LEVEL 6 - UNIT 11 – PLANNING LAW
SUGGESTED ANSWERS – JUNE 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 June 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 Challenge

(a) Routes of Appeal

Section 288 of the Town and Country Planning Act 1990 ('the TCPA 1990') provides that the legality of a grant of planning permission by a planning Inspector or the Secretary of State may be challenged on specific grounds amounting to substantive ultra vires or procedural illegality within six weeks of the decision by a 'person aggrieved'. There is no direct access to the High Court under s288; there must have been an appeal to the Secretary of State by the applicant for planning permission. However, the expression 'person aggrieved' now includes, in addition to the applicant, a person who has taken part in the planning process and someone who has a relevant interest in the land (Times Investment Ltd v SoSE (1991)).

A substantive error of law arises when a local planning authority ('the LPA') has acted ultra vires and in that event the court may quash the decision. A procedural error occurs when the LPA has not followed the requirements of the relevant legislation and, in particular, the TCPA 1990. In the latter case the applicant must have sustained 'substantial prejudice' if the permission is to be quashed (Miller v Weymouth and Melcombe Regis Corpn (1974)). The powers of the court are limited to quashing the decision.

In the exercise of its original jurisdiction the High Court may also review the determinations of the LPA (R v Hillingdon LBC ex p Royco Homes (1974)). Apart from prohibitory and mandatory orders the High Court may make a quashing order and a declaration. These remedies may be obtained by way of judicial review provided the claimant has 'sufficient interest' (locus standi) (R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Businesses Ltd (1981)). The remedies are available to persons other than the

applicant for planning permission who allege that there has been an error of law on the face of the record.

However, judicial review is a discretionary remedy. Application must first be made to the High Court for leave to be heard on the substantive issue or issues. The application must be made promptly (and in any case not later than three months after the grounds for the claim arose) (Crest Nicholson Ops Ltd v SSCLG (2016) EWCA). Moreover, the applicant must have an arguable case.

(b) The Exercise of Discretion

The fact of a legal error on the part of an LPA or a planning Inspector does not mean that the court will necessarily quash the decision in issue. In Simplex G E (Holdings) v Secretary of State for the Environment (1989) the Court of Appeal held that but for the identified error of law the decision would have been the same and, accordingly, the planning permission was not quashed (see also Bloor Homes East Midlands v SSCLG (2016) EWHC).

This approach has become more common in recent years. For example, in Smech Properties Ltd v Runnymede Borough Council and others (2016) EWCA the report of the officers to the Council's Planning Committee contained incorrect advice regarding the impact of a proposed mixed use development on a former Defence Evaluation and Research Agency site situated in the Metropolitan Green Belt. The Planning Committee followed the incorrect advice. The court noted that the learned judge at first instance dismissed the claim on the basis that the Council would inevitably have granted planning permission. The court also noted that the judge had addressed paragraph 87 of the National Planning Policy Framework ('the NPPF') which specifies that 'very special circumstances' were required to justify the grant of planning permission for development in green belt.

However, in R (Gerber) v Wiltshire County Council and others (2016) EWCA the learned judge at first instance quashed a planning permission for a solar farm with the consequence that the appellant would have had to bear significant costs in dismantling the half-completed farm. The appellant's appeal was carefully framed and concentrated on two factors: the fact that the appeal had been allowed out of time under CPR Part 54.5 and also that the judge had exercised his discretion under s31(6) Senior Courts Act to quash the permission. The court found that there was no basis for extending the time for appeal as there was no reasonable explanation for the delay. Consequently, the court did not need to consider the exercise of discretion but indicated that had it been required to it would have set the judgment aside and determined the issue afresh.

The case of SSCLG v South Gloucestershire Council and AZ (2016) EWCA turned on rather different facts. The court allowed an appeal by the Secretary of State against a decision at first instance to quash an Inspector's decision letter in relation to a mobile home located in green belt despite the fact that there were serious errors in his report. The Court of Appeal acknowledged that the errors were 'serious' because they related to the requirement that the LPA should at all times evidence a five year supply of housing land. The Inspector's decision, if allowed to stand, could have cast doubt on the integrity of the Council's core strategy and set a precedent. The Court of Appeal found that the precedent argument should not have been a factor in the judge's exercise of discretion and set his decision aside. Instead of remitting the case to him, it exercised its own discretion to uphold the Inspector's decision in what it described as an 'exceptional case'.

The cases show that the Court of Appeal, at least, is more and more unlikely to uphold decisions to quash at first instance and will uphold decisions not to quash. This line was followed in Wychavon District Council v SSCLG (2016) EWHC where Coulson J adopted the test advanced by Ousley J and approved by the Court of Appeal in Europa Oil and Gas Ltd v SSCLG (2014) EWCA where he found that, notwithstanding the error of law, the decision would not have been different. He distinguished errors of form from errors of substance. Coulson adopted the same approach in R (Surringer) v Vale of Glamorgan Council and Raymond Brown Mineral and Recycling Ltd (2016). In that case he adopted the test advanced by Carnwath LJ in R (Champion) v North Norfolk District Council (2015) UKSC where the learned judge said that the court should take account of 'the seriousness of the defect invoked' and whether the prejudice had been 'substantial'.

