Representations of Thames Farm Action Group

Thames Farm Planning Appeal October 2023

Reading Road Lower Shiplake

APP/Q3115/X/23/3325922

1. Introduction

Thames Farm Action Group (TFAG) - Is a residents group formed by residents of Shiplake Villages. Its purpose is to ensure that all Planning matters relating to the development of Thames Farm and other nearby sites, all of which sit within a Water Source Protection Zone (SPZ1), are thoroughly and properly considered by the various regulatory Authorities responsible for approving such proposals, and do not cause harm to the villages or locality.

TFAG has the support of some 1500 residents and local people (who signed a petition over the Thames Farm Drainage proposals) and is funded by some 220 local residents. It's work also has the support of Shiplake Parish Council, Harpsden Parish Council and Henley Town Council all of whom objected to the Appellants proposals when their Application for a LDC was made to SODC. Further information about TFAG may be found at https://www.shiplakevillages.com/index.php?pid=393

TFAG wishes to record at the outset, that the Appeal document pack contains a number of new and varied documents from those available to SODC and others, at the time that the LDC to which this Appeal relates, was rejected by SODC.

This includes inter alia the following:

- An HIA of the Grouting Proposal (Technical) of July 2023HIA Non technical summary of July 2023
- Traffic Impact Assessment of Grouting Works June 2023
- Indicative Foundation July 2023
- Program Rev2 July 2023

We believe that it would be wholly wrong and unreasonable for the Planning Inspectorate to ignore guidance and to consider this new material in deciding this Appeal. We believe that the Appeal should therefore be dismissed for those reasons alone.

The decision to refuse to grant the LDC Application of 2021, was made within a framework of knowledge and information that was available at the decision point, and as such the addition of these further new reports and information does not change the fundamental decision made by SODC nor why it was made. The decision is one of law, nothing else.

If the Inspectorate is not minded to dismiss the Appeal for those reasons, we would offer the following comments and observations to the matter having regard to the new documents introduced. We maintain however that the new documents, add nothing to the question of whether the rejection of the LDC application was correct in law.

We have provided our review of the contents/impact of those new documents in the event that the Inspectorate does decide to consider those documents as well, notwithstanding and without prejudice to our stated position above.

The primary thrust of our argument is that at the time Outline Planning Permission was granted, this was considered to be a 'typical' residential development, requiring no intrusive and extensive ground remediation. As such, it did not trigger the EA's National Policy on Water resource protection, in particular N8 - Physical Disturbance of an Aquifer.

Since OPP was granted, new information on the ground conditions and the extent of remedial works required to stabilise them has come to light.

These works will contravene Policy N8 and result in physical disturbance of the aquifer

In order to enable the responsible authorities to be able to comment on the impact of these works and satisfy themselves and the public that no environmental harm will occur, then the only available recourse is to subject the planned works to a detailed planning application in their own right.

Moreover, it is not possible to approve something that has not been applied for, and the proposals represent a separate development project requiring a separate planning consent to carry out a ground improvement project on the site.

In that regard, we comment as below:-

2. <u>Legal Statement</u>

This legal submission should be read in conjunction with those already provided at the application stage of the process.

Engineering Operations

The officer's delegated report concluded that the undertaking of the ground stabilisation works would amount to a separate activity of substance which is not authorised by the existing planning permission; in addition, the report concluded the Works are not part of the foundation works nor ancillary to the development. As such the proposed groundworks are of a scale and extent that they require separate planning permission.

This view is shared and supported by TFAG.

In the Court of Appeal decision in West Bowers Farm Products v Essex County Council (1985) 50 P. & C.R. 368 the Court was faced with the question whether a proposal to construct a reservoir on agricultural land in order to provide a water supply for crop irrigation fell within a permitted development right consisting of the carrying out on agricultural land of engineering operations requisite for the use of land for the purposes of agriculture.

The construction of the reservoir involved the extraction of gravel but the amount of gravel to be excavated was limited to that necessary to construct the reservoir and no other operations were involved. The appellants argued that the development would amount to no more than an engineering operation requisite for the use of their farm, that it was impossible to build the reservoir without the extraction of the gravel and that the latter was an integral part of one indivisible process.

They sought to rely on the permitted development right accordingly. The council in that case argued to the contrary on the basis that mineral extraction was also involved, and that the proposal was not solely for agricultural purposes. The Court found for the council and held that the permitted development right did not apply.

The decision started from the same premise explained in New World Payphones Ltd v Westminster City Council [2019] EWCA Civ 2250, namely, that, to take advantage of the permitted development right in question, it had to be shown that the development was, and was only, an engineering operation requisite for the use of the land for the purposes of agriculture. The Court rejected the notion of indivisibility and held that development could be of a hybrid (that is, dual purpose) character. It also held that, in deciding whether that was the case, the question was an objective one to be decided as a matter of fact and degree and judged on the basis of the scale, or nature and extent, of what was proposed.

If it involved an activity of substance apart from that which was the subject of the permitted development right, the right did not apply. The construction of the reservoir was not just an engineering operation requisite for the use of land for the purposes of agriculture but also involved winning and working minerals on a substantial scale.

The present case involves Works to be carried out on a very significant scale indeed which, on an objective basis as a matter of fact and degree, amount to an activity of substance leading to the conclusion that the Works require planning permission.

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The works according to the Appellants own programme have a planned duration of **34 weeks and 2 days,** and will involve **1,738 vehicle movements or 20 lorries per day**. This cannot be considered to be insubstantial.

An engineer will necessarily be heavily involved in the Works. By way of example of the breadth of discretion available to a decision maker when assessing if an operation is an engineering operation, in the Court of Appeal case of R F W Coppern (Trustees of the Thames Ditton Lawn Tennis Club) v K J Bruce-Smith [1998] JPL 1077 it was held that breaking up and digging out a tennis court could be considered an engineering operation. The caselaw gives decision makers a wide discretion in this regard.

The Council was entitled and correct to conclude that the Works comprise a separate activity of substance particularly given the scale of works proposed.

Other Operations

The report does not consider whether the Works could constitute "other operations" within Section 55(1) of the Town and Country Planning Act 1990. "Other operation" within Section 55(1) of the Town and Country Planning Act 1990 is its own distinct category of operational development, and does not require such operations to be ones normally undertaken by a builder. Operations that are not "building operations" within Section 55(1)(d) could conceivably be "other operations" within Section 55(1).

Case law has established that the term "other operations" is to be interpreted widely, and as such there is significant scope for a decision maker to conclude that the operations proposed comprise "other operations". In Coleshill & District Investment Co Ltd v Minster of Housing and Local Government [1969] 1WLR 746 it was held that "other operations" should be construed as meaning other operations similar in nature to "building, engineering or mining operations". "Other operations" therefore covers operations that do not precisely fit within the other categories but are similar to them- see R (on the application of Beronstone Ltd) v First Secretary of State and Chiltern DC [2006] EWHC 2391 (Admin)

Indeed, there are likely to be a whole host of other operations involved in carrying out the Works proposed by the Appellant. These operations are a separate and distinct construction project or operations from that of the building of houses from foundations upwards. Foundations will typically be built on or in the improved surface after the ground improvement works are finished and the civil engineering contractor responsible for the ground improvement works moves off site. Many of these operations would constitute operational development that requires planning consent. Whilst those matters are not the subject of the appeal, if the appeal is allowed, the Council may struggle to control these other inevitable forms of operational development, which could have very significant impacts allowing a dangerous precedent to be set.

It is the responsibility of the applicant, now appellant for a certificate of lawful development to provide sufficient information to support an application: see the Planning Practice Guidance at Paragraph: 006 Reference ID: 17c-006-20140306. Insufficient information to justify the granting of the appeal has been provided.

Cases referred to may be found at Appendix 4 of this document

3. What is the purpose of the/an Outline Planning Permission

The Planning Portal has the following to say about OPP's

When permission is required

Outline planning applications are used to gain an understanding as to whether the nature of a development is acceptable, this can help ensure viability up front. Specific details known as 'reserved matters' can then be confirmed later.

Allowing for planning permission to be granted subject to the condition that reserved matters are approved before development begins.

A reserved matters application can be completed through the Planning Portal's application service.

Thus the purpose is to undertake a 'high level' review as to whether or not any given site might potentially be suitable for a given form of development. It is a relatively inexpensive way to establish the likelihood of development being permitted, and is an alternative to a detailed Planning Application which will provide all of the information designs and data necessary for a comprehensive 'oven ready' scheme to be submitted for approval, and, which then enables the developer to commence on site with the development very quickly.

Naturally this latter form of application is very time consuming and hugely expensive to assemble and submit and requires detailed designs to be produced at the outset following a very large amount of detailed investigation about all manner of different factors relating to the site.

Dependent upon the volume of supporting material submitted with an Application, it is very often the case that a Outline Permission will incorporate a large number of pre-conditions and requests for the supply and approval of information, designs and the like before a development can subsequently be approved, and then take place.

In this case, there was no detailed knowledge of the ground, understanding of ground conditions, or of potential impacts on the aquifers which is the sole source of drinking water for Henley Water supply area. Given none of this knowledge existed at the time of the outline planning permission was applied for and granted ,no proper conditions relating to these matters could be attached to the Outline Consent.

This is contrary to the provisions of both the current NPPF, and was also the case in the 2012 edition. Para 188 refers, and states that Planning decisions should be based on comprehensive information in order to avoid decisions being reviewed via subsequent permitting regimes from pollution monitoring and control organisations.

4. **<u>For what was permission sought?</u>**

The original Applicant for Thames Farm was the then site owner, ie not a developer and her requirement was for an Outline Approval. The costs of mounting the Application were kept to the bare minimum with the minimum of supporting material therefore submitted, and virtually no detailed investigations undertaken.

Whilst expedient for an applicant, this is a dangerous strategy carrying significant risks for a complex site for the reasons that have become clear with the passage of time and the carrying out of far more due diligence.

5. The Case at the Time of Refusal

The Inspector will already have received details of the many objections to this matter made at the time of the Outline Planning Application and then again to the LDC Application. The purpose of this paper is not to repeat those arguments, but to illuminate and clarify why TFAG feel that this Appeal should be dismissed by the Inspector.

It would appear that no intrusive investigation was carried out for the purposes of the 2016 Application at all, and reliance was placed entirely upon a minute amount of extant data, which appears to be data that is from adjacent land and not the subjects (extract from CEC Flood Risk Assessment 2016 Issue 4) :-

"Existing Ground Conditions Refer to BGS Borehole logs in Appendix 2. 2.9 An intrusive site investigation is yet to be undertaken. Borehole logs relating to the land adjacent to the site have been obtained from the British Geological Survey (BGS) website. The logs indicate that ground conditions in the vicinity of the site are characterised by a thin surface layer of topsoil, underlain by Taplow Gravel deposits comprising a mixture of clays, gravels and sands to a depth of 2 – 3m below ground level. Below 2 – 3m depth the sand content of this material increases to a depth of approximately 10m below ground level. The Taplow Gravel is underlain by Upper Chalk strata to depth"

This information dates back to 1994; was obtained from the British Geological Survey web site, and comprises of a couple of Light Cable Percussion bore holes close by the site, and **not on the site itself it seems**. (See Appendix 1)

These bore holes indicate nothing of any great note, and it appears that no appraisal whatsoever of potential foundation design or of any necessary groundworks to stabilize the ground of any description, was undertaken. The Applicant at that time was working to a small budget, and was not interested in demonstrating how practical or otherwise it would be to carry out the development of the site proposed, nor whether it **might** cause harm to others.

What is therefore patently clear, is that the site owner who obtained the Planning Permission had no intention, no knowledge and no desire to undertake any form or major programme of groundworks, soil stabilization or even piled foundations at the time the Application was submitted, and subsequently approval was granted.

The sole interest then appears to have been to 'bank' an outline consent and then sell the site. This in fact is what actually then occurred in practice.

Moreover, the current owner of the site, the Appellant, only undertook the necessary due diligence and intrusive investigation work necessary to verify the ground conditions and to identify the need for the very extensive groundworks now proposed, in September 2021, shortly before its application for a LDC, in November 2021.

It naturally follows that a Planning Permission cannot give permission for works of a very substantial nature that were not even in contemplation at the time of the initial Application or Approval.

Under English Planning law, development is tightly controlled even to the extent of having a list of 'permitted' forms of development, being relatively minor works primarily to individual houses. It is therefore inconceivable that the grant of an outline Planning Consent can be construed to confer permission upon the Applicant to construct any and all forms of groundwork's that might subsequently be found to be necessary to enable that development to proceed. This is particularly pertinent where substantial Groundworks were not envisaged at the time the Application was originally made, and where this relates to a highly protected and safeguarded category of land having an SPZ1 designation.

There are many reasons for saying this, however the most compelling relate to how the Planning system is constructed, operates, and considers outline applications for development proposals of medium to large scale developments in England.
The Application effectively scopes out the nature and degree of consultation and debate brought to bare on the Application by accurately filling out the Application forms and commissioning the necessary due diligence information needed to show that the site can be developed safely and without causing harm to others. The Application and supporting material is also the only thing available for the public and other interested parties to get an understanding of the proposal in order to then comment upon those proposals.

6. Sinkholes in Oxfordshire

There is no formal register of sink holes in the UK, but a quick Google search of the term 'Sink holes in Oxfordshire', will literally return dozens if not hundreds of unique references to the existence of sink holes and the alarming frequency with which they suddenly appear without warning. A developer of the size and stature of Taylor Wimpey will be more than aware of such matters and have come across such issues before. However given that they are such a major player, it is hard to understand why they did not embark on a major intrusive exercise to test the on-site ground conditions of the subject site. The warning signs were there! One can only assume they were under fierce time and commercial pressures to compete in purchasing the land, or something of that nature, as the complete and utter lack of detailed investigation into this site, pre purchase is breathtaking.

7. Lack of Information and Due Diligence

South Oxfordshire is incredibly well known for its geographical and hydrogeological characteristics. The area is well known for local mineral extraction of sand, gravel and brick earth (for brick and tile manufacture), and extensive Chalk dip slopes that frequently result in sink holes appearing without warning. Some of the local street names bare witness to what happened in the area historically ie Kiln Lane, Quarry Lane, Gravel Road etc.

The Oxfordshire Landscape and wildlife Study Oxfordshire Wildlife & Landscape Study - Landscape Types categorises the region as follows (my highlighting for emphasis):

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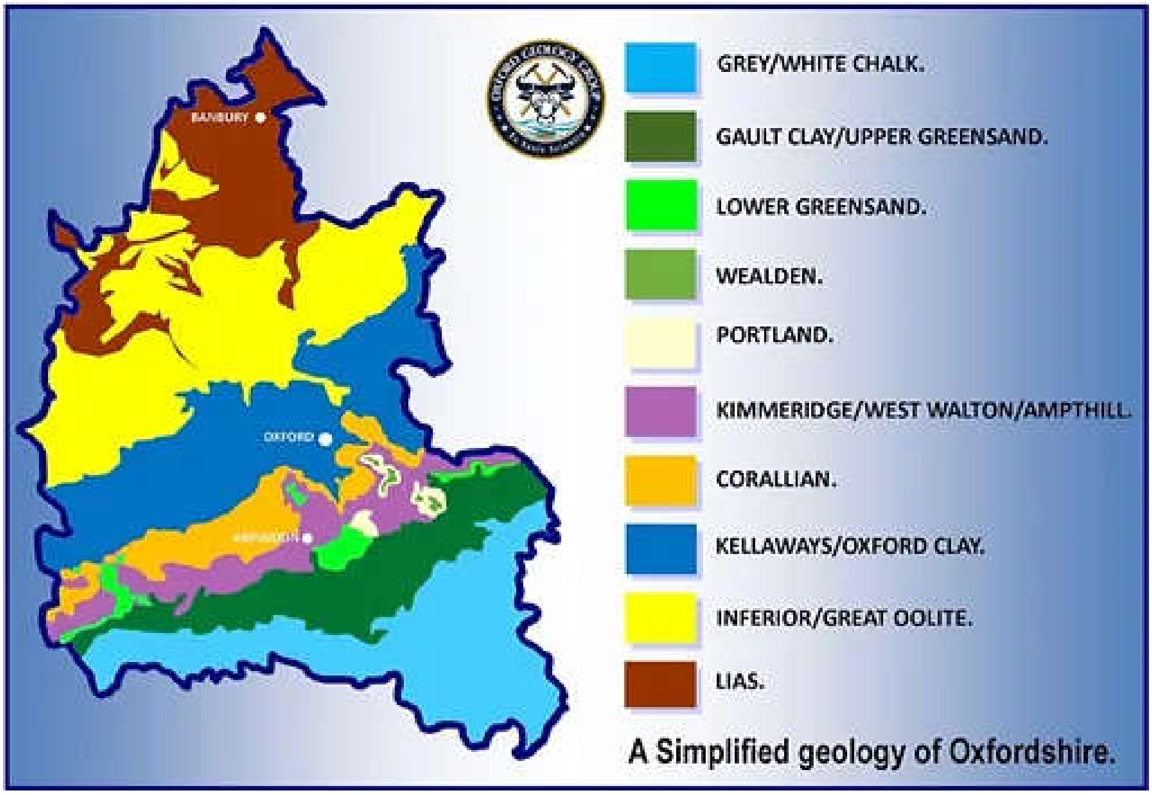
Key Characteristics

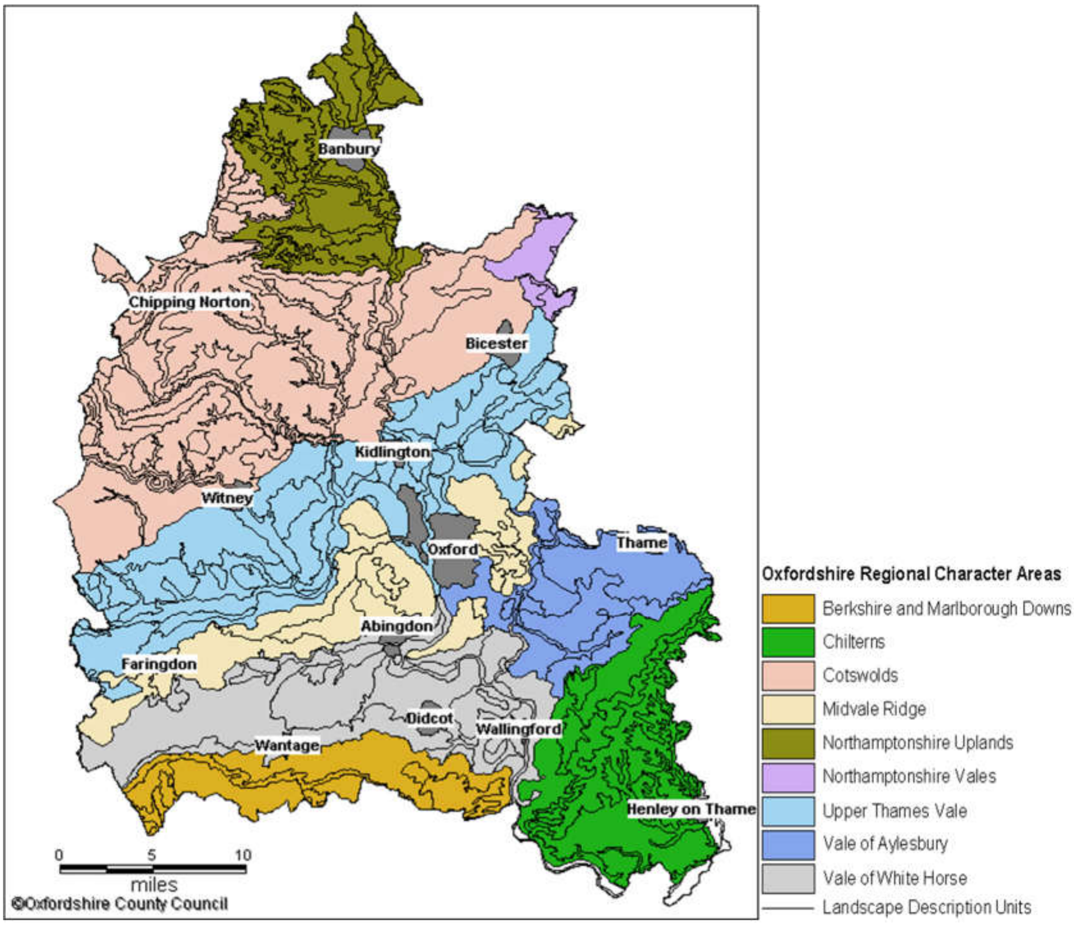
• Open, undulating landscape with steep escarpments.
• Large, open arable fields.
• Variety of woodlands, including recently planted mixed and deciduous plantations, shelterbelts and deciduous secondary and ancient woodland.
• Extensive areas of chalk grassland and patches of ancient woodland on steep slopes.
• Sparsely settled landscape with a few isolated farmhouses.

Geology and landform

The geology of the area includes the layers of the Lower, Middle and Upper Chalk. The Middle and Upper Chalks give rise to smoothly rolling downland resulting in a series of rounded hills and ridgelines. Along the northern edge of the landscape type, the eroded surface of the Lower Chalk gives rise to the prominent steep escarpment. The scarp dominates the skyline and forms a dramatic backdrop to the adjacent low-lying clay vale. In some areas it is almost vertical, and in places such as White Horse Hill it becomes dramatically convoluted.

[Oxfordshire Geology (ogg.rocks)](#)

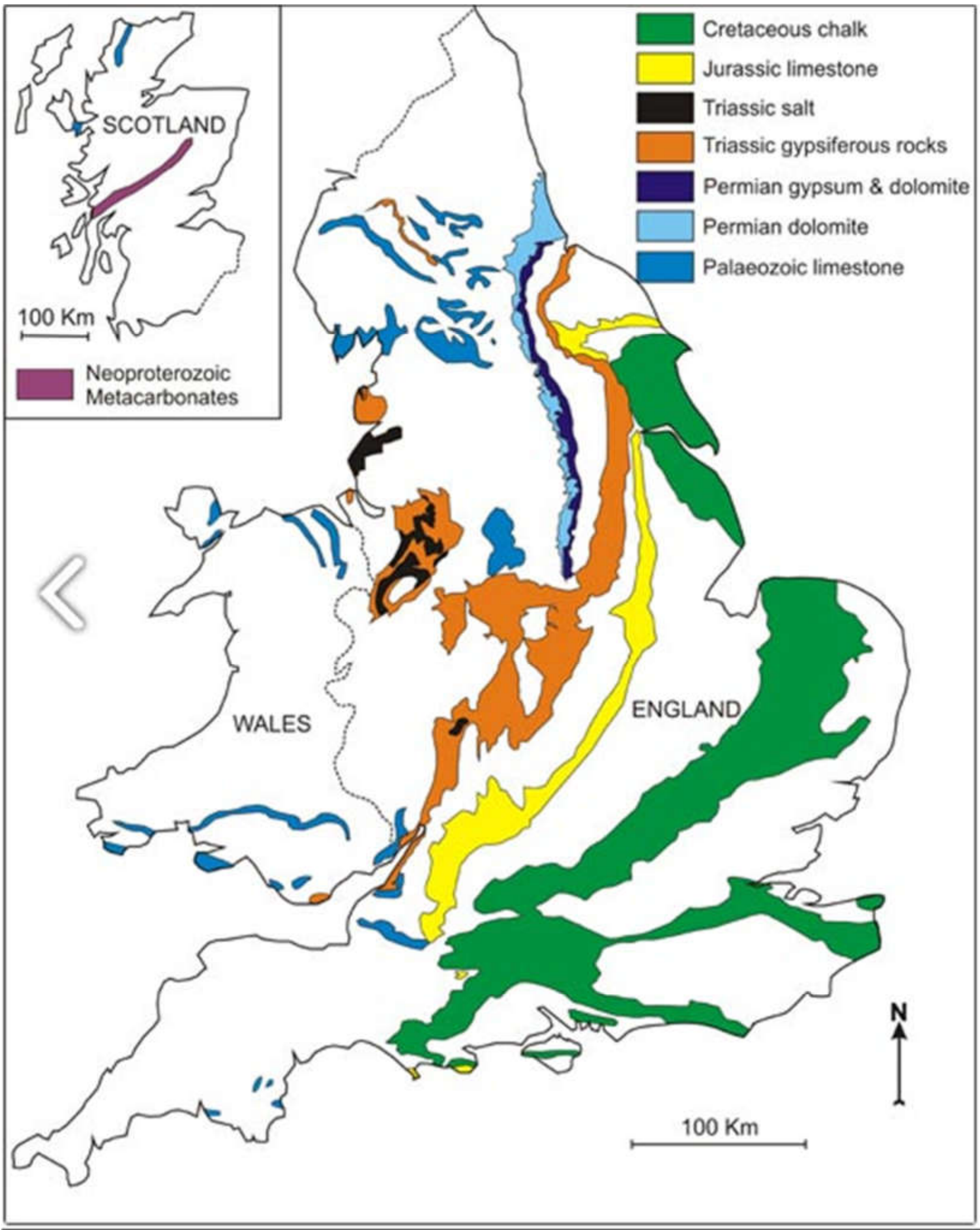




The Applicant in this instance purchased land with an outline Planning Permission in situ. The land was purchased with insufficient due diligence carried out pre acquisition as to the state and condition of the ground upon which the development would take place.

As illustrated above, South Oxfordshire is well known for its gravel extraction, clay extraction for brick and tile manufacture and for its extensive chalk dip slopes. Any local knowledgeable or professional purchaser should be well aware of the characteristics of the underlying ground, and the frequent appearance of 'sink holes' in the area.

What causes sinkholes and where do they occur in the UK? - British Geological Survey (bgs.ac.uk)



Soluble rocks in the UK. BGS © UKRI.

This characterization is also recorded and highlighted in the Shiplake Neighbourhood Plan

[Referendum version Vol 1 NP 05-06-22 final (southoxon.gov.uk)](southoxon.gov.uk)

3.4.9. Aquifer information on the Government's Magic.gov website[13] indicates that the Plan area is underlain by a Principal bedrock aquifer and areas of secondary (A) Superficial Drift aquifer. The Plan area is also underlain by areas of medium high to high soluble rock risk (groundwater vulnerability).

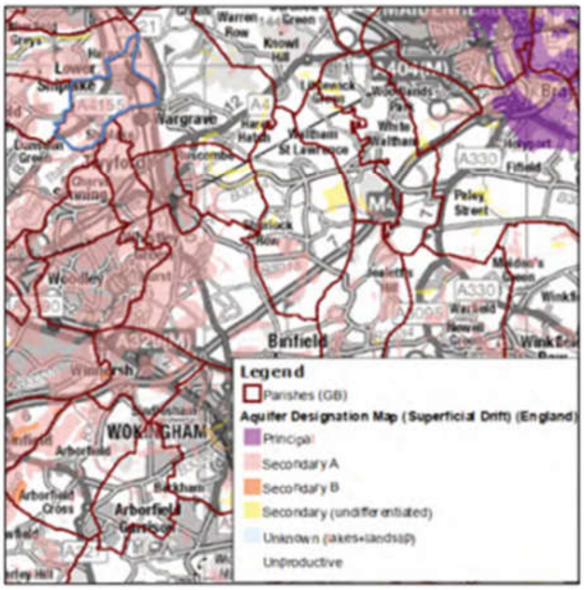


Figure 6. Aquifer Designation Map (superficial drift) [13]

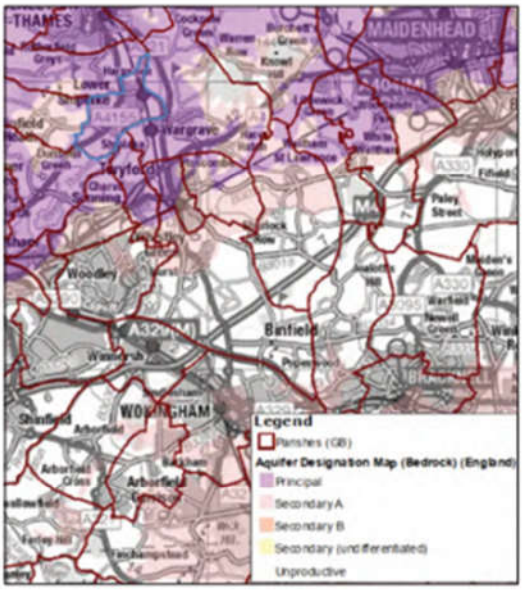


Figure 7. Aquifer Designation Map (bedrock) [13]

[12] https://www.archiuk.com/
[13] https://magic.defra.gov.uk/MagicMap.aspx

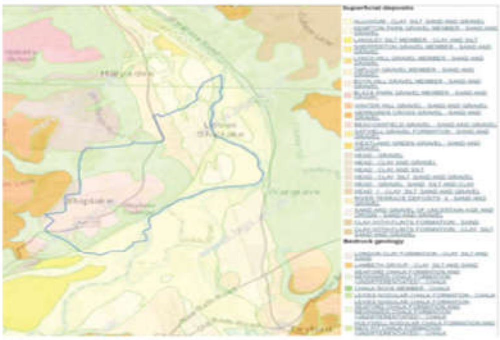


Figure 8. – British Geological Society Map viewer as accessed 26 April 2021 [14]

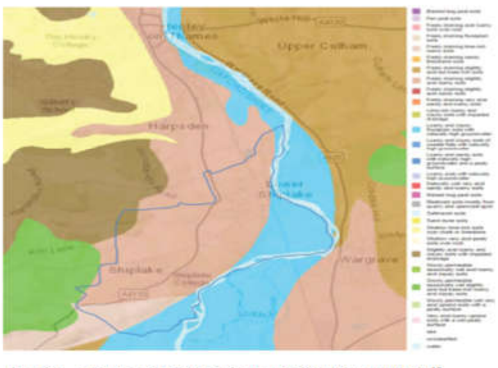


Figure 9. – Soilscape Map viewer as accessed 26 April 2021 [15]

3.4.10. The British Geological Society Map Viewer[14] confirms that the bedrock geology of the Plan area comprises predominantly Lewes Nodular Chalk Formation, Seaford Chalk Formation and Newhaven Chalk Formation. The superficial geology comprises Kempton Park Gravel member, Taplow Gravel Member and Alluvium.

3.4.11. The Soilscape map viewer confirms the soils of the Plan area to contain freely draining slightly acid loamy soils across much of the Plan area, slightly acid loamy and clayey soils with impeded drainage in the far west of the Plan area, loamy and clayey floodplain soils with naturally high groundwater along the river corridor and a small area of freely draining lime-rich loamy soils to the south of the Henley Road west of Shiplake College.

3.4.12. Recent data provided for the Thames Farm site has indicated that that site is underlain by *"…deep seated disturbed ground across the site associated with karstic solution voids within the underlying Chalk, and shallow weak/disturbed ground"* (see paragraph 1.2.1 of the JBA Technical Note on the Shiplake Parish Council website dated January 2021) [16]

8. **What was the purpose of getting an Outline Consent?**

The previous owner of the site secured their outline planning permission without having any knowledge or intent for the need to undertake major ground stabilisation works in order to enable development of the site to take place. They submitted minimal information about the nature of the underlying ground, the existence of chalk below, or the existence even of the SPZ1 designation and the aquifers it was designated to protect. Their sole purpose in submitting an Application was to get the cheapest and quickest of consents in order to sell the site.

Had the need to undertake grouting of the site at all, let alone to a depth of 16m or more been contemplated at the time of the application, this would have triggered a whole host of additional investigations and consideration by parties such as the Environment Agency who have a statutory responsibility to protect land designated as a Source Protection Zone from development, that may physically affect or disturb the underlying aquifers. (The Environment Agency's approach to groundwater protection Feb 2018

The Environment Agency's approach to groundwater protection (publishing.service.gov.uk)).

9. **What information is needed by the EA and what do they expect, in order to process an Outline Application**

Within its guidance, at para A below, the EA state the requirement of due diligence information, analysis and risk assessment to be undertaken by **the applicant** to enable the EA to assess any Planning Application and it's impacts :-

A. General approach to groundwater protection

Section A covers the overarching groundwater protection principles and approaches that will apply to the activities described in later position statements. Section A should be referred to first before reading the sector-specific position statements.

A1 - Risk-based approach
Wherever legislation allows, the Environment Agency will use a tiered, risk-based approach to regulate activities that may impact groundwater resources and to prevent and limit pollution.

A2 - Precautionary principle
Development must be appropriate to the sensitivity of the site. Where the potential consequences of a development or activity are serious or irreversible the Environment Agency will adopt the precautionary principle to manage and protect groundwater. The Environment Agency will also apply this principle in the absence of adequate information with which to conduct an assessment.

A3 - Risk-based approach
The Environment Agency encourages everyone whose activities may impact upon groundwater to consider the groundwater protection hierarchy in their strategic plans when proposing new development or activities. The aim is to avoid potentially polluting activities being located in the most sensitive locations for groundwater. A sensitive location with respect to groundwater would depend on the hazard from the proposed activity and importance of the receptor.

A4 - Responsibility for assessments
The Environment Agency expects developers and operators to assess the area of influence of their activities and to take account of all current and future groundwater uses and dependent ecosystems. Developers and operators are expected to assess and mitigate the potential impact on groundwater, throughout planning, construction, operation, and decommissioning phases of the development or operation.

A5 - Supply of adequate information
The Environment Agency expects developers and operators to provide adequate information to statutory bodies, including the Environment Agency, when submitting their proposals. This is so that the potential impact on groundwater resources and quality can be adequately assessed. In particular, where new techniques, operations, products or substances are involved, developers or operators should be prepared to supply specific relevant data to allow the risk to groundwater to be assessed.

A6 - Compliance with guidance
The Environment Agency expects site owners, developers and operators to comply with any relevant: • government or Environment Agency guidance • other standards and guidance, eg British Standards, International Organisation for Standardisation (ISO)

This applies particularly to the handling, use, storage and treatment of substances that can potentially result in pollution of groundwater.

10. What is required when potable water is at risk?

The guidance continues under B, to refer to the issue of protecting water that is for human consumption and the information/approach needed.

B. Protection of water intended for human consumption

This section contains the position statements on source protection zones (SPZs), areas identified as Drinking Water Protected Areas (DrWPAs) and aquifer designations. The Environment Agency adopts a risk based approach using a hierarchy of SPZs, DrWPAs and aquifer designations.

The Environment Agency may object in principle to, or refuse to permit, some activities or developments if they have potential to adversely affect groundwater. However, note that SPZs and aquifer designation are not site-specific risk assessments. The Environment Agency uses them as generic indicators of risk. Developers or operators may need to supply site specific information to demonstrate that the risks are acceptable and can be mitigated.

SPZs are not statutory designations but recognised within EPR as zones where certain activities cannot take place (for example, in certain standard rule permits specified activities are not permitted under those roles).

All abstractions, including private water supplies, that are used for drinking water supply or food production purposes are by default in an SPZ1 or SPZ2. Table 1 indicates the position statements (including restrictions or extra controls) applicable to certain activities within a SPZ1, including default zones used for private water supplies. If you undertake any activity in SPZ1 you should refer to the relevant position statement.

Note: Local councils are the lead regulators for private water supplies. The pollution prevention responsibilities for private water supplies are available from the Drinking Water Inspectorate. Owners or users of any private water supplies should notify their local council of the supply.

For more information on SPZs, see the guidance on SPZs designations. For more detailed information see Groundwater SPZs: Review of methods. You can view SPZs on interactive maps.

B1 - Initial screening tools
The Environment Agency will use SPZs, DrWPAs and aquifer designations as initial screening tools to show: • areas where it would object in principle to certain potentially polluting activities, or other activities that could damage groundwater • areas where additional controls or restrictions on activities may be needed to protect water intended for human consumption • how it prioritises responses to incidents Note: For some high risk activities, the presence of an SPZ will be a deciding factor in the response to a development proposal or permit application. For other activities, additional investigation may show that a proposal is or is not acceptable regardless of the requirements set out in the position statements in this document.

B2 - Designation of SPZs around groundwater abstractions
SPZs and the associated position statements apply to the area around any groundwater abstraction intended for human consumption, as defined in the Drinking Water Directive 98/83/EC. However, for production of bespoke SPZs the Environment Agency have prioritised: • public drinking water supplies • other commercial potable supplies (including mineral and bottled-water) • groundwater abstractions used in commercial food and drink production* • other sources where additional protection is required

The guidance then continues with policy notes particularly relevant to Aquifers where they may be at risk.

The EA provides for policies N7 and N8 as follows:-

N7 - Hydrogeological risk assessment

Developers proposing schemes that present a hazard to groundwater resources, quality or abstractions must provide an acceptable hydrogeological risk assessment (HRA) to the Environment Agency and the planning authority. Any activities that can adversely affect groundwater must be considered, including physical disturbance of the aquifer. If the HRA identifies unacceptable risks then the developer must provide appropriate mitigation. If this is not done or is not possible the Environment Agency will recommend that the planning permission is conditioned, or it will object to the proposal.

N8 - Physical disturbance of aquifers in SPZ1

Within SPZ1, the Environment Agency will normally object in principle to any planning application for a development that may physically disturb an aquifer.

It is also worth noting that the size of this site was such that it **exceeded** the trigger level for an EIA under EEC directives, however because the proposal did not trigger the volume of dwellings threshold, a decision was unfortunately taken **not** to require the production of an EIA.

11. Shortage of Information Supplied/requested

The relevant information necessary for either the EA, SODC or Thames Water and OCC (as LLFA) to assess the impacts of this site of inter alia a proposal to grout the site to a depth of 16m or more, and to vibro-compact it's surface, were simply not submitted as part of the Outline Application. Indeed the SPZ1 designation and the possibility of sink holes existing, simply were not considered in detail or at all by the then Applicant.

It must naturally follow that such ground works as might now be considered necessary cannot possibly be considered to be integral to the consent granted, given the inability for the EA and others to be able to assess those proposals under its statutory obligation to protect Ground Water.

As a reminder, the EA's Position StatementGroundwater protection: Principles and practice (GP3). N8 related to Groundwater resources and SPZ1's states that:

"N8 - Physical disturbance of aquifers in SPZ1:

Within SPZ1, the Environment Agency will normally object in principle to any planning application for a development that may physically disturb an aquifer."

In this particular instance the due diligence necessary to confirm exactly what groundworks might be necessary had not been undertaken at all at this time, hence the issue could not have been addressed by any of the regulatory bodies. It must naturally follow therefore that permission has not been conferred upon the Applicant to do the very extensive grouting and vibro-compaction works now proposed.

The protection of groundwater was not something new, that was just introduced in February 2018 when the latest guidance was published. It existed long before then, and of course as a member of the EEC, the UK took its environmental obligations very seriously.
An example of this being the previous - 2013 position statements, extant at the time this Application was submitted and approval granted:-

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598799/LIT_7660.pdf.

The regulations were just as strenuous if not more so in this earlier guidance

12. Henley Water Resource Zone

The excerpt below from Thames Water's draft 2024 Water Resources Plan (section 4) states:

"4.18 The water resources of the Henley WRZ are derived from three groundwater sources abstracting from the unconfined Chalk of the South West Chilterns and the lower River Loddon catchment. There is nitrate contamination of groundwater at the Sheeplands source which is managed by treatment as well as blending with groundwater from the Harpsden source under an aggregate abstraction licence.

4.19 There are no surface water sources in the Henley WRZ, and the yields of the groundwater sources in the zone are not deemed to be drought sensitive. "

Henley Water Resource Zone is the smallest WRZ within Thames Water's region and is unique in that it is **not connected to other** adjacent zones thereby transfer of water is not technically feasible into or out of this zone.

As can be seen, this water resource is already under threat due to nitrate contamination and is therefore dependant on abstractions from Harpsden, the borehole adjacent to the Thames Farm site. Should this borehole and the aquifer from which is draws be compromised in any way, then the supply of 20ML/d of water is at risk

13. Is this discussion normal?

The writer has been involved in a number of ground remediation and stabilisation operations throughout the UK from contaminated sites, to poor quality ground bearing conditions. In each case the underlying Groundwork's and ground stabilisation work has without exception been considered as a separate and distinct operation from that of the foundation formation on site. This is because specialist contractors and designers are required for such works and the works are generally completed in full as a separate project by the sub- contractor, long before the formation and construction of infrastructure and foundation works takes place.

Apart from needing the services of a specialist contractor with an experienced team of designers, the insurance regime for this work is quite different and distinct from building houses or other properties. Indeed, this is borne out by the Applicants own advisor Peter Brett Associates. Their report referred to Ground Stabilisation as a separate and distinct operation to the construction of foundations which they also believe would normally be carried out separately - by specialist contractors or sub-contractors

Excerpt from Ground Stability Report conducted by Peter Brett Associates (now Stantec) – December 2019. Taken from report recommendations (pg 14)

6.1 Deep Seated Disturbed Ground

6.1.1 Given the identified magnitude and lateral extent of karstic ground conditions across the site, predominantly within the Phase 1 area, it is recommended that ground stabilisation works are undertaken prior to the construction of foundations and infrastructure.

6.1.2 Ground stabilisation works should target the plan areas and depths of disturbed ground that have been recorded in the dynamic probing logs and shown in **Tables 3 – 35**, **Figure 2 and Figure 3**. The technique of compaction grouting has a good track record of densifying loose infill material and filling voids associated with solution features.

6.1.3 The treatment process compacts the ground by injecting a viscous sand, cement, PFA and bentonite grout mixture under high pressure to locally consolidate the ground surrounding the point of injection. Hence, a grid of holes with close-centred injection points to depth is able to treat and stabilise a volume of weakened, disturbed ground. The stiffness of the grout mix used ensures that the injected grout stays in the near vicinity of the grout injection hole.

So it can be seen that the Appellant's own consultant's recommendations clearly state that ground stabilisation works are undertaken prior to construction of foundations and infrastructure and this advice was available in 2019.

14. <u>The Inspector at the Outline Planning Appeal Hearing</u>

It should be noted that whilst making the decision to allow residential development on this site, the Inspector decided albeit very marginally, that SODC had failed to demonstrate its achievement of its Housing Supply numbers. The Inspector at the Appeal allowing the Outline Consent said:

"24. The agreed shortfall to be included in the housing land supply analysis is 1,553 dwellings. The FOAN requirement for the relevant five year period, agreed by both main parties, is 4,125 dwellings giving an overall requirement of 5,678 dwellings. Applying a 20% buffer to this overall requirement gives a total requirement for the five year period of 6,814 dwellings (rounded up from

6,813.6), or 1,363 dpa. Housing supply during this period, from sites included in the AMR and from windfalls, should be 4,086 dwellings (this figure is included in Mr Durrant' s tables in ID23). On the basis of these figures the Council cannot demonstrate three years of housing land supply, though they would if the annual requirement had been found to be 1,362 rather than 1,363."

Whist this finding permitted the disregard of Local Plan policies, it does not and should not result in a disregard of either of the obligations of the EA nor the Application of the provisions of the NPPF. Hence the decision must give full weight to the following 2 matters – (text taken from the Planning Case Officers report to committee):

1. *The Obligations of the EA*

The site is within the inner source protection zone for the public water supply abstraction at Harpsden. The Environment Agency initially objected to the previous application as the previous submission did not provide sufficient detail to demonstrate that the development would be able to provide adequate waste water infrastructure to serve the development and not adversely impact upon the Harpsden public water supply abstraction. This [waste water] matter had been addressed by the time of the appeal as the applicant had, in discussion with Thames Water, found a solution to connect to the public foul sewer

2. *The Provisions of NPPF*

Inadequate information accompanied the application to demonstrate that the proposed development will have adequate waste water infrastructure to serve the development and will not adversely impact upon the Harpsden public water supply abstraction. The development is therefore contrary to policies EP4, EP6 and EP7and to advice contained within paragraph 109 of the NPPF.

The current Inspector should note that the application for outline planning permission at Thames Farm - Ref P16/S0970/O, was dated 18 March 2016. The Appeal decision was then handed down on 2 August 2017. At this time, there was no expectation of Soil Improvement works!

15. <u>What is Soil Improvement</u>

Designing Buildings, (designingbuildings.co.uk) also known as the Construction Wiki, confirms the clear distinction between normal foundations, and ground stabilisation and ground improvement techniques viz:

"There are a number of ground improvement or ground modification techniques that can be used to stabilise or improve the condition of an area of ground before construction work

takes place. This may be necessary to improve or modify the ground shear strength, stiffness, permeability, and so on

Some of the most used techniques:

Grouting

Grouting in civil engineering refers to the injection of pumpable materials into a soil or rock formation to change its physical characteristics. It is one of the ways in which ground water can be controlled during civil engineering works. Grouting is suitable where soil permeability would create a heavy demand on pumping or where ground conditions mean it may be economically inefficient to bore wells.

Jet grouting uses high velocity fluid jets to construct cemented soil and is commonly used to underpin foundations and provide excavation support.

Chemical grouting uses a low viscosity, non-particulate grout to permeate pore spaces in granular soils and hardens to create a cemented mass.

For more information, see Grouting in civil engineering.

Soil mixing

Soil mixing improves soft clays, peats and other weak soils with a high moisture content. It involves mechanically mixing the wet soils with a dry cementitious binder to create soilcrete. This helps increase bearing capacity and decrease settlement.

Soil compaction

Soil compaction produces an increase in soil density and a decrease in air volume without producing a decrease in water content. It can improve shear strength, stiffness, bearing capacity and stability, reducing settlement and frost heave. This may be necessary in the construction of bases for highways, embankments and so on, or to create a suitable level base for the construction of a building. Existing soil can be compacted, or layers of new soil can be compacted, taking a site to the required level.

For more information see: Soil compaction.

Vibro-replacement

Vibro-replacement works by using a crane-suspended downhole vibrator to construct stone columns through weak soils, improving their load-bearing and settlement capacities. Another term that can be used for this technique is vibro stone columns (VSC)

For more information, see Vibro-replacement.

These operations are a separate and distinct construction project or operations from that of the building of houses from foundations upwards. Foundations will typically be built on or in the improved surface after the ground improvement works are finished and the civil engineering contractor responsible for the ground improvement works moves off site.

Whilst with a larger development it is possible for both contractors to be on site simultaneously, the improved ground would be handed over in phases as each section is completed so that the housing contractor may then proceed with their works once the other contractor has handed over sectionally complete elements of the ground improved site.

Simply saying that the operations can be done simultaneously is obviously possible, but does not detract from the fact that they are 2 separate and distinct operations each with its own separate design and programme of works, a specialist contracting team and separate contractual terms of business.

Designing Buildings continues with a large section devoted to Grouting and grouting techniques at:

https://www.designingbuildings.co.uk/wiki/Grouting_in_civil_engineering

There are books written about grouting (as a separate subject) from foundations and one of the best known is Wiley's Practical Handbook of Grouting: Soil, Rock, and Structures

James Warner
ISBN: 978-0-471-46303-0 April 2004 720 Pages

https://www.wiley.com/en-gb/exportProduct/pdf/9780471463030

16. What is correct?

The Appellant, would have the Inspector believe that the soil improvement/grouting works necessary to develop out the site as proposed is part and parcel of a 'normal' house building operation. Their view of life is that even though they had no expectation that grouting would be necessary at Thames Farm, nor indeed any one of many other ground improvement and stabilisation techniques; that whatever ground improvement works might be needed can simply be gone ahead with because it is covered by the Outline Planning Permission.

This is complete nonsense which if remotely considered to be correct would mean that anywhere in the UK wherever there is a outline planning consent granted be it for one house or a thousand; a single storey structure or 200 storeys, grouting to 100 metres or 1 metre, whatever was necessary would be permissible!

Moreover, that proposition would mean that despite not including details of the ground, the existence, location and precise information about hydrology, geology or other details any site requiring ground improvement could and would escape full and proper consideration by a number of the regulatory bodies that are in place to protect the environment and protect the public from such activities even though they might cause harm. That cannot possibly be correct, or intended.

17. <u>Previous Objection by TFAG to P21/S4749/LDP</u>

Appendix 2 contains our previous objection to the subject Application for LDC, wherein we provided comprehensive reasons for the Application to be rejected. This explained in detail the **errors and omissions** in the original Outline Planning Application, accepted definitions of what comprises development, and a comprehensive review of the precedents cited by the Applicant.

We would refer the Inspector once again to these documents which may be found at the end of this document under Appendix 2.

18. <u>The new material submitted with the current Appeal Documents</u>

- An HIA of the Grouting Proposal (Technical) of July 2023
- HIA Non technical summary of July 2023
- Traffic Impact Assessment of Grouting Works June 2023
- Indicative Foundation July 2023
- Program Rev2 July 2023

Comprehensive documents were requested by TFAG from Taylor Wimpey many years ago at our very first meeting with them of 18 December 2020. The focus of the discussions was how they intended to manage surface water disposal.

The then proposed solution was an on-site pump house and well, and the pumping of the surface water over a mile away to the Lashbrook alongside Mill Lane. This was one of a number of ill-conceived and inadequately researched proposals for which approval was sought. The concept and design were proven after a very significant period of time and much discussion to be defective and would result in the flooding of property and houses in the vicinity of Mill Lane. The proposal was ultimately abandoned and an acknowledgement made that TFAG and others opposing this idea were quite correct. Further similar exercises arose including one to pump the drainage to the North, and once again this was proven to be a defective, an ill-conceived design and that it would result in flooding of land proposed for development by Henley Town Council currently used as playing fields close by the Tesco roundabout on the A4155.

Unfortunately time and time again the development proposals for Thames Farm by Taylor Wimpey have resulted in exercises of producing concepts and designs that TFAG's Engineers have proven to be deficient and poorly conceived and which would result in harm to others in the locality.

There remain numerous outstanding conditions to the Outline Planning permission which have not been addressed or catered for illustrating both the piecemeal approach to this development, the inadequate overviewing of the proposals by the regulatory bodies and the need to bring in independent consultants to undertake a comprehensive review of different aspects of the proposals in order to ensure that the residents and public do not suffer harm from those proposals.

The matter has 'limped' along for 7 years now, perhaps indicating that this poorly conceived idea should have been more carefully scrutinized at the time of the first appeal particularly having regard to the numerous earlier attempts that had been made to secure consent for the site, before it was ultimately approved by the Inspector in 2017.

19. <u>Provisions of NPPF 2012 and 2023</u>

One of the challenges with the development of Thames Farm is that regulators are being put into a position of having to re-visit prior decisions. The fundamental reason for this is that the Original Application was defective, factually incorrect and misleading in a number of respects, and failed to deliver sufficient due diligence material to enable clear cut decisions to be made that would not require revisiting.

NPPF of 2012 at para 122 says:

"122. In doing so, local planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities

Site investigation information: Includes a risk assessment of land potentially affected by contamination, or ground stability and slope stability reports, as appropriate. All investigations of land potentially affected by contamination should be carried out in accordance with established procedures (such as BS10175 (2001) Code of Practice for the Investigation of Potentially Contaminated Sites). The minimum information that should be provided by an applicant is the report of a desk study and site reconnaissance"

The same issues are carried through to the current NPPF of 2023 which says at para 188:

"188. The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities"

The inability to react in a timely fashion and also the lack of information provision to the regulatory bodies at the point of the Outline Applications have resulted in a scramble to consider such issues after outline consents have been issued. The result of this is poor decisions and poor town planning.

The cause of this inability in this particular instance is the defective nature of the original application, its deficiencies in supplying sufficient and accurate information about the nature of the application the site itself and the underlying ground conditions. Whilst this may not be an issue of the Appellants entire making, it is quite clear that there have been some major failings both at the time of the Original Application and also at the time the Appellant decided to purchase the site. Its failure to properly and comprehensively review exactly what it was buying and what the consent enabled it to do being the most significant issue.

20. JBA Report on new material

In the very short timescale allowed by the Inspectorate we have nevertheless been able to obtain an analysis of the new information submitted by the Appellant, and a copy of this report is provided in Appendix 3 to this document.

The conclusions of this report are:

"Conclusion

Based on the above discussion, the applicant's environmental consultant's consideration of the grouting effects on the Harpsden Water Treatment Works concluded that no significant effects are expected.

However, in the absence of a definitive drainage strategy by the applicant there is a significant gap in what has been assessed and should include a robust determination of contamination sources potentially affecting the Source Protection Zone from the grouting works and consideration of drainage to assess effects of the development during its operational phase. Due to the sensitive location of the proposed development, a more comprehensive assessment is expected to assess risks to the public abstraction.

The HIA focuses on risks associated with turbidity, grouting reaching the abstraction borehole and the reduction in permeability over the proposed development. It doesn't provide a chemical assessment of the substances that would be used to support the grouting. No Material Safety Datasheets have been provided for the grouting or for substances that could be added to the grouting mix.

Inconsistencies within the report have been noted, the most significant relating to the actual distance of the Harpsden Water Treatment Works to the site stated at 80m in Section 2.1 Background, or 130m in Section 7 Conclusions. With a worst-case *scenario of grouting moving 130m, the proposed grouting would reach the public water supply. "*

Whilst the provision of an HIA does not have any material bearing upon correctness or otherwise of the decision made by SODC to reject the application for an LDC, it does demonstrate that there remain major deficiencies in the Appellants proposals to grout the site.

In short, and I quote from JBA:-

"The HIA is mainly looking at the physical effects avoiding the chemical element. There are several deficiencies in their assessment which are reported in the technical note. I think they don't have the information yet from third parties / sub-contractors to effectively do a proper risk assessment.

It is not impossible for them to develop and use grouting as required but they have not demonstrated that the methods currently proposed would have no significant effect on the groundwater public supply – the report inaccuracies almost implies that there will be despite concluding the opposite!"

This would not be the first time where submitted data and models have concluded one thing but they are inaccurately quoted to show quite the reverse in this long running saga!

21. <u>The Precautionary Principle</u>

The UK's Environmental model post Brexit is founded upon 5 basic principles as set out by DEFRA's Environmental Principles Policy Statement (January 2023). The one called the Precautionary Principle and which governs the EA's overriding approach to potential harm to the Environment of which our drinking water is one example, fundamentally states that :-

*"If an activity **may** cause serious or irreversible damage, the Environment Agency will apply the <u>precautionary principle</u> and assess circumstances using a potential worst case result. This is because once polluted, groundwater may take years to clean up".*

In this instance, it is not possible to fully assess or quantify risk, hence it follows that the precautionary principle should apply.

ie. even if in the legal dispute the subject of this Appeal should find in favour of the Appellant, they are not able to assess the risk profile of the proposed operations and as such they should not be permitted.

22. **Conclusion**

We invite the inspector to refuse the appeal on the basis that the Works amount to a separate activity of substance neither ancillary to the construction of the permitted dwellings and thus requires planning permission.

TFAG 30/Sept/2023

Appendix 1

Appendix 1

SU 77NE 74 [7712 7977]

IGES	19 Talisman Square, KENILWORTH, CV8 1JB. Tel: 0926 851113 Fax: 0926 851394	Job No. 6157	Site : SHIPLAKE, NEAR READING, OXON (ADDITIONAL PLOT) Client : BRAYANT COUNTRY HOMES LIMITED Engineer :	BOREHOLE LOG BH 4 Sheet 1 of 2
Method: Light Cable Percussion.		Date 22/08/94	Drilling Crew KS / Logged By SC	Scale 1:50
Dia (mm) 150	Coord	Ground Level m.		

Date & Casing Depth	Depth m.	Sample Type	Water Level	SPT N or Cu	M/C %	Depth m.	Description of Strata
							TOPSOIL.
						0.25	Very dense brown and grey very medium-coarse sandy fine-coarse angular and subangular GRAVEL.
	0.50	J					
1.00	1.00 - 1.45	C	DRY	62N			
	1.50	J				1.50	Medium dense brown and grey medium-coarse sandy fine-coarse GRAVEL with occasional cobbles.
2.10	2.10 - 2.55	C	2.00	13N			
	2.50	J					
3.00	3.10 - 3.55	C	2.70	19N			
	3.50	J					
4.00	4.15 - 4.60	C	3.90	16N			
	4.60	J					
5.00	5.00 - 5.45	C	4.50	15N			
	5.50	J				5.50	Structureless CHALK composed of subangular and subrounded gravel size white highly weathered very weak to weak fragments in a matrix of white sandy silt size particles; scattered up to cobble size flints. (Grade V-VI).
5.80	5.80 - 6.25	SD	WET	19N			
	6.80	J					
6.00	7.40 - 7.85	SD	DRY	13N			
	8.40	J					
6.00	9.00 - 9.45	SD	DRY	6N			
	10.00	J					

Remarks
1/ Water added to assist drilling from GL to 5.8m
2/ Chiselling required from 0.7 to 1.0m (0.5hr)

GROUNDWATER

Struck	Cased	20 mins	Sealed	Remarks
10.50	6.00	10.40	NS	

SU 77 NE 75 [7712 7980]

British Geological Survey
IGES
19 Talisman Square, KENILWORTH, CV8 1JB.
Tel: 0926 851113
Fax: 0926 851394

Job No. 6157

Site : SHIPLAKE, NEAR READING, OXON (ADDITIONAL PLOT)
Client : BRAYANT COUNTRY HOMES LIMITED
Engineer :

BOREHOLE LOG

BH 5

Sheet 1 of 2

Method: Light Cable Percussion.
Date: 23/08/94
Drilling Crew: ks
Logged By: SC
Scale: 1:50
Dia (mm): 150
Coord:
Ground Level m.:

Date & Casing Depth	Depth m.	Sample Type	Water Level	SPT N or Cu	M/C %	Depth m.	Description of Strata
						0.20	TOPSOIL.
							Dense brown and grey medium-coarse sandy fine-medium GRAVEL with some small predominantly clay pockets.
	0.70	J					
1.00	1.00 - 1.45	C	0.80	27N			
	1.70	J					
2.00	2.00 - 2.45	C	1.70	31N			
							occasional cobbles.
	2.70	J					
3.00	3.00 - 3.45	C	2.00	28N			
	3.90	J					
3.90	3.90 - 4.35	C	2.90	37N			
	4.50	J					
4.50	4.70 - 5.15	C		13N			
	5.20	J				5.20	Structureless CHALK composed of up to cobble size white highly weathered very weak to weak fragments with some matrix of white sandy silt size particles; scattered up to cobble size flints. (Grade V).
5.50	5.50 - 5.95	SD	WET	13N			
	6.50	J					
6.00	7.00 - 7.45	SD	WET	16N			
	8.00	J					
6.00	8.50 - 8.95	SD	DRY	18N			
	9.50	J					
6.00	10.00- 10.45	SD	DRY	16N			

Remarks
1/ Water added to assist drilling from 0.2m to 5.2m bgl
2/ Chiseling required from 4.7 to 5.2m (0.5hr)
3/ Borehole dry during drilling

GROUNDWATER

Struck	Cased	20 mins	Sealed	Remarks

~~Eastern~~ LS Thames NRA.

HILLSIDE ABOVE ENGBERS OBH

264 SU 78 / 118 SU78SE 44

Owner TWUL. Land owned by: Mr. Hoggot, Sheephouse Farm Shop, Licence No.

Occupier Reading Road, Henley IGS Ref. No.

Nat. Grid Ref. SU 7666 8014

Status OBH

Aquifer CHALK

Ground Level	m OD		ft OD
Level of Well Top	m OD		ft OD
Rest Water Level 16·70	m bwt		ft bwt
(Date 1/9/94)	m OD		ft OD

Construction B

Depth bwt	Dia.	Linings (below well top) From	To	Dia.	Type
50m	200mm	0	15m	210mm	plan.

Summary of Geological Section	Thickness	Depth
Brown topsoil & gravel		0:30
Clay & gravel		2·00
Sandy clay & gravel		10:30
Soft Chalk & flints		12·00
Firm chalk & flints		50·00

Abstraction Rates

gph

gpd

Type of Pump

Chem./Bact. Anal. YES NO

Well Driller G. Stow 1994

If insufficient space has been allowed, continue in 'Notes' overleaf.

NGDC ACCESSION NUMBER 22152

Site Plan

RECEIVED N.GD.C. DATE: 24.10.95 SIG: S. Roach

Notes

L. SHIPLAKE ROADSIDE VERGE OBH

SU 77/175 181

SU77NE/52

Owner TWUL. Land owned by:		Licence No.	
Occupier Oxfordshire County Council		IGS Ref. No.	
Ground Level	m OD		ft. OD
Level of Well Top	m OD		ft. OD
Rest Water Level 12.504	m bwt		ft. bwt
(Date 1/9/94)	m OD		ft. OD
Construction B			

Depth bwt	Dia.	Linings (below well top) From	To	Dia.	Type
32	200mm	0	16.8m	210mm	Plain

Abstraction Rates		Type of Pump	
gph		Chem./Bact. Anal.	YES NO
gpd		Well Driller	G. Stow 1994

If insufficient space has been allowed, continue in 'Notes' overleaf

Nat. Grid Ref. SU 7709 7966

Status OBH

Aquifer CHALK

Summary of Geological Section	Thickness	Depth
Dark brown sandy soil		0.30
Sand & clay		3.10
Sand & gravel		6.65
Silty sand		7.90
Sand & gravel + traces of Chalk		9.80
Crumbly Chalk & flints		11.00
Firm Chalk & flints		32.00

Site Plan

Notes

~~Eastern~~ LS Thames NRA.

HILLSIDE ABOVE ENGBERS OBH

768 SU 78 / 118 SU78SE

Owner TWUL. Land owned by: Mr. Hopper, Sheephouse Farm Shop,			Licence No.		
Occupier Reading Road, Henley			IGS Ref. No.		
Ground Level		m OD		ft. OD	
Level of Well Top		m OD		ft. OD	
Rest Water Level	16·70	m bwt		ft. bwt	
(Date 1/9/94)		m OD		ft. OD	
Construction B					

Depth bwt	Dia.	Linings (below well top) From	To	Dia.	Type
50m	200mm	0	15m	210mm	plan

Nat. Grid Ref. SU 7666 8014

Status OBH

Aquifer CHALK

Summary of Geological Section	Thickness	Depth
Brown topsoil & gravel		0:30
Clay & gravel		2·00
Sandy clay & gravel		10:30
Soft Chalk & flints		12·00
Firm chalk & flints		50·00

Abstraction Rates

gph

gpd

Type of Pump

Chem./Bact. Anal. YES NO

Well Driller G. Stow 1994

If insufficient space has been allowed, continue in 'Notes' overleaf.

Site Plan

Notes

Appendix 2

Thames Farm Action Group, Rambler Cottage, Reading Road, Lower Shiplake, Oxon RG9 3PH

Emma Bowerman,
SODC Planning,
135 Eastern Avenue
Milton Park
Milton OX14 4SB

04 January 2022
By Email only

Dear Emma,

<u>Thames Farm, Reading Road Lower Shiplake - Objection to Planning Applications P21/S4749/LDP & P21/S4524/DIS</u>

I am writing to you to object to the above Planning Application for an LDP, and also to support the statement made to residents by SODC Head of Planning on 7 May 2021 about this matter, which stated that in SODC's opinion, a further full planning application would be necessary from Taylor Wimpey in respect of the groundworks / soil remediation and stabilization works that they now propose. The validity of P21/S4524/DIS s also contingent upon SODC's decision upon P21/S4749/LDP and so this letter of objection applies equally to that application.

<u>About TFAG</u>

You will recall that Thames Farm action group is primarily a Shiplake Resident's vehicle formed to represent residents' interests in ensuring that Thames Farm was/is correctly progressed and scrutinized as it proceeds through the approvals process.

After SODC permitted a very material variation to be made to the Outline Planning Permission for Thames Farm, and thus also allowed the commencement of works on site followed by the subsequent issue of a Lawful Development Certificate to the applicant, many of the residents of Lower Shiplake felt that the authorities could not necessarily be relied upon to fully and correctly review the actions and proposals of Taylor Wimpey.

TFAG is assisted in its work by JBA Engineers as experts in Hydrogeology and Hydrology and also Temple Bright our Planning Lawyers.

TFAG is supported by approx. 1,500 residents who have signed our petition and a further approx. 220 residents of Shiplake Villages, many of whom have contributed to funding TFAG's work or are assisting in other ways.

<u>TFAG's Objectives</u>

TFAG's sole purpose is to ensure that following the discovery of dissolution features and sinkholes over a wide area of Thames Farm, post the grant of Outline Planning Permission at Appeal, the proposed development is properly progressed and reviewed by the various regulatory authorities. This would ensure that the revised proposals, involving a major ground remediation project, are properly designed, scrutinized and approved, if found to be both acceptable and safe, before any further works are permitted to start on site.

Why is TFAG objecting to this application and also to P21/S4524/DIS?

Our opinion and as set out to residents by SODC Head of Planning on 7 May 2021, is that whilst Taylor Wimpey may have received an OPP to build 95 houses on the site, it does not have Planning Permission to undertake a major ground remediation project to stabilize and remediate the site prior to its development for housing. It therefore also follows that P21/S4524/DIS is also wrongly submitted since permission to undertake the works that it covers has not yet been approved and may not be approved.

Our objections include the following:

Why do the proposed Groundworks not benefit from the existing Planning Permission?

We believe that there are 2 primary reasons for this conclusion:

1. The base application for permission to develop, submitted and prosecuted at Appeal by Taylor Wimpey's predecessors contained a variety of errors and misleading information. The net result of this was that the application bypassed a number of important consultations and checks, when it passed through both the Planning Approval system and subsequently the Appeal system.

These questions and the related answers provided by the applicant are set out here:

Q. How will foul drainage occur? – Answer. Possible foul pumped system

Commentary: *Correct answer*

Q. Is the site in flood risk area 2 or 3? – Answer. No

Commentary: *Incorrect in that off-site drainage is proposed to a flood risk area*

Q. Is the site within 20m of a watercourse river stream or beck? - Answer. No

Commentary: *Incorrect as there is no mention of the underground aquifer, or SPZ*

Q. Will the proposal increase flood risk elsewhere? – Answer. No

Commentary: *Incorrect as the proposal is to pump drainage away and variously to area(s) that already flood and are in flood zones 2 or 3.*

Q. How will surface water be disposed of? – Answer. Sustainable drainage system (and not existing watercourses) nor main sewer or pond or soakaways.

Commentary: *Incorrect, an off-site pumped solution is now proposed together with on-site storage tanks and other storage facilities. By definition a pumped solution will not be 'sustainable'.*

Q. 13) c. Are there any features of geological conservation/importance? – A. No not on the site or adjacent or near the proposed development.

Commentary: *Incorrect, as there are present underground aquifers, on site hydrology channels, a nearby potable bore hole etc.*

It is evident that in many instances the answers given were simply wrong or at best, guesses:

To reiterate, the reality, is that these proposals will:-

- **Require an Off-site pumped drainage solution**
- **Make use of existing watercourses for SW drainage**
- **Be unable to utilize a sustainable drainage system**
- **Increase flood risks elsewhere including existing residences**
- **Take water to a Flood risk area zone 3**
- **Interfere with the water table and aquifer in an SPZ1**
- **Be within 20m (vertically) of an important (underground) water course i.e. the Aquifers providing potable water to Henley and area.**

Very importantly, in Q13)c) the presence of underground aquifers, on site hydrology channels, a nearby potable bore hole was incorrectly answered in relation to geological features of importance on or near the site. The only such data that was provided with the application, was an FRA and a surface level topographic survey. The SPZ1 designation is not mentioned on the application forms at all, and there is little more than a passing reference to the aquifers and groundwater on pages 21 and 22 of the Design and Access Statement accompanying the application viz:-

> 2.28 Resting groundwater levels were recorded at between 12 – 16 m below ground level. According to the EA Aquifer Map, the bedrock chalk strata at the site is classified as a Principal Aquifer. As such the aquifer may support water supply or river base flow on a strategic scale.

The effect of these failures to disclose/find and supply correct data and submit it, have resulted in this application bypassing a number of regulatory consultees such as the EA and parts of Thames Water as well as providing the wrong 'alerts' to SODC Drainage and OCC as LLFA. There has been an over simplification as a result of the deficiencies in the data supplied which would and should have been a very complex and otherwise carefully considered application by consultees. That scrutiny which would then also have been available to the Appeal Inspector would have resulted either in a different outcome at Appeal, or significantly more and more stringent conditions applied.

These questions exist on the forms and require accurate and full answers/disclosure so that the LPA can ensure that all of the relevant issues that are likely to arise with an application are properly considered and addressed. Each question will trigger a line of enquiry and due diligence checks by the LPA. Failure to properly answer the questions has resulted in significant problems for both the developer the LPA and other regulatory consultees, as all subsequent RM and DIS Applications have not provided them with the correct vehicle or opportunity to correct the situation.

2. Our second reason for saying that Planning Permission does not exist for the groundworks and remediation works is simply **that at the time the application was submitted and the appeal determined**, there was **no** knowledge of the existence of sink holes and dissolution features on the site. So the outline designs, layouts, statements about intentions and other materials both submitted and then approved neither saw a need for such work, nor approved such work or the consequences of those works e.g.a pumped surface water discharge system with significant on site storage facilities and tanks or the pumping of waste water to watercourses over a mile away or adding to the risk and volume of flooding already taking place in zone 2/3 flood zones in those locations and finally the grouting of the site, the vibro-compaction of the site and the very significant issues that will arise therefrom.

What is development?

Government Guidance on developments requiring Planning Permissions specifically refers to 'groundworks' as being inter alia, such an operation viz:

"Planning permission is only needed if the work being carried out meets the statutory definition of 'development' which is set out in section 55 of the Town and Country Planning Act 1990.

'Development' includes:

- building operations (eg structural alterations, construction, rebuilding, most demolition);
- material changes of use of land and buildings;
- engineering operations (eg groundworks);
- mining operations;

- other operations normally undertaken by a person carrying on a business as a builder.
- subdivision of a building (including any part it) used as a dwellinghouse for use as 2 or more separate dwelling houses "

This is further clarified by the guidance identifying works that do not need Planning Permission:-

"The categories of work that do not amount to 'development' are set out in section 55(2) of the Town and Country Planning Act 1990. These include, but are not limited to the following:

- interior alterations (except mezzanine floors which increase the floorspace of retail premises by more than 200 square metres)
- building operations which do not materially affect the external appearance of a building. The term 'materially affect' has no statutory definition, but is linked to the significance of the change which is made to a building's external appearance.
- a change in the primary use of land or buildings, where the before and after use falls within the same use class."

There is therefore no uncertainty at all, that **a** planning permission is required to permit the proposed groundwork works. There is also no doubt that the groundworks proposed are indeed **an** Engineering Operation.

The question therefore arises, has permission already been granted under P16/S0970/O? The Applicant has submitted both a legal opinion and also a barrister's opinion which they say supports the suggestion that permission already exists, reciting a small number of cases to support this contention.

Why do we say that these Groundworks are not Authorised/permitted?

Put very simply, if these groundworks were not contemplated at the time the application was submitted and then determined, nor were they referred to in any plans, reports designs or other submissions, the works cannot have been approved. The LPA and the Inspector will all have assumed that because of the questions in the Application and the answers provided, that this was good building ground not requiring any special treatment or consideration. Again, that was not correct.

The additional works are of such magnitude and importance, with such wide reaching impacts that they cannot simply be ignored or pass through the system without proper scrutiny, they are groundworks, they do need planning permission and they do require full and proper scrutiny by the EA and others before being permitted/accepted in principle.

Whilst these groundworks are **an** Engineering operation, they are quite clearly not **the** Engineering Operation that was considered and approved for this site by the extant Planning Permission P16/S0970/O.

The Precedents Provided by the Applicant

None of the precedents cited for the applicant can actually be considered as true precedents. It is simply wrong to suggest that P16/S0970/O allows the following engineering operations:- grouting the site to a depth of 16m via drilling steel pipes into the ground, filling and vibrating these pipes with a stiff concrete and fill material.and then the majority of the surface area of the site being vibro-compacted with unknown ramifications for the aquifer below.

That operation would be to do with stabilizing and remediating ground, and nothing to do with the later construction of houses on the site. Any development of any type of building on this site at the density levels suggested would require ground stabilization to first occur. That however was not apparent at the time of the planning application or appeal

This major engineering operation which is of such scale, would be a completely separate development project to the construction of dwellings upon the site. It was not envisaged in any shape or form as being necessary when the consent was granted, nor were the correct details designs and data provided to enable proper scrutiny to occur.

None of the subsequent applications dealing with either reserved matters or the discharge of conditions have raised the matter of the groundworks. This is why approval is now sought for a revised Construction Management Plan under application number P21/S4524/DIS, which does now also envisage these works. Its predecessor application P19/S0311/DIS, seeking earlier approval to a CMP, did not envisage these works at all.

Analysis of the Case Law Cited for the Applicant

A. The legal advice to the applicant says:

"The digging of foundations for a house will incidentally involve the extraction of relatively small quantities of minerals from the foundation trenches, but that is not a mining operation requiring a separate permission. If the site was hitherto an open field, a material change of use of the land concerned is involved; nevertheless the permission will be a grant for operational development, namely the erection of the dwelling house in question.

" No separate planning permission for the residential use is required.

Commentary

This paragraph infers that ground stabilisation work is part and parcel of constructing foundations. It is not, and it relates to a separate engineering operation which when completed will then have foundations built on top of those works. Both the submitted program and the method statements provided confirm that this is the case.

B. The West Bowers case:

The case referred to is misleading. It is a case relating to works on an agricultural holding and seeks to separate and distinguish between excavation for a reservoir and the removing of minerals as part of that operation. This is where the depth and extent of the proposed reservoir was always a known and expected depth. The LPA here misdirected itself.

Commentary

The mere fact that the farmers were able to sell the resultant minerals that were excavated as part of the construction process of this reservoir has no bearing on the primary purpose of the works, namely the construction of a reservoir to improve agricultural drainage.

Although minerals existed within the proposed excavation ‘envelope’ of depth for the reservoir, no separate planning permission was necessary for those works. The authority argued that the co-incidence of minerals being present changed the objective from the provision of a reservoir to one of mining minerals, which clearly was incorrect.

The decision handed down was therefore correct.

Those circumstances are wholly different to the current circumstances and factual matrix at Thames Farm. The grouting works are new and in addition to the previously approved/contemplated works. Had they been detailed or disclosed in the application, then the position would be completely different. This precedent is therefore not relevant

C. The Northavon case:

A similar situation applied in the Northavon case, where the dispute related to whether raising the height of agricultural land with fill material, in order to improve its drainage, constituted an operation to dispose of waste material.

Commentary

Again, the correct decision for that factual matrix and comprehensive application was applied. The purpose of the project was agricultural drainage, and not waste disposal.

D. The applicant’s advice further states:

"In an inspector’s decision it was held that a developer, in the absence of anything in a permission relating to levels, had a reasonable degree of freedom to determine the level of work “under-build”; further, the developer had a right to undertake all necessary reasonable works for the implementation of the planning permission in accordance with R. v Basildon DC Ex p. Grant Homes. *However, in the case in question, large raised patios had also been constructed which were not within the approved drawings".*

Commentary

This item relates to a case of relatively minor changes in ground levels to achieve a finished floor level. It does not in any way relate to drilling holes to a depth of 16m, injecting concrete and fill material, vibrating the concrete and repeating that operation hundreds of times across a large proportion of the site. Once finished Taylor Wimpey will then apply vibro-compaction techniques across most of the surface area of a 5.5 HA site.

Again, the factual matrix is wholly different, as is the degree and extent of works, not to mention the significant impacts on hydrology, hydrogeology, the aquifers and the pumped surface water drainage, all of which are caused by the grouting and vibro-compaction works, and none of which have been fully and properly reviewed or scrutinised by the statutory consultees.

The Original Appeal Decision

The Appeal decision documentation (which is incorrectly shown on the Planning Portal entry for this site/application and relates to a different site entirely) makes no reference to any works of remediation or other significant groundworks, and nothing of this nature is referred to in any of the drawings or other supporting documents that form part of either the Application or the Inspectors decision. It is clear therefore that grouting was never contemplated when the outline approval was given.

At the time of the Appeal decision, the knowledge that the site had a myriad of dissolution features beneath it to a depth of 16m or more, simply did not exist, and was neither contemplated nor envisaged. The risks posed to the Aquifers was also unknown at that time, although knowledge of the local geology should have rung alarm bells/suggested otherwise. However, nobody appears to have considered this issue at all at the relevant time.

It was simply and naively thought/assumed, that the ground was good building ground and that conventional strip foundations would be used when the site was developed. The reason why this entire debate is taking place at all is because the owner of this site failed to do adequate due diligence in an area that is known to have a chalk sub-strata and or gravel beneath it and which also lies within a grade 1 Source Protection Zone for the adjacent bore holes and aquifers.

These simple indicators or ‘red flags’ should have resulted in the use and application of best practice development measures when submitting a Planning Application for the wholesale redevelopment of this site for residential use, but they did not do so, and worse still the relevant application forms were poorly completed and misleading.

1. Neither the original owner of this site nor Taylor Wimpey were able to establish whether the site could safely sustain the development proposals being put forward and that is very unfortunate. However, the fact remains that these fundamental errors in procedure/process do not give the current applicant the right to impose its will on SODC or the local residents affected by its plans. All the works need proper scrutiny and approval.

2. The Planning Permission granted envisages conventional foundations being constructed when the houses are developed. Works to stabilize the ground prior to the construction of houses comprises a separate and different engineering operation entirely and is not automatically permissible.

Case Law for the LPA (As provided by Temple Bright)

We have attached 2 relevant case summaries:

1. *Coleshill & District Investment Co. Ltd. [1969] 1 WLR 746* , pp 756A-E; 760B-E

2. Eatherley v Camden LBC, 2016 WL 06989230 (2016).

These cases highlight the importance of degree and extent in the interpretation of what is development rather than the necessity to do groundworks before building houses on a/the site.

Whether or not a particular operation constitutes an engineering operation is a matter of judgment for the decision maker, based on the facts presented, or on inference from those facts (*Coleshill & District Investment Co. Ltd. [1969] 1 WLR 746* , pp 756A-E; 760B-E).

In the Eartherley case, the High Court allowed the appeal. LBC had misdirected itself before concluding that the proposed engineering works were not "a separate activity of substance" that required express planning permission. The CLOPUD was 'quashed' and the application resubmitted to LBC. In the case, the judge had to decide whether the construction of the basement involved engineering operations that amounted to a separate activity of substance.

Mr Justice Cranston held that in the context of an original "two up two down" terrace house in suburban London, the development of a new basement (where there is none) could amount to two activities, each of substance.

- The enlargement, improvement and alteration of the dwellinghouse.
- An engineering aspect of excavating a space and supporting the house and its neighbours.

The court held that is the position, even though the engineering operation was necessary to achieve the developer's aim and was indivisible from it. If there was a separate engineering aspect of substance in the development, planning permission would be required from the LPA. Class A permitted development rights grant planning permission for the enlargement, improvement, and alteration of the dwellinghouse but not for the engineering aspect.

It is a matter of fact and degree.

LBC should not have asked itself whether the engineering works were part and parcel of making a basement but whether they constituted a separate activity of substance. LBC needed to address both the:

- Nature of the excavation and removal of the ground and soil.
- Works of structural support to create the basement space.

The Importance of Due Diligence and 'Best Practice'

Unfortunately Taylor Wimpey's predecessors failed to undertake any significant ground investigations before they submitted their planning application to develop the site for a large residential development under P16/S0970/O. Equally the earlier applications for the same form of development (which were rejected on appeal) also failed in this regard. This was the overriding mistake in the processes and procedures that took place to secure consent, and were arguably a very long way from being 'best practice'.

Had adequate due diligence been done, the issues would have become visible, and the developer would have ensured that the risk remained with the vendor and required an amendment to the Planning or a fresh application be made as a pre-condition to handing over the agreed price and completion of the sale.

What is the Applicant currently permitted?

It is illogical to suggest that any or all Outline Planning Permissions automatically give the land owner the right to do **whatever it takes** to make its land fit for development. There must be a demarcation line, which is logical and sensible, and that in our opinion, and it seems that of SODC's Head of Planning's must be the distinction between work down to floor and foundation level, and work below that level.

This situation is analogous to a contaminated site where major groundworks are needed, to make the site developable, and the necessary consents to dig deep and rectify are required and subject to all normal planning and health and safety scrutiny. A developer would not contemplate doing such works without the necessary permissions in place.

Works of this nature cannot simply escape the entire planning system by the suggestion that a consent to build also gives the right to indiscriminate works below ground to any level or depth that may be necessary.

There must be, and there is a control mechanism, where Government guidance specifically refers to this and says that 'groundworks' require a planning consent.

https://www.gov.uk/guidance/when-is-permission-required

It therefore must follow that details of such work need to be submitted with and as part of a Planning Application. Where this does not occur, then the consequences are very significant as in this instance.

The Method Statement

As far as the updated (Revision D) version of the Method Statement produced for Taylor Wimpey by Vertase FLI is concerned, I am enclosing a report from JBA Engineers dated October 2021, which has reviewed both the original 'final document' submitted with P20/S2808/DIS and this later revision.

JBA is a specialist engineering advisor to the 3 Councils impacted by this matter and also to TFAG and local residents. This report highlights a number of deficiencies in the information provided by the applicant not least being the absence of any up to date and accurate report on the Hydrology / Hydrogeology of the site, its hinterland and the flooding consequences of the grouting and development proposals.

The current report is almost identical to the earlier final report submitted in support of P20/S2808/DIS but it has been cosmetically updated:-

- All references to "ground improvement" works have been changed to "ground stabilisation" works.
- In section 1 and 2, reference to "the construction process" is changed to "the foundation works".
- Insertion in section 2 of the wording that the works are "necessary to stabilise the areas affected by dissolution"

Other than these changes, the main document is identical to the earlier version issued to SODC. It references the same appendices as the September 2021 version, but the new appendices have not been uploaded to the planning portal – therefore we would have to assume that there has been no change to these.

The only purpose of the above changes in references that we can think of, is that this may result in the reader considering that the works might be considered to be part of the overall foundation works for the site. This is not correct, however, and the report clearly identifies this as a separate and distinct project to that of the construction of foundations which are part of the second project comprising the building of houses upon the site.

Conclusions

The only way to remedy the early errors made at Thames Farm is to apply for a separate Planning Permission to allow the groundworks project to take place and which will then bring about the full and necessary scrutiny of bodies such as the EA and others as indicated above.

The applications for an LDP and also the revised CMP should therefore be rejected. If a further application is made for Planning Permission to proceed with the grouting works, then once this has been scrutinized, and if the project is likely to be permitted, adjustments should be made to address the detailed comments made by JBA in their various assessments of this project.

Some of their particular concerns in the reports are:-

1. Without a full assessment and understanding of the potential risk of contamination of the aquifer (and the PWS) during the works it is unclear how the risks to the aquifer and nearby property and residents can be monitored, managed and mitigated.
2. The grout will eventually settle and harden, but the applicant has little or no control of the movement of grout once it is within a void.
3. Disturbance to this aquifer should be considered particularly risky because it is the sole source of water for the Henley Water Resource Zone.
4. There is no consideration of how the grouting works will influence groundwater flow within the chalk. There appears to be significant risk that groundwater infiltrating from the surface will flow around the grouted volumes and, over time, result in dissolution of the currently intact chalk.
5. The long-term risk of dissolution from surface water and potential leakage from water pipes should be assessed.
6. The chemical composition of grouting material would need to be assessed in a full Hydrogeological Impact Assessment – The composition of any leachate from the grout material should be specified within the HIA and whether this could impact upon the aquifer water quality arriving at the PWS, especially if there is significant rainfall and recharge during the grouting works.
7. The risk to trees meant to be protected is identified: “The main document (section 11) states that “no ground improvement works are proposed within root protection areas.” Whilst this could be achieved at ground level by following the tree protection plan, it is not stated how subsurface grout will be prevented from spreading and encroaching into the root protection areas. Indeed, in some locations, the areas requiring compaction grouting appear to encroach into the root protection areas.

In addition, any consent if granted should be heavily conditioned to prevent damage, flooding and nuisance to existing property and local residents both nearby the site and also those downstream of any discharge point.

I look forward to hearing from you that SODC is going to reject both of these current applications in accordance with the advice previously issued by the Head of Planning on 7 May 2021.

Your sincerely,

SIGNED ELECTRONICALLY

Peter Boros

Chairman,

Thames Farm Action Group

Attachments:

JBA Report October 2021
Case Report Eatherley v Camden LBC
Case Report Coleshill and District Investment Co Ltd v MOHLG

*746 Coleshill & District Investment Co. Ltd. v Minister of Housing and Local Government and Another

Positive/Neutral Judicial Consideration

Court
House of Lords

Judgment Date
6 May 1969

Report Citation
[1969] 1 W.L.R. 746

House of Lords

Lord Morris of Borth-y-Gest, Lord Guest , Lord Upjohn , Lord Wilberforce and Lord Pearson

1969 March 11, 12, 13, 17, 18, 19; May 6

Town Planning—Development, meaning—Operations on land—Demolition—Partial demolition—Removal of embankment and blast walls surrounding magazines—Whether "engineering ... operations"—Whether works "alteration of ... building which ... materially affects ... external appearance"—Whether "development"— Town and Country Planning Act, 1962 (10 & 11 Eliz. 2, c. 38), s. 12 (1) (2) .

An ammunition depot, constructed for use during the 1939–1945 war, consisted of six separate buildings, four magazines and two explosive stores, round each of which were erected blast walls about nine feet high. Against the walls were substantial sloping embankments which extended from the top of the walls to some eight to ten feet from their base. They were all grass-covered. In 1962 the Minister determined that user of the buildings for commercial storage would not constitute development, and the buildings were so used. In 1966, the owners decided to remove the embankments and walls. The embankments were removed by using a mechanical excavator and the material was transported away in lorries. The *747 local planning authority served an enforcement notice on the owners, alleging development without planning permission and requiring them to restore the land to its prior condition. The owners appealed to the Minister, also asking, pursuant to section 43 of the Town and Country Planning Act, 1962 , for a determination whether planning permission was required to remove the blast walls. An inquiry was held; the inspector reported to the Minister. The Minister concluded that the blast walls and embankments were an integral part of each of the buildings, that the removal of the embankments was an engineering operation within the definition of "development" in section 12 (1) of the Act [1] ; he also held that the removal of the blast walls would constitute an alteration of the buildings, materially affecting the external appearance of the buildings, and constituting "development." He, accordingly, upheld the enforcement notice and refused planning permission. On appeal on a point of law the Divisional Court allowed the appeal, but the Court of Appeal restored the Minister's order.

On the owners' appeal:—

Held, that there was no error of law in the Minister's conclusions that the walls and embankments were an integral part of each building (post, pp. 754C–D, 769C); that the removal of the embankment was an engineering operation (post, pp. 756C, D, 770F); that pulling down the blast walls would involve structural alterations to the buildings affecting the external appearance (post, pp. 756E–G, 769H — 770A); and that, accordingly, there was no error of law in the Minister's decision that both operations constituted "development" within section 12 (1) , requiring planning permission (post, pp. 759D, 761C, D, 766A).

Per Lord Morris of Borth-y-Gest, Lord Guest, Lord Upjohn and Lord Wilberforce. You cannot look at a clause of exclusion to extend the natural construction of the main section: qualifying words in section 12 (2) (a) of the Act of 1962 cannot be introduced into section 12 (1) to enlarge the scope of it (post, pp. 756F, 759A, B, 762C–E, 764C–E).

Per Lord Guest. In considering whether, as the blast walls were physically discontinguous from the magazines, they could in law form part of a unum quid, it is legitimate to consider the functional as well as the physical test. If they were built originally as an integral and necessary part of the building and at the same time as the magazines, the fact that they are physically discontinguous does not prevent them from being part of the building (post, p. 759G, H).

Per Lord Upjohn. There is nothing in section 12 or elsewhere which makes it plain that demolition per se or simpliciter is necessarily excluded from the very wide words of section 12 (1) if otherwise the relevant operation fits within those words as a plain matter of the use of the English language (post, p. 761H). The question whether demolition per se or simpliciter is development within section 12 (1) does not call for determination. All that it is necessary to decide is that, if such demolition is covered, as in the present case, by other provisions of that subsection, it is not saved from the application thereof merely by reason of the fact that it is only demolition per se or simpliciter (post, p. 762F).

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Decision of the Court of Appeal [1968] 1 W.L.R. 600; [1968] 1 All E.R. 945, C.A. upheld.

The following cases are referred to in their Lordships' opinions:

British Launderers' Research Association v. Hendon Borough Rating Authority [1949] 1 K.B. 462; [1949] 1 All E.R. 21, C.A.
Cheshire County Council v. Woodward [1962] 2 Q.B. 126; [1962] 2 W.L.R. 636; [1962] 1 All E.R. 517, D.C.
Marks & Spencer Ltd. v. London County Council [1952] Ch. 549; [1952] 1 All E.R. 1150, C.A. ; *[1953] A.C. 535; [1953] 2 W.L.R. 932; [1953] 1 1 All E.R. 1095, H.L.(E.)* .

The following additional cases were referred to in argument:

Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326, H.L.(E.) .
Howell v. Sunbury-on-Thames Urban District Council (1963) 62 L.G.R. 119, C.A.
Lord Advocate v. Reliant Tool Co. [1968] 1 W.L.R. 205; [1968] 1 All E.R. 162, H.L.(Sc.) .
Luke v. Minister of Housing and Local Government [1968] 1 Q.B. 172; [1967] 3 W.L.R. 801; [1967] 2 All E.R. 1066, C.A.
Magnhild (Owners) v. McIntyre Brothers & Co. [1920] 3 K.B. 321 .
Maurice (C.) & Co. Ltd. v. Minister of Labour [1968] 1 W.L.R. 1337; [1968] 2 All E.R. 1030, C.A.
Nelsovil Ltd. v. Minister of Housing and Local Government [1962] 1 W.L.R. 404; [1962] 1 All E.R. 423, D.C.
Newcastle City Council v. Royal Newcastle Hospital [1959] A.C. 248; [1959] 2 W.L.R. 476; [1959] 1 All E.R. 734, P.C.
Tillmanns & Co. v. S.S. Knutsford Ltd. [1908] 2 K.B. 385, C.A.

APPEAL from the Court of Appeal.

This was an appeal by Coleshill and District Investment Co. Ltd., by leave of the House of Lords, from an order of the Court of Appeal (Lord Denning M.R., Diplock and Salmon L.JJ.) dated December 19, 1967, allowing the appeal of the Meriden Rural District Council from, and setting aside, the order of the Divisional Court (Lord Parker C.J., Widgery and Chapman JJ.) dated November 24, 1967, and restoring the decision of the Minister of Housing and Local Government given on May 16, 1967.

The question arising on the appeal was whether the operations which the appellants carried out (without planning permission), and which they wished to carry out, constituted "development" within the meaning of section 12 (1) of the Town and Country Planning Act, 1962 , for which planning permission was required.

On December 8, 1966, an inspector held an inquiry into an appeal by the appellants under section 46 (2) of the Act of 1962 against an enforcement notice, dated March 30, 1966, served by the Meriden Rural District Council acting on behalf of the Warwickshire County Council, relating to the removal of embankments which had materially affected the external appearance of magazines at Hampton-in-Arden, and requiring the appellants to restore the land to its prior condition. The appeal against the notice was made on ground (d) of section 46 (1) but ground (c) was added at the inquiry. The following description of the site and surroundings is taken from the inspector's report:

> "Hampton-in-Arden is a pleasant village containing a good deal of … residential development, in the countryside between Birmingham and Coventry and about nine miles from each. … The site is a ***749*** former ammunition depot extending in an elongated shape southerly from Meriden Road beyond development in the village. It has a total area of about 8¾ acres. On the northerly part of this, about five acres, are six well spaced buildings within encircling blast walls extending singly southerly from Meriden Road, which were used formerly as magazines (four) and explosive stores (two). They are prominent in the surroundings. The explosive stores, which are nearer the road, are each about 25 to 30 feet long and about 12 feet wide and constructed of brick, and the magazines are each about 70 feet long and about 30 feet wide and constructed of concrete. They are all about 11 feet high, the magazines rising to about 13 feet at the roof centres. Around and about four feet away from all the buildings are concrete blast walls about nine feet high. Through these at each end are two narrow entrances to the magazines and one to the explosive stores. The tops of windows along the sides of the magazines are at about the same level as the tops of the blast walls. On the outside of the blast walls were formerly embankments, most of which have now been removed, although around the magazines broken and whole loosely stacked bricks, which formed part of these, still remain in places. … The embankments appear to have extended from near the tops of the blast walls down to about eight to ten feet out from their base. The site is surrounded with agricultural land, which westerly and north-westerly, apart from a detached post-war bungalow about 200 feet away along Meriden Road, extends in about 550 feet to dwellings in the village, including medium and large detached inter- and post-war houses along a private cul-de-sac road, The Crescent."

After hearing evidence and submissions the inspector found the following facts:

> "(1) The site is in the countryside beyond development in the nearby village and is surrounded with agricultural land which westerly and northwesterly extends in a short distance to houses.
>
> (2) On part of it are six buildings about 11 feet to 13 feet high, formerly used as magazines or explosive stores.
>
> (3) Around these and about four feet away are concrete blast walls about nine feet high.
>
> (4) Broken and whole bricks are stacked against the exteriors of the blast walls in places.
>
> (5) There are narrow entrances through the blast walls to narrow doors in the buildings and along the sides of the four largest buildings there are windows, the tops of which are about level with the tops of the blast walls.
>
> (6) The blast walls and the tops of the buildings are prominent in the surroundings.
>
> (7) In the development plan the site is within white land and within the proposed green belt.
>
> (8) The buildings have an existing use for storage.
>
> (9) Formerly there were embankments covered with vegetation against the exteriors of the blast walls, which extended from near the tops to about eight to ten feet out from the base.
>
> (10) Around [four] buildings … these consisted of bricks and brick rubble and ash covered with soil, the soil constituting about one-third of the whole.

(11) Around [the fifth] building … it consisted of ash and around [the sixth] building … of ash covered with soil.

(12) The embankments were removed during 1966 by means of a mechanical excavator loading into lorries.

(13) The embankments and vegetation thereon screened from view the blast walls and much of the buildings protruding above them."

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The inspector came to the following conclusions:

"The legal implications of the above facts are matters for consideration by the Minister and his legal advisers, but it appears to me that:- (1) Surrounding embankments and blast walls are a necessary and integral part of buildings used for storing explosives and together they constitute a magazine. That the buildings here now have a different storage use, which does not require embankments and blast walls, is immaterial as the enforcement notice is directed towards 'the magazines.' Their appearance has been materially affected by the removal of the embankments, which work was an engineering operation constituting development. Nevertheless, it could be regarded as demolition of part of the magazine and planning permission is not required for demolition of a building.…

"On the planning merits of the case I am of the opinion that the exposure of the concrete blast walls and buildings forming these magazines, by the removal of the grass and vegetation covered embankments, has resulted in these ugly structures being much more prominent in the rural surroundings. The quality of the countryside here, and its effectiveness as a part of a proposed green belt, has accordingly deteriorated to an unacceptable extent. Removal of the embankments has not enlarged the accesses, or improved the lighting to any appreciable extent, as the blast walls remain. Even had it done so, it is doubtful if that would have been sufficient justification for accepting the removal."

The inspector recommended that if it was decided that development requiring planning permission was involved, planning permission should not be granted.

On the appeal against the enforcement notice the Minister in his letter of decision dated May 16, 1967, stated that the evidence given at the inquiry and the inspector's findings of fact and conclusions had been considered and continued:

"The appeal site is a narrow strip of land occupied by six buildings surrounded by concrete blast walls, four of which were formerly used as magazines and the remaining two as explosive stores. On the outside of the blast walls were formerly embankments made up of two-thirds ash and brick rubble, the remaining third being soil, except in the case of one explosive store where there was no soil covering. The development alleged in the enforcement notice is the removal of … the embankments.…

"… In support of the appeal on grounds (c) and (d) it was submitted that the removal of soil did not constitute development as it was not against the buildings themselves but against the surrounding blast walls and that its removal did not affect the external appearance of the actual magazines. The council maintained that the blast walls and the embankments were an integral part of each of the buildings. This latter view is accepted as the correct one in this case. The blast walls surrounding the inner buildings cannot be regarded simply as means of enclosures. They were erected as essential features of the structures as erected and without them the inner buildings would have been ineffective for the use for which the magazines were built. The soil and other materials (ash, rubble etc.) which formed the embankments to the walls were similarly parts of the magazines which description is regarded as covering also the explosive stores. The Ministers ***751*** decision in 1962 that the premises had a use within Class X of the Use Classes Order 1950 , which is a use as a warehouse or repository for any purpose, does not affect this situation. The removal of the embankments was an engineering operation clearly falling into section 12 (1) of the Act. This operation constituted material development for which planning permission was required and the appeal therefore fails on grounds (*c*) and (*d*). On the planning merits of the case no reason is seen for disagreeing with the inspector's conclusions and it is not proposed to grant permission for the operations in question, on the application deemed to be before the Minister under section 64 (2) of the Act."

Accordingly the Minister upheld the enforcement notice, subject to variations not relevant to the present appeal, refused planning permission for the development to which it related, and dismissed the appeal.

On the application under section 43 of the Act of 1962 to determine whether an application for planning permission was necessary for the removal of the blast walls, the Minister in his letter of decision dated May 16, 1967, stated:

> "With regard to the removal of the walls, the company argued that the blast walls were separate from the storage units and that as they in no way afforded any support to the buildings their removal could not be said to affect the external appearance of the buildings and further that demolition of itself does not involve development. In the opinion of the local planning authority the blast walls (and the earth banks which previously surrounded them) were all part of the original design of the buildings and their removal would therefore materially affect the external appearance of the buildings. It is noted that the buildings were erected shortly before the last war, some were used for the storage of ammunition and some for the storage of explosives. The blast walls and soil embankments were provided to prevent damage from explosion and to conceal the internal structure. The council's view that the blast walls form part of the buildings is accepted as a fact and it is considered that the removal of the blast walls would therefore constitute an alteration of the buildings, and that it would materially affect the external appearance of the buildings. In these circumstances the provisions of section 12 (2)(a) of the Act do not apply to the proposal which therefore constitutes development of the land for which planning permission is required since such development is not within any of the classes set out in Part I of Schedule 1 to the Town and Country Planning (General Development) Order, 1963 …"

Accordingly the Minister determined that the removal of the blast walls would constitute development requiring planning permission.

On appeal against those decisions of the Minister on a point of law, the Divisional Court allowed the owners' appeals. The Court of Appeal reversed that decision.

The owners appealed.

Representation

Sir Derek Walker-Smith Q.C. and S. Goldblatt for the appellants.
S. C. Silkin Q.C. and Gordon Slynn for the Minister.
A. Cripps Q.C. and A. E. Holdsworth for the local planning authority.

LORD MORRIS OF BORTH-Y-GEST

Their Lordships took time for consideration.

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May 6. My Lords, one question that was persistently raised in this appeal was formulated as being whether demolition constitutes development for the purposes of the Town and Country Planning Act, 1962 . Neat and arresting as the question so expressed may seem to be it is not in fact the direct question which calls for our decision. If someone propounded a question of comparable generality such as whether modernisation constitutes development someone else might ask for a ruling as to whether renovation constitutes development. No one of these inquiries has precision. If development needs permission, which in most cases it does, and if development is defined, as in the Act it is, the true path of inquiry first involves ascertaining exactly what it is that it is desired to do, or exactly what it is that has been done, and then to see whether that comes within the statutory definition of development. Once some completed or projected work or operation is fully and clearly described then the words of definition can be applied. It is unnecessary and may be misleading to give the work or operation some single labelling word and then to try to apply the definition to that word. We are here concerned with actual operations and not with possible operations or with those which can for the future be imagined. Why, then, introduce and interpose some general word of description when precise words of description are at hand? Why gaze into the crystal when one can read the book?

The present case relates to certain structures which are on a site having an area of about eight and three-quarter acres near Hampton-in-Arden. The structures themselves occupy about five acres. They consist of a number of buildings or magazines constituting, and during the last war used as, an ammunition depot. There are six separate buildings: four of them were magazines and two of them explosives stores. Around each one of them blast walls were erected which were about nine feet in height. Against these walls there were substantial sloping embankments consisting of rubble and brick and ash and soil. They extended from near the top of the walls to a distance of eight to ten feet from their base. They were all grass covered.

The War Department released the depot in 1958. In 1962 the Minister determined that user of the buildings for purposes of commercial storage (for which permission was then sought) would not constitute or involve development. In the early part of 1966 the appellants decided that they would like to remove the embankments and the walls which were felt to be unnecessary and a cause of inconvenience when the buildings were used for civilian purposes. So as a first step they set about removing the embankments. They instructed contractors to undertake the work. The contractors used a mechanical excavator. The material after being loaded into lorries (which the contractors hired from various firms) was transported away to be delivered at various different sites.

When those who lived in houses near to the depot saw that the embankments were being removed they were aggrieved. The grass-grown or vegetation covered green banks had blended with the countryside and had so camouflaged the depot as to screen the blast walls as well as much of the buildings from view. As the embankments were removed the buildings became starkly exposed and the general result, so the people felt, was that the whole place became an eye-sore which marred the locality and detracted from the amenity to be expected in a green belt. The result was that complaints were expressed to the Meriden Rural District Council and following upon them the clerk of the council wrote to the appellants ***753*** pointing out that the operations being undertaken constituted development and that no application for planning permission had been made. An enforcement notice dated March 30, 1966, followed. The appellants were required to discontinue their operations and to restore the land to its prior condition. The appellants took the view that their operations did not constitute development and that no planning consent had been needed. So they appealed against the enforcement notice. An inquiry before an inspector (pursuant to section 46 of the Town and Country Planning Act, 1962), was held on December 8, 1966. The inspector made a full report to the Minister dated January 11, 1967. The Minister gave his decision in a letter dated May 16, 1967. Subject to making certain variations, which do not now call for consideration, in the wording of the enforcement notice the Minister upheld the notice and, refusing planning permission, dismissed the appeal. The appellants exercised (see section 180 of the Act of 1962) their right to appeal to the High Court against the decision "on a point of law."

The appeal which, by a notice of motion dated June 12, 1967, they lodged was related also to the kindred question whether they could without planning permission take down the walls. The removal of the embankments had only been intended to be the first stage in the operation of completely removing the embankments and walls. So when the appellants were confronted with the question whether planning permission was needed to remove the embankments it was manifest that a similar question arose or would arise in regard to the walls. Pursuant to section 43 of the Act they asked the council, as the local planning authority, to determine that question. They so asked by a letter dated July 4, 1966. There was no determination within the prescribed time and accordingly the appellants appealed to the Minister. He gave his decision in a separate letter dated May 16, 1967. Other matters were involved but the only determination that is for present purposes relevant was that the removal of the walls would constitute or involve development and that planning permission was required. The appellants claiming to be "dissatisfied with the decision in point of law" (see section 181) therefore appealed to the High Court on this issue also.

Though there was but the one local inquiry the facts relating to the whole site were fully and carefully set out in the inspector's report of January 11, 1967. The report was made a part of the Minister's first letter of decision of May 16, 1967. The report contained a description of the site and its surroundings: it set out the contentions of the appellants, of the council, and of interested parties: it made specific findings of fact. I do not propose to refer to these in detail. Suffice it to say that it set out that the explosive stores which are brick built are each 25 to 30 feet long and about 12 feet wide: the magazines which are constructed of concrete are each about 70 feet long and about 30 feet wide and are about 11 feet rising to 13 feet high. Around, and about four feet away from each one of the buildings are the blast walls which are also constructed of concrete and are about nine feet high.

Having set out his findings of fact the inspector concluded that the legal implications from them were matters for consideration by the Minister and his legal advisers. He considered, however, that the embankments and blast walls were a necessary and integral part of buildings which constituted a magazine. He further thought that the work of removing embankments was an engineering operation constituting development though he added that it could be regarded as demolition of part of the **754* magazine "and planning permission is not required for demolition of a building." He recommended that if the Minister decided that development requiring planning permission was involved, such permission should not be granted.

The Minister had the issues fairly and fully placed before him for his decision. As regards the buildings the Minister considered whether the blast walls and the embankments were an integral part of each of the buildings. He concluded that they were. He said that they could not be regarded simply as means of enclosures because they were erected as essential features of the structures which were erected. What had been built were magazines and the inner buildings would have been ineffective in use without the walls and embankments.

Pausing there, I cannot see how it can possibly be said that the Minister made a wrong decision on a point of law. In effect he was saying that the blast walls and embankments were an integral part of each of the buildings and could not be divorced from the internal buildings. The view might be held that his conclusion was not only one of fact but was on the evidence almost the inevitable one. There is, however, no need to consider whether or not that was so. It is enough to say that no error of law was involved.

The next part of the Minister's decision was that the removal of the embankments was an engineering operation and so was within the definition of development. He upheld the enforcement notice, refused planning permission and dismissed the appeal.

In the Minister's other decision, i.e., that relating to the appellants' application under section 43 , the first conclusion was again "accepted as a fact" that the blast walls form part of the building. The further conclusion was that the removal of the blast walls would constitute an alteration of the buildings and one which would materially affect the external appearance of the buildings. The removal of the walls would constitute development requiring planning permission: such development was not within any of the classes set out in Part I of Schedule 1 to the Town and Country Planning General Development Order, 1963 .

On appeal to the High Court the various grounds of appeal covered both the contention that neither what had been done nor what was proposed constituted development and also the contention that the embankments and walls were not part of the magazines. In allowing the appeal and setting aside the Minister's decision the *Divisional Court [1968] 1 All E.R. 62* took the view that the removal of the embankments could not be described either as a building operation or as an engineering operation: nor was it an operation of the scale, complexity and difficulty which would require a builder or an engineer or some mining expert. The view was held that the operation was a "simple removal of soil" or a "little job of shifting a few cubic yards of soil with a digger and a lorry" though it was said that earth moving on a grand scale requiring the intervention, supervision and planning of qualified engineers might well be an engineering operation.

The *Court of Appeal [1968] 1 W.L.R. 600* restored the order of the Minister and held that the operation of removing the embankments and also the operation of removing the walls constituted development.

As appears from the judgments in the Court of Appeal, argument was in that court presented on behalf of the appellants to the effect that demolition of a building is not development and that no proper distinction can be drawn between demolition of a building and demolition of part of a building. Arguments to the like effect were fully and attractively developed on behalf

*755 of the appellants in support of their appeal in this House. Supported by a careful and painstaking analysis of very many sections in the Act of 1962 the contention was urged that throughout the Act there is a clear, consistent and logical distinction between demolition and alteration. The term "alteration" when used in the Act may sometimes denote development and sometimes corrective action: the term "demolition," on the other hand, so the argument ran, is not used in the Act as denoting development but is only used in the context of corrective action or in reference to procedures for the preservation of special buildings. It was contended that there are very many indications pointing to the conclusion that Parliament has deliberately excluded demolition (as opposed to alteration) from the scope of planning control and from the concept of development. Thus, the need to protect certain buildings (such as those of historic or architectural interest) from demolition is met by special provisions. I do no more than summarise some of the steps in a very carefully constructed argument. If the contention is once accepted that demolition is not development then further steps (or jumps) in the argument run as follows: removal of the embankments or of the walls is demolition: demolition is not development: therefore, the removals are not development. Alternatively, even if the embankments and walls were parts of the buildings, since, by the definition section (section 221), a part of a building is a building, each removal of an embankment or of a wall is removal of a building: but as removal is demolition and as demolition is not development the result is that there was not and would not be any development.

My Lords, these arguments, however persuasive, must not compel a diversion from the facts as ascertained and from the statutory terms as defined. It was for the Minister to make certain decisions. The appeals to the High Court from his decisions are only on points of law. I have already expressed the view that it is quite impossible to assert that there was any invalidity in law in the findings of the Minister to the effect that the embankments and walls were integral parts of each of the buildings. It is next necessary to consider his findings relating (a) to the removal of the embankments and (b) to the desired removal of the walls.

The definition of "development" is set out in section 12 (1) and section 221 of the Act. Subject to certain exceptions, and leaving aside the making of any material change in the use of any buildings or other land, "development" means the carrying out of building operations (which include rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder) or of engineering operations (which include the formation or laying out of means of access to highways) or of mining operations or of other operations, in, on, over or under land. "Land" means any corporeal hereditament, including a building (which includes any structure or erection, and any part of a building so defined but not including plant or machinery comprised in a building). "Erection" in relation to buildings includes extension, alteration and re-erection. Wide though the definition is, it does not include any and every operation on land. In section 43 is set out the procedure to be followed when it is desired to have a determination whether planning permission is required. Any person who proposes to carry out "any operations" on land may apply for a ruling. Had development meant "any" operations in, on, over or under land there would not have been included in section 12 (1) the words "building, engineering, mining or other." I think that the word "other" must denote operations which could be spoken of in the context of or in association with or as being in the nature of or as *756 having relation to building operations or engineering operations or mining operations.

It was submitted, on the one hand, that the underlying conception of development is that of change. A rival submission was that the conception is that of positive construction. Another submission was that everything is development which is within the framework of what a "developer" (whoever so anonymous and elusive a person might be) would understand as being development. My Lords, as Parliament has denoted what is meant by development I do not think that we should be tempted to enlarge upon or to depart from the statutory definition. It may well be that some operations which could conveniently be called demolition would not come within the definition. But we must not decide hypothetical cases. Here we have actual facts and findings. The Minister had a careful report before him. No suggestion has been made that the procedure deviated from that which is laid down in the Town and Country Planning (Inquiries Procedure) Rules, 1965 (S.I. 1965 No. 473). The question that now arises is whether the Minister erred in law. He decided that the removal of the embankments was an engineering operation clearly falling within section 12 (1) of the Act. He had certain primary facts found for him by the inspector. He did not differ from them. His conclusion from them was one that he could reasonably and properly make. It was really a conclusion of fact, and I can see no trace of any error of law. It was contended that the Minister was giving a wider meaning to "engineering" than it could in accepted or current use bear. I cannot accept this. The findings relating to the dimensions of the various embankments show that the task of their removal was one of some magnitude. I do not think that it can be said that the Minister erred in law in coming to the conclusion that their removal was an engineering operation.

Similar considerations apply to the Minister's decision that the removal of the blast walls would constitute or involve development and that planning permission for their removal was required. I think that it is inherent in the Minister's decision that the operation of pulling down the concrete walls (which were an integral part of the various buildings) would involve structural alterations to buildings and would therefore constitute development within the statutory definition. He then proceeded to consider section 12 (2) . That subsection does not enlarge subsection (1) ; but if an operation is covered by subsection (1) it may be taken out of the definition of "development" by subsection (2) . The Minister was, I think, amply warