authority, directly intending to undermine the regular operation of the development control process by concealing their unlawful development. In the case of Fidler v Secretary of State for Communities & Local Government (2010) EWHC, Mr Fidler had used a mountain of straw bales to hide the construction of a house until the four-year period had expired. The court found that the level of deception was just as serious as that in the Welwyn Hatfield case, (‘a paradigm case of deception’) and found a way around the four year rule by saying that the operations were not complete (and therefore the four year period had not started to run) until the straw bales had been removed. The ruling was based on the Connor principle.
where fraud creates a state of affairs which leads to the application of a statutory rule which would not otherwise have applied.

In the light of these two cases, Parliament enacted Section 124 of the Localism Act (TCPA 1990 s171BA-171BC). This Section gives the local planning authority a power to apply to the magistrates’ court for a planning enforcement order (‘a PEO’) where, on the balance of probabilities, the apparent breach has been concealed deliberately and the court considers it just to make the order having regard to all the circumstances.

In the case of Jackson v Secretary of State for Communities and Local Government (2015) EWCA, Mr Jackson, a trout farmer, had challenged the Secretary of State's decision to uphold an enforcement notice served by Winchester City Council which alleged that there had been a change of use of a barn from use as an agricultural barn to that of a residential dwelling. The main question arising out of this case was whether the statutory PEO code had replaced the principles laid down in Welwyn. The court concluded that Welwyn had not been superseded by the enactment of the provisions of the Localism Act 2011. In particular, the court could detect no intention on the part of Parliament either to enlarge the scope of the four year time limit in order to make it subject to the PEO code or to disapply Welwyn so that concealment could be dealt with only under that code.

The decision in Jackson confirms that LPAs have two routes available to them in concealment cases. They can either apply to a magistrates’ court for a planning enforcement order or, in cases of deliberate concealment, rely on Welwyn and argue their case before a Planning Inspector or the High Court, as the case may be.

On the basis of the foregoing analysis Edward should be advised that he would not succeed; that he should conform to the requirements of the enforcement notice; and that he should apply for planning permission for the residential use.

**Question 2**

The first issue raised by this scenario is the apparent failure of the local planning authority (‘the LPA’) to consult Historic England. The duty is contained in the Town and Country Planning (Listed Buildings and Conservation Areas) Regulations 1990. Regulation 5A provides:

‘Publicity for Application affecting setting of listed buildings

(1) This regulation applies where an application for planning permission for any development of land is made to a local planning authority...and the authority think...that the development would affect the setting of a listed building or the character or appearance of a conservation area’

The question is whether the LPA considered there was an effect on Netherfield Hall (‘the Hall’) and the conservation area. The Conservation Officer clearly thought there would be an adverse effect albeit ‘negligible’; but the real issue is whether there was an effect not the extent of it (Daniel Gerber v Wiltshire County Council (2016) EWCA). Evaluation of the effect was precisely why English Heritage needed to be consulted (R (Friends of Hethel Limited) v South Norfolk District Council (2011) EWCA) The LPA’s failure was a clear error of law and the
reaction of Historic England to consultation on the amendment application supports this view.

The second issue is whether the LPA failed to discharge its duty under s66 of the Town and Country Planning Listed Buildings and Conservation Areas) Act 1990.

Section 66(1) provides that ‘in deciding whether to grant planning permission for development which affects a listed building or its setting, the local planning authority...shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses’

This duty is not displaced by s38(6) of the Planning and Compulsory Purchase Act 2004 (formerly s54A of the TCPA 1990). They are separate statutory duties (Hetherington UK Ltd v Secretary of State for the Environment (1995)).

The extent of the duty was reviewed by the Court of Appeal in East Northamptonshire District Council v Secretary of State (2014) EWCA: ‘...Parliament in enacting s66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given ‘considerable importance and weight’ when the decision-maker carries out the balancing exercise...’ (per Sullivan LJ).

It is clear that the LPA did not give ‘considerable importance and weight’ to this matter when carrying out the balancing exercise (R on the application of Forge Field Society v Sevenoaks District Council (2014) EWHC). Accordingly, Jenny should be advised that the LPA failed to discharge its s66 duty.

The failure to notify Jenny of the application raises the issue of the scope of the Statement of Community Involvement and the matter of legitimate expectation. That statement is not limited to notifying neighbours adjoining the development site (R on the application of Majed) v Camden LBC (2010)). Jenny should have been consulted.

As to the screening opinion, Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 precludes the grant of planning permission unless environmental information has been taken into account in respect of Schedule 2 development. The screening opinion in this case is flawed as to its substance and its reasoning. It does not explain why the development did not qualify for an EIA and it does not pass the test of properly taking environmental information into account (Commercial Estates Group v Secretary of State for Communities and Local Government and Charnwood Borough Council (2014) EWHC).

As Jenny should succeed on all heads of her complaint she should be advised to apply to the Administrative Court for judicial review to have the planning permission quashed.
Question 3

Section 20 of the Planning and Compulsory Purchase Act 2004 (‘the PCPA 2004’) and the National Planning Policy Framework (‘the NPPF’) sets out the purpose of the independent examination of a local plan i.e. to determine whether

(a) it satisfies the statutory requirements and regulations concerning local plans
(b) the LPA has satisfied the duty to cooperate; and
(c) it is sound.

The Suspension of the Examination

There is no specific statutory provision which authorises an Inspector to suspend an examination in public although it may be implied (Samuel Smith Old Brewery v Selby District Council (2014) EWCA). However, s20(7)(C) PCPA 2014 provides that if asked to do so by the local planning authority (‘the LPA’) the Inspector must recommend modifications of the document that would make it one that satisfies the requirements of s5 PCPA 2004 ‘and is sound’ and provided the modifications taken together do not materially affect the policies set out in it (s23 PCPA 2014). It follows that in order to entertain modifications the Inspector had to suspend the examination while the modifications were drafted and approved by the Council. The Company would not succeed on this head.

Failure to Engage with the Vision

The Council did not take the Company’s Vision into account on the basis that it was not strategic and the Inspector agreed. Section 19(1)(a) of the PCPA 2004 requires the LPA to have regard to national policies and advice during the preparation of a development plan document. The NPPF at paragraph 155 requires ‘early and meaningful engagement and collaboration with neighbourhoods, local organisations and businesses is essential. A wide section of the community should be proactively involved so that Local Plans, so far as possible, reflect a collective vision and a set of agreed priorities for the sustainable development of the area...’

The Vision deals with housing strategy and the Inspector misconstrued his own ruling otherwise. The Company should succeed on this head.

The Duty to Cooperate

The only stage at which the duty to cooperate under s33 of the Localism Act 2011 arises is that of plan preparation (University of Bristol v North Somerset District Council (2013) EWHC). That stage ends with the submission of the plan for examination however major or minor its shortcomings and whatever further work is required. Otherwise all further work supports the plan as it stands or supports possible modifications proposed by the Inspector. There is a clear distinction between s19 and s20 of the 2004 Act in this regard. Once submitted for examination the plan is out of the Council’s hands. The duty to cooperate does not apply after the conclusion of the preparation stage and the fact that work was being done on modifications during the period of suspension is irrelevant as during that time it remained within the control of the Inspector Samuel Smith Old Brewery v Selby District Council (2014) EWCA. The Council can only ask the Inspector to recommend modifications. That is not plan preparation, whether the Council has worked on modifications or not. Section 33
was not intended to interrupt the course of an examination once commenced (Samuel Smith Old Brewery (Tadcaster)).

The Company would not succeed on this challenge.

Sustainability Appraisal

This complaint is that the Council failed to carry out a sustainability appraisal (SA) on the proposed modifications. The obligation arises under s19(5) PCPA 2004 and Regulation 12(2) of the Environmental Assessment of Plans Regulations 2004. This requires an evaluation of the significant effects on the environment of implementing the plan and an assessment of the reasonable alternatives. There is no basis for holding that the provisions do not apply to modifications. The Company would succeed on this head (R (on the application of Howsmoor Developments Ltd) v South Gloucestershire County Council (2008) EWHC).

There is an underlying problem with the way in which the examination was conducted in this case. The PCPA 2004 states that modifications must not affect the essence of the policies set out in the submitted Plan. However, the Company's complaints were about policies, namely HP1 and GB1 and the modifications went to the heart of those policies. The Inspector should not have entertained a request to consider such fundamental modifications and should not have approved the plan with such modifications. The Company should challenge the approval and the adoption of the Plan.

The legality of a development plan can be challenged under s287 TCPA 1990. The PCPA 2004 provides, inter alia, that a DPD and revisions thereof cannot be questioned in any legal proceedings except as provided for in the PCPA 2004 i.e. that the document is outside the appropriate authorizing power and/or a procedural requirement has not been complied with. Under s 113 PCPA 2004 the application to the High Court must be made not later than six weeks from the date of publication, approval or adoption of the plan. The High Court may quash the plan in whole or in part (Ensign Group Ltd v First Secretary of State (2006) EWHC) where the error could not be remedied by declaratory relief. Sullivan LJ referred to the power to quash as a ‘blunt instrument’. Accordingly, the Government introduced s 185 of the Planning Act 2008 which enables the court to remit the document to the originating authority with directions as to the remedial action to be taken. This means that the document may then be treated as an unapproved or unadopted draft.

Question 4 (a)

Site A

The Site is described in the scenario as derelict land and its previous use is not stated. Unless it can be established that the previous use was for haulage or for some other use within the same use class or the development is ‘permitted development’ planning permission will be required. It is quite possible that the previous use has been abandoned (Hartley v Minister of Housing and Local Government (1970)) in which case any previous use not subject to a specific grant of permission cannot be revived (Pioneer Aggregates Ltd v Secretary of State for the Environment (1985) AC). The same considerations apply to the lorry maintenance and servicing use.
It is not clear whether the Company’s unauthorised use has been in place for ten years. If it has it will be immune from enforcement action (s171B TCPA 1990).

The matter of the workshop is less straightforward. It was a workshop when the Company bought the land and if it was a free-standing use the use may be held to exist independently of the haulage depot use. If it was ancillary it cannot be detached and turned into an independent use (G Percy Trentham Ltd v Gloucestershire County Council (1966)). As the preceding use of the land is not known it would be difficult to argue that the use of the workshop was ancillary to an established use as the land is derelict. A workshop could have been ancillary to a number of different uses. The fact that the use was interrupted for three months should not affect the issue (Secretary of State v Thurrock Borough Council (2002)).

As to the office building, s171B TCPA 1990 provides that no enforcement action can be taken against operational development after four years from the date of ‘substantial completion’ (Sage v Secretary of State (2003) HL), so the issue here is the date on which the building was completed and the timescale is quite tight. In Sage it was held that the building had to be substantially complete both externally and internally even though the internal works would not require planning permission if considered in isolation (applied in Fidler v Secretary of State (2010)) EWHC and Secretary of State v Welwyn Hatfield District Council (2011) UKSC. If that is the case here no enforcement action will succeed.

The Company should be advised to appeal to the Secretary of State on all three heads of the enforcement notice. In regard to head (a) the appeal should be on the basis that planning permission should be granted; on head (b) that no planning permission is required as there exists an existing use but that if that argument is not accepted, planning permission should be granted; on head (c) that the office building is immune from enforcement action because of the elapse of time. The burden of proof will be on the Company (Nelsovil v Minister of Housing and Local Government (1962)).

Notice of appeal suspends the operation of the enforcement notice pending the outcome of the appeal though the LPA could issue a temporary stop notice. The Secretary of State may

(i) uphold, quash or vary the enforcement notice;
(ii) grant planning permission or a certificate of Lawful Established Use or Development (CLEUD); or
(iii) correct any defect if to do so would not cause injustice to any party.

Challenge to the Secretary of State’s decision lies to the High Court (s289 TCPA 1990).

4(b)

Site B

In regard to Site B it would seem that the only option available to the Company is to serve a purchase notice under s137 TCPA1990. A purchase notice may be served 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 (as he then was) said ‘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. Beneficial use is not necessarily synonymous with profit (Colley v Secretary of State for the Environment and Canterbury City Council (1999)).

The Secretary of State must decide

(i) whether or not to confirm or revoke it or amend any condition so as to render the land capable of reasonably beneficial use; or
(ii) grant planning permission for the development in question; or
(iii) direct that a planning permission be granted if a future application is made for some other form of development.

Appeals against the decision of the Secretary of State lie to the High Court under s284 and s288 TCPA 1990.