Sales LJ made an interesting comment in Gerber to the effect that the application of domestic law in relation to time limits and remedial discretion did not offend against EU law principles of equivalence and effectiveness as regards procedure and remedy.

Question 2 Certificates of Existing and Proposed Use

(a) CLEUD

With the gradual erosion of the law on estoppel in regard to representations made by planning officers (Western Fish Products Ltd v Penwith District Council (1981)) the need for certainty in regard to prima facie established uses and the status of completed operations led to the introduction of s191 Town and Country Planning Act 1990 ("TCPA 1990"). This provides that 'any person' who wishes to ascertain whether any

- use of buildings or other land is lawful
- operations which have been carried out in, over or under land are lawful
- other matter constitutes a failure to comply with a condition or other limitation on a planning permission

may apply to the local planning authority ('the LPA') for a Certificate of Lawfulness of Existing Use or Development (a 'CLEUD').

The TCPA 1990 provides that uses and operations are lawful if

- no enforcement action can be taken against them
- they do not contravene the requirements of any enforcement notice
- the time has passed to enforce against any failure to comply with any limitation or condition on a planning permission
- the development in issue does not contravene any enforcement notice or breach of condition notice

The application can be made in respect of any existing use, operation or failure to comply with a condition. The burden of proof (on the balance of probabilities) resides with the applicant who may adduce evidence from extrinsic sources. The applicant's evidence need not be corroborated by an independent source absent any contrary evidence from the LPA. The LPA's decision is a quasi-judicial one and, if the case is made out, the certificate must be granted.

The certificate must specify the relevant land, describe the operations and any use by reference to its use class (where appropriate) and extent, give reasons for the determination and state the date of the application. The LPA can modify the

description or substitute an alternative. If these requirements are complied with the certificate is conclusive as to the matters specified at the date of the application and renders the operations in issue, as they existed at the time, immune from enforcement action. (A use could, for example, be abandoned subsequent to the grant (M & M (Land) Ltd v SSCLG (2007)). The grant cannot be affected by subsequent legislation whereas a CLOPUD (see below) can be so affected.

The degree of definition required by the court depends upon the circumstances of the case (Hillingdon Borough Council v SSCLG (2008)). Appeal lies to the Secretary of State ('the SoS') against refusal by the LPA (s195(1) TCPA 1990) provided it is made within eight weeks and the decision of the SoS can be challenged only by appeal to the High Court under s288 TCPA 1990.

The LPA may revoke a certificate if it proceeded from a false statement or the exclusion of material evidence (s193(7) TCPA 1990) but proper notice must be given (Surrey CC ex p Bridge Court Holdings (2000)).

Any contravention of a planning condition or limitation must be continuing at the date of the application for a CLEUD (Nicholson v Secretary of State for the Environment (1998)). Moreover, the elapse of time must be continuous in regard to s171B(3) TCPA 1990(Ellis v SSCLG (2009) (but compare Westminster City Council v SoSCLG and Cordani (2013) where the use of pavement and chairs on the pavement was ancillary to the main restaurant use).

Dishonesty can also affect the rule (SSCLG v Welwyn Hatfield (2011) and Fidler v SSCLG (2010)). The loophole which these cases revealed was blocked by the Localism Act 2011 and the introduction of planning enforcement orders ('PEOs'). A use established on the basis of a criminal offence will not affect the process (R v Epping Forest DC ex p Philcox (2000)). Accrued development rights can be extinguished by the implementation of a new planning permission as in Wiggins Group plc v First Secretary of State (2000) where the planning permission had opened 'a new chapter'.

(b) CLOPUD

Any person proposing to develop land either by change of use or by operations can check whether planning permission is required for the development proposed by applying to the LPA for a certificate of Lawfulness of Proposed Use or Development (a 'CLOPUD'). The relevant statutory provision is contained in s192 TCPA 1990. Aside from a declaration of the court this is the only way an applicant can obtain a definitive ruling on the lawfulness of a planning proposal.

The applicant must specify the land in question and describe the proposed use and/or operations. If the LPA is satisfied that at the time of the application the use or operations would be lawful it must issue a certificate to that effect, specifying the land, the use and operations in issue, the reasons for determining that they are lawful and the date of the application. The certificate must be in prescribed form (James Hay Pension Trustees v First Secretary of State (2007)).

In order to examine whether the proposed use is lawful the LPA may examine background issues but the certificate is limited to prospective changes. The certificate is conclusive as to its contents only in relation to the date on which it was granted and subsequent changes in the law can supersede its effect, whereas that is not the case in respect of a CLEUD. Where projects have been completed and there is uncertainty as to the lawfulness or otherwise of

operations the LPA may advise a developer to apply for planning permission under s73A TCPA 1990, but cannot insist on it.

Question 3 Listed Buildings

The Planning Acts contain a number of special controls relating to development in special cases. Among these is the legislation affecting listed buildings. Buildings which are regarded as having special architectural or historic interest are enrolled in a list compiled by Historic England on behalf of the Secretary of State and graded Grade I, Grade II* and Grade II (according to their importance).

The criteria for listing are:

- age and rarity
- aesthetic merits
- selectivity
- national interest
- state of repair

The definition of a listed building in s1(5) of the Planning (Listed Buildings and Conservation Area) Act 1990 ('P(LBCA)A 1990') includes any object or structure fixed to the building (Debenhams plc v Westminster City Council (2007)) and any object or structure within its curtilage (Sumption v Greenwich LBC (2007)). The provisions do not apply to ecclesiastical buildings or ancient monuments.

Section 7 P(LBCA)A 1990 provides that no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special and historical interest unless those works are authorised. This provision applies whether or not planning permission is required. Planning permission for demolition is permitted development under the General Permitted Development Order 2015 (the GDPO 2015) but listed building consent will, generally, still be required.

The definition of demolition in regard to listed buildings was considered in Shimzu (UK) Ltd v Westminster City Council (1997) which decided that the unit for consideration was the listed unit. Accordingly, part demolition of a listed building did not require listed building consent but if only part of a building was listed that part would require consent. The planning position on demolition was made clear in R (on the application of Save Britain's Heritage) v SSCLG (2011) EWCA i.e. that any demolition of a listed building amounts to development but may be permitted development under Part II of the General Permitted Development Order 2015 (the GDPO 2015) unless an Environmental Impact Assessment is required or the local planning authority ('the LPA') has made an Article 4 Direction.

Planning applications affecting listed buildings may not be made in outline.

Where a planning permission has been granted for the demolition or alteration of a listed building, application may be made to the Secretary of State (SoS) for a certificate of immunity ('COI') certifying that there is no intention to list the building in question (s6 P(LBCA)A 1990). The certificate is valid for five years.

There is a right of appeal under section 20 and it is open to an applicant to argue that the building is not of architectural or historic interest and ought to be removed from the list (section 1) (Chambers v Guildford Borough Council (2008)). By virtue of the Planning and Compulsory Purchase Act 2004

applications for LBC must include a statement of the design principles and concepts that have been applied and an explanation of how issues relating to access have been dealt with. The Enterprise and Regulatory Reform Act 2013 ('ERRA 2013' amending s1 P(LBCA)1990) provides that listing after 2013 can be confined to parts of a building which are of special interest rather than the whole building and that owners can apply to have earlier entries altered to take account of the change in the law.

It is an offence to carry out unauthorised works affecting the character of a listed building (section 7) although there are defences including necessity e.g. for the preservation of the building or for safety or health. The offence is one of strict liability (Wells Street Metropolitan Stipendiary Magistrate ex parte Westminster City Council (1986)).

Where unauthorised works have been carried out the LPA may serve a listed building enforcement notice requiring the restoration of the building to its former state provided the structural materials still exist (R v Leominster DC ex p Antique Country Buildings (1987)).

Where a building is under threat of demolition or radical alteration the first step towards listing could be the service by the LPA of a building preservation notice (s3 P(LBCA)A 1990). This comes into force as soon as it is served and remains in force for six months. In the case of an unoccupied listed building the LPA may serve an urgent works notice (s54 P(LBCA)A 1990) whereby on seven days' notice the LPA can carry out such works as it considers necessary and recoup the expenses. Where the LPA wishes to secure the proper preservation of a building it may serve a repairs notice (s48 P(LBCA)A 1990) and if the repairs are not carried out it may proceed to acquire the building compulsorily. There is no appeal against such a notice and the financial means of the owner are irrelevant. The relevant date for determining the nature of the repairs required is the date the building was listed (Robbins v SoSE (1989)).

ERRA 2013 introduced three interesting reforms. The first enables owners of listed buildings to enter into contracts with LPAs and Historic England whereby they may carry out specified work such as alterations and extensions without the need for separate LBCs. The second introduces listed building consent orders granting consent for certain specific works analogous to the provisions of the General Permitted Development Order 2015. Thirdly, there is provision for the grant of certificates of lawful works analogous to a CLOPUD.

LPAs have specific duties in considering applications which affect listed buildings. If an application involves the demolition or alteration of a listed building the application must be advertised and any member of the public has the right to make representations within 21 days. Where a planning application affects the setting of a listed building the application must also be advertised for 21 days and information about the application must be published on the LPA's website. In the case of proposed demolition notice must be given to specified bodies such as Historic England. If the LPA proposes to grant consent the SoS must be informed. The LPA in considering any application for development which affects a listed building or its setting must have regard to the desirability of preserving the building or its setting or any features of historic interest which it possesses (s66 P(LBCA) 1990). In Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council (2014) EWCA it was held that 'considerable weight' should be given to assessing the likely harm to the setting of a listed building.

Question 4 Planning Unit

The Planning Acts do not mention the 'planning unit'. The concept is judge-made and is important in determining whether a material change of use has taken place in new development. A single activity which occurs in a small part of a larger area may not be material (Johnston v Souse (1974)). Thus, for example, a change in the use of one office building in a business park to a café use may not be material if the planning unit is the business park, but could be if the planning unit is the office building.

Clearly the matter is of great importance to the local planning authority ('the LPA') if it is contemplating taking enforcement action against unauthorised development or if it is faced with an application for a CLEUD or CLOPUD. The issue was clear in Church Commissioners v SoSE (1996) which involved the change of use of a shop in a shopping centre. The court found that the planning unit was the shop and not the shopping centre.

The leading case is Burdle v SoSE (1972) where Bridge J defined three issues in determining whether the correct planning unit should be the whole of a site or a part of it.

(i) Incidental/Ancillary use.
Whenever it is possible to identify a single main purpose of the occupier's use of his land to which secondary activities are ancillary or incidental the whole unit of occupation should be considered.

It is important in this case to be able to identify a use which is ancillary. The operation of a non-residents' bar in a hotel has been held to be ancillary to the main hotel use (Emma Hotels v SoSE (1980)). However, public entertainment in connection with pilgrimages and public worship were held not to be ancillary to a residential theological college (International Society for Krishna Consciousness v SoSE (1992) CA). The opening of a pharmacy in a supermarket is not a material change of use as it is a retail use (Maldon District Council ex p Pattani (1999)). However, there can be a material change of use in respect of an ancillary use if the main use diminishes. In Harrods Ltd v SSET&R (2002) it was held that the correct test was not 'functional connectivity', as advanced by counsel, but whether it was 'ordinarily incidental'.

(ii) Composite Use.
It may be equally apt to consider the entire unit of occupation even though the occupier carries on a variety of activities which are functionally separate and it is not possible to say that one is ancillary to another.

(iii) Dual /Mixed Use.
Within a single unit of occupation two or more physically separate and distinct areas of occupation may be occupied for different and unrelated main purposes, in which case each area should be viewed as a separate planning unit.

It should be noted that intensification of an ancillary use can lead to a dual or mixed use (Trio Thames Ltd v SoSE & Reading BC (1984)). Equally the diminution of the main use can promote an ancillary use to a composite use.

The rules are not absolute. In Wood v Secretary of State for the Environment (1973) where part of a house was used for the sale of produce from a smallholding Widgery LJ said it could rarely, if ever, be right to dissect a dwelling and regard a room as a separate planning unit. Even if there was a change of use the house, as in the case of a part business use, had to be looked at as a

whole. However, Widgery's dictum does not apply to buildings other than single dwellings e.g. where the issue concerns a block of flats (Johnston v SoSE (1974)). Where a business operates from more than one site it would not be appropriate to treat them as a single planning unit (Fuller v Secretary of State for the Environment (1987)).

Then there is the issue of whether dividing the planning unit amounts to a material change of use. In Wakelin v SoSE (1978) it was decided that the change of use was material where there was a change of use from one unit to two, though it would not necessarily be the case in every instance. Winton v SoSE (1982) decided that there had to be 'planning consequences flowing from any subdivision'. By virtue of s22(2)(f) TCPA 1990 the subdivision of a unit into two or more within the same use class does not constitute development.

Although the principles are clear there is undoubtedly much room for discretion in determining the planning unit.

SECTION B

Question 1 Green Belt

The issues in this scenario are governed by the interaction of legislation, the National Planning Policy Framework ('the NPPF') and the Council's local plan. Section 336 of the TCPA 1990 defines agriculture as including horticulture and fruit growing.

The Planning Acts do not mention Green Belt apart from Metropolitan Green Belt. However, the legislation is clear that in considering applications for planning permission the local planning authority ('the LPA') 'shall have regard to the provisions of the development plan so far as material to the application…and to any other material consideration ((s70(2) Town and Country Planning Act 1990 ('TCPA 1990'))'. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ('PCPA 2004') provides: '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.' Material considerations are land use planning matters relevant to the decision and include national policy guidance such as the NPPF. The Acts create a presumption in favour of development which is in accordance with the development plan (Edinburgh City Council v SoS Scotland (1998)). The policies contained in the NPPF are material considerations (paragraph 212).

Turning to the NPPF, LPAs are required to approve development proposals that accord with the development plan without delay and where the development plan is absent, silent or out of date to grant planning permission unless:

- the adverse effects of approval would outweigh the benefits when assessed against NPPF policies as a whole; or
- specific policies in the NPPF indicate that development should be restricted (paragraph 14).

The policies in local plans are to follow the presumption in favour of sustainable development so that development which accords with that principle can be approved without delay (paragraph 15). Sustainable development has economic, social and environmental roles (paragraph 7).

The NPPF contains the government's policies for protecting Green Belt land. It states *inter alia* that 'inappropriate' development is harmful to the Green Belt and should not be approved except in 'very special' circumstances (paragraph 87).

'Very special' circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness and any other harm, is clearly outweighed by other considerations. 'Substantial weight' should be given to the issue of any harm to Green Belt (paragraph 88). While the construction of buildings in Green Belt is considered inappropriate (and *prima facie* harmful) there is an exception for agriculture and forestry. The extension or alteration of a building is appropriate 'provided it does not result in inappropriate additions over and above the size of the original building' (Paragraph 89). The exception in favour of agriculture is one of six. The other five exceptions are subject to the proviso that they preserve the openness of the Green Belt and do not conflict with the purposes of including land within the Green Belt.

Misinterpretation of National Policy

The principal question in the instant scenario is whether or not the proposed development is inappropriate in Green Belt and whether the planning application should have been refused on that ground (R (otao Heath and Hampstead Society) v Camden LBC (2014)). All agricultural buildings are regarded by the NPPF as appropriate regardless of their effect on the Green Belt and regardless of size and location. Such development is not subject to the proviso affecting the other exceptions to 'inappropriate development', namely that they preserve the openness of the Green Belt and do not conflict with the purposes of including land within the Green Belt. By definition, therefore, there could be no harm to the Green Belt in approving the application. The position is simply a matter of policy (R (otao Lee Valley Regional Park Authority) v Epping Forest DC and Valley Grown Nurseries Ltd (2016)). Accordingly, the Council's Policy GB1 would not apply although other policies might point in a different direction (see below).

It follows that the court would dismiss this head of complaint.

Misinterpretation of Local Policy

The development plan is the starting point for determining all planning applications. In this case the LPA granted planning permission contrary to the provisions of Policy GB2 and Policy GB3 of the Cornbrash Local Plan. The question is whether there were legitimate planning grounds for so doing.

The proposed development undoubtedly met one of the criteria for 'sustainable development', assuming that the LPA was correct in saying that the proposal contributed to the economic wellbeing of the LPA's administrative area. It is an open question whether it met the environmental criterion. So far as concerns Policy GB3 the LPA was probably correct in its interpretation, namely that even though the proposed development was prima facie inappropriate it fell within the NPPF exception. Not only that, the development was not required to contribute to the openness of the Green Belt or to avoid conflict with the purposes for including the land within Green Belt. Local Plan Policy GB3 can be read in that way. The development did not have to be justified by any 'very special circumstances'.

The position is more difficult in regard to Policy GB2. This states that the visual amenities of the Green Belt are not to be injured by development whether viewed from within or without the Green Belt. This was an issue the LPA had to deal with. Visual impact is something different from openness. Did the potential harm outweigh the presumption in favour of sustainable development?

It would appear that the LPA conducted a balancing exercise in this regard as it concluded that the economic benefit to the locality of the proposed development outweighed any harm to the visual amenities of the Green Belt (Forest of Dean DC v SSCLG (2016)). The question is whether that was a legitimate exercise and outcome and whether the reasons given for departing from the Local Plan were 'material considerations' which justified the departure.

The LPA gave prominence to the economic thrust of 'sustainable development' at the expense, perhaps, of the environmental element. In Fordent Holdings Ltd v SSCLG (2013) EWHC it was held that the decision-maker should not focus on one of the requirements of sustainable development at the expense of another. Moreover, there is authority in Colman v SSCLG, North Devon DC & REW Npower Renewables (2013) that the economic policies of NPPF should not be read into a local plan where such policies do not appear there (as they did not in this case). However, on balance, theirs was a decision the LPA was entitled to take (Lee Valley Regional Park).

It is likely that he court would dismiss this head of complaint.

Habitats

The presumption in favour of the development plan contained in s38(6) Planning and Compulsory Purchase Act 2004 is subject to an exception where development requires appropriate assessment under the Birds or Habitats Directives (NPPF paragraph 119).

Regulation 61 of the Habitats Regulations (enacting the EU Habitats Directive) provides that before giving consent for a proposal which is not directly connected with the management of a European SPA but likely to have an effect on it, it must make an 'appropriate assessment' of the implications for the site in the light of the site's conservation objectives. It must also consult the appropriate nature conservation body and it may only approve the proposal if it is satisfied that the proposal will not adversely affect the integrity of the SPA.

The appropriate nature conservation body for England is Natural England and the LPA consulted it on the proposal. The Park Authority maintains that the LPA wrongly delegated to Natural England its duty to make an 'appropriate assessment'.

While a local authority has wide powers of delegation (s101 Local Government Act 1971) the Planning Acts do not empower an LPA to delegate the exercise of a duty, in this case to make 'an appropriate assessment', to a consultee. It appears that the LPA simply accepted the view of Natural England that the proposal would not adversely affect the integrity of the SPA, subject to the mitigation conditions it specified. The LPA was entitled to accept the view of Natural England (R (otao Morge) v Hampshire County Council (2011)) but, equally, it should have explored with Natural England its casual treatment of the representations of RSPB. Furthermore, the LPA would have had to have good reasons to ignore, as it did, the mitigation conditions proposed by Natural England (R (otao Hart District Council v SSCLG (2008)). There appear to have been no such reasons.

It is likely that the court would remit the case to the LPA to modify the planning permission to include stringent mitigation conditions in order to take account of the representations of RSPB as well as the conditions advanced by Natural England. It is unlikely that it would quash the permission unless it considered the LPA's errors were 'serious' and the prejudice 'substantial' (R (Champion) v North Norfolk District Council (2015) UKSC).

Question 2 Neighbourhood Plan

The Inspector rejected the Company's appeal not on the merits of the local planning authority's ('LPA's') reasons for refusal but on the interaction between the planning proposal ('the proposal') and two emerging plans: the draft Woodcroft Neighbourhood Plan ('the Neighbourhood Plan') and the draft Cornbrash Local Plan ('the Local Plan').

He found that the LPA had not identified a five year supply of housing in the Local Plan; that the Site was not allocated for housing in the Neighbourhood Plan; and that the examination of that Neighbourhood Plan might lead to the inclusion of specific sites. For these reasons he considered that the application was premature.

Ground 1

By virtue of s 70(2) of the Town and Country Planning Act 1990 ('the TCPA 1990') and s 38(6) of the Planning and Compulsory Purchase Act 2004 ('the PCPA 2004') the Inspector's first duty was to consider the proposal in the light of the development plan. Having found that the old saved development plan to 2008 provided no guidance the Inspector had then to consider the provisions of the draft Local Plan. Emerging plans may be material (paragraph 216 National Planning Policy Framework, 'the NPPF') and the weight to be according to them depends upon the stage the draft has reached. However, the Local Plan was unhelpful in that the LPA had not at that point identified a five year supply of housing sites. The Inspector had then to consult the draft Neighbourhood Plan. This did not allocate the Site for housing and, according to the Inspector, the relevant housing policy allocation of 30-40 houses introduced a cap.

Where the development plan is out date or silent the decision-maker has to look to other material considerations. The policies contained in the NPPF are material considerations. If the development plan provides no help the decision-maker must consider the proposal in the context of sustainable development. The relevant policy in the draft Neighbourhood Plan is a housing policy and engages paragraph 49 of the NPPF (South Northamptonshire Council v SSCLG (2014) EWHC). Paragraph 49 extends the scope of the presumption in favour of sustainable development contained in paragraph 14 NPPF to drafts as well as adopted development plans, provided no five year supply of housing is evidenced and the relevant provision relates solely to housing supply policies (Redhill Aerodrome Ltd v SSCLG (2015)). There is no evidence that the Inspector went down this route.

Accordingly the Company should be advised that it would succeed on Ground 1.

Ground 2

Given that the Inspector had found that there was 'a compelling case for releasing the Site for development' he had no basis, in principle, for rejecting the planning application as it amounted to sustainable development. He had not

commented adversely on the scale of the proposal nor had he formed the view that 'harm' would result were it approved. His reliance on the fact that the Site had not been allocated for housing and his conclusion that the housing allocation of 30-40 houses was a cap were incorrect (BDW Trading Ltd v Cheshire West & Cheshire B C (2014) EWHC). His analysis of the conflict between the proposal and the Neighbourhood plan was flawed (Tesco Stores v Dundee City Council (2012)).

The Inspector had failed to articulate the conflict between the proposal and the draft Neighbourhood Plan which underlay his decision and, therefore, the Company should be advised that it would succeed on Ground 2.

Ground 3

However, the decisive factor in the Inspector's decision was his view that the proposal was premature.

The Company claims that the inspector failed to take account of or to apply the Secretary of State's own policy on prematurity. In regard to prematurity the provisions of the NPPF have been supplemented by Planning Practice Guidance ('the PPG') published on 6 March 2014. The issue of prematurity cannot be divorced from the local plan (neighbourhood plan) process (Veoilia ES (UK) Ltd v SSCLG (2015) EWHC).

Whether a draft plan has reached a sufficiently advanced stage is simply treated by the PPG as an entry point for considering prematurity as a possible reason for refusal (Woodcock Holdings Ltd v SSCLG and Mid Sussex D C (2015)). LPAs may give weight to the provisions in emerging plans. The weight accorded to such a plan depends upon the stage the draft plan has reached in preparation (paragraph 216); whether there are unresolved objections; and whether the policies are consistent with the NPPF.

The PPG gives guidance on when planning permission may be refused for prematurity. Prematurity is unlikely to justify a refusal unless it is clear that any adverse impact of a grant would outweigh the benefits; or the effect of the grant would be substantial and have a significant cumulative effect. 'Refusal of planning permission on grounds of prematurity will seldom be justified where a draft Local Plan has yet to be submitted for examination or, in the case of a Neighbourhood Plan, before the end of the local authority publicity period'.

There is no evidence that the Inspector considered whether any adverse impact would result for the Neighbourhood Plan policies in approving the proposal or that he considered the provision in the Neighbourhood Plan for a review of housing allocations early in the plan period.

Accordingly, the Inspector's decision was flawed in that he did not apply the key tests as to prematurity or consider the issue of whether particular issues should be determined in the examination of a plan rather than in the decision on a planning application. Furthermore, the assumption that the remaining stage of the examination of the plan might reveal that more land needed to be allocated had no evidential or legal justification.

The Company would succeed on Ground 3.

As under s288 TCPA 1990 the court is only empowered to quash the determination it is increasingly reluctant to do so. However, the Inspector's

reasoning was so flawed in this case that undoubtedly the court would quash the determination. The Company should be advised to appeal.

Question 3 Enforcement

This scenario raises the issue of when the Secretary of State can grant planning permission on an enforcement appeal.

Section 174(2) of the Town and Country Planning Act 1990 ('the TCPA 1990') sets out the grounds on which an appeal against an enforcement notice may be brought.

Ground (a) states:

> '…that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged…'

Ground (f) states:

> '…that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed that which is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach…'

Section 20C TCPA 1990 introduced by the Localism Act 2011 provides that a local planning authority ('LPA') in England may decline to determine a retrospective application for planning permission if an enforcement notice has been issued previously for any part of the development.

The Secretary of State has the power to allow or dismiss an appeal made under ground (f); he may quash the notice and has power under s176(2A) to 'make any directions' required to give effect to his decision (Ahmed v SSCLG (2014)).

The enforcement of planning control is essentially a remedial process not a punitive one (Tapecrown Ltd v First Secretary of State (2007)). However, the question is whether the scope of an appeal on the second limb of ground (f) is reduced (or not) by the absence of an appeal on ground (a) and a deemed application for planning permission. Does the validity of the ground depend on which of the two purposes in s173(4) the requirements of the enforcement notice were intended to achieve i.e. returning the land to its condition before the breach and remedying any injury to amenity? Or does it depend on the nature of the 'planning objections' those requirements were intended to overcome?

When an applicant is seeking planning permission for the matters alleged in enforcement notice the appropriate ground of appeal is ground (a) Alwyn de Souza v SSCLG and Test Valley BC (2015). But can a successful appeal on ground (f) lead to a grant of planning permission under section 173(11)? Issues of planning judgement can arise under ground (f) as well as under ground (a) (SSCLG v Ioannou (2014)). The Secretary of State must consider 'any obvious alternative' to the development targeted by the enforcement notice (Tapecrown). The second limb of ground (f) always enables an appellant to argue that nothing more is necessary to remedy any harm to amenity and that the requirements of the enforcement notice go too far. Thus the Inspector must ask himself whether the requirements of the notice are at least partly directed to overcoming

'amenity-based objections'. This is a matter for the Inspector not the court subject only to challenge on Wednesbury grounds.

The real nature of Xanthe's appeal is that the Inspector failed to consider the planning merits of her alternative proposal i.e. approval for the mixed use of restaurant and drinking establishment or its use as a restaurant with ancillary use as a drinking establishment, subject to a degree of control over the number of non-dining drinkers.

The judgment in Secretary of State for the Environment, Transport and the Regions v Wyatt Brothers (Oxford) Ltd (2002) is authority for the proposition that the SoS may have no power to consider an appeal under ground (f) when there is no appeal seeking planning permission under ground (a). Furthermore, in Iannonou Sullivan LJ observed that the power to allow an appeal on ground (f) 'is not a power to grant planning permission' and if planning permission is to be granted under section 174 'it may only be granted under section 177(1)'. It would be contrary to the intention of Parliament, he said, to adopt an interpretation of subsection 173(11) which in conjunction with ground (f) would 'have the effect of granting planning permission for matters other than those specified in the enforcement notice as constituting the breach of planning control'.

Thus there is no freestanding 'obvious alternative test'. If there is no appeal under ground (a) the reach of ground (f) is limited. There is no discretion in the statutory regime to grant or refuse planning permission where the only ground of appeal is ground (f).

Planning objections may remain even where the effect on amenity is removed though an appeal on (f) may succeed if the only issue is impact on amenity.

In principle it would be open to the court to uphold Xanthe's appeal if it considered the Council's requirements went too far. However, on the basis of the judgment in Stamatios Miaris v SSCLG and Bath and North East Somerset Council (2016) EWCA she would not succeed.

Xanthe should be advised to seek planning permission for a drinking establishment with disc jockey entertainment and appeal under section 78 TCPA 1990 if permission is refused, as is likely. Incidentally, there is now no scope under s70C TCPA 1990 to seek a retrospective planning permission where an enforcement notice has been issued.

Question 4 Agricultural Occupation Condition

The issues here are (a) whether planning permission is required for the livery operation and (b) whether Mrs Swain is engaged solely or mainly in agriculture locally and whether her husband and children are dependents in the context of the condition.
(a) So far as concerns the livery operation, the keeping of livestock otherwise than for the production of food does not fall within the definition of agriculture (Belmont Farm Ltd v. Minister of Housing and Local Government (1962)). While grazing can fall within the definition (Sykes v Secretary of State for the Environment (1981)) the grazing here is not for the production of food and, in any case, is ancillary to the livery operation. However, the use has continued for more than ten years and the stables have been in existence for more than four years. Accordingly, no enforcement action can succeed in regard to the livery operation either as a use or as an operation (s171B(3) and 171B(1) TCPA 1990).

(b) So far as concerns the agricultural operation, it is clear that Mrs Swain is engaged in agriculture for the greater part of her working week. There is no basis for describing her as a 'hobby farmer' even if she fails to make a profit. Moreover, only a small proportion of her time is engaged each week by the livery operation.

A local planning authority ('LPA') may impose such conditions as it thinks fit on a grant of planning permission provided they serve some useful purpose having regard to the objectives of planning legislation (s72(1) TCPA 1990). Agricultural occupancy conditions are imposed, for the most part, in cases where planning permission for the dwelling to be occupied would not have been granted but for the condition. The leading case on agricultural occupation conditions is that of the House of Lords in Fawcett Properties Ltd v Buckinghamshire County Council (1961). The agricultural condition in issue was similar, but by no means identical, to that in the instant scenario. In Fawcett the issue of whether the condition was void for uncertainty brought into consideration the definition of 'dependents'.

Lord Keith of Avonholm opined '...Nor can I see any difficulty in construing 'dependents', when brought within the confines of the house, as meaning persons living in family with the person defined and dependent on him in whole or part for their subsistence and support…' . For his part, Lord Denning stated that the word 'dependents' showed that the head of the household 'may have with him his wife and family and anyone else dependent on him'.

A later departmental circular (11/95) referred in endnote 5 to Lord Keith's definition:

> 'Dependents' means persons living in family with the person defined and dependent on him (or her) in whole or in part for their subsistence and support'

Nevertheless, there is no single definition of 'dependent' applicable to all circumstances and context is all important (Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions (2002) EWHC). The issue should not be determined in the abstract and the general rules for construing a planning permission apply to the construing of a condition (R v Ashford Borough Council ex parte Shepway DC (1999) and University of Leicester v SSCLG (2016) EWHC).

Fawcett is not authority for the proposition that dependency means exclusively 'financial dependency'. In ordinary language 'dependent' is capable of involving non-financial dependency e.g. in the case of a baby or disabled or elderly person. Within a family home spouses can be said to be dependent on each other and children as dependent on both parents irrespective of the relative financial contribution of the spouses/parents (Shortt and Shortt v SSCLG and Tewkesbury BC (2014) EWHC).

A family relationship is shown in the condition's inclusion of the widow/widower relationship within the scope of 'dependents'. It would be a strange result of the wording of the condition if the agricultural worker was permitted to have family members living with him only if they were financially dependent or so long as the agricultural operation was profitable. Moreover, the condition is not tied in its operation to any particular agricultural enterprise nor does it impose a requirement of profitability.

Mrs Swain should be advised to lodge an appeal against the enforcement notice under section 174(3) if the Town and Country Planning Act 1990 on the following grounds:

(a) In regard to the livery operation

Ground (d): that when the notice was served no action could be taken in regard to any breach of planning control.

(b) In regard to the agricultural condition

Ground (b): that the matters alleged in the notice have not occurred
Ground (c): that if the matters alleged had occurred they do not constitute a breach of planning control
Ground (f): that the steps required to be taken exceed what is necessary to remedy any breach of planning control

She can expect to succeed on all counts.

In the circumstances there is little point in appealing the LPA's refusal to grant a certificate.

Mrs Swain's complaint that the Council's action has interfered with her right to family life engages Article 8 of the European Charter on Human Rights (ECHR) incorporated into English law by the Human Rights Act 1998. This article is intended to protect close family ties and contains a right not to have one's home life interfered with. However, the right is qualified and the Council could argue that the action it has taken is for the economic well-being of the country and possibly protective of the rights and freedoms of others. However, the action must be necessary and proportionate. There is an argument for saying that it was not in this case (Stevens v SSCLG and Guildford B C (2013) because the enforcement action, if successful, would result in Mrs Swain's family being unable to live in their family home (Connors v United Kingdom (2004)).

Generally, there have been few instances where the Planning Acts regime has been held not to comply with ECHR but Mrs Swain would have nothing to lose in arguing this point in her appeal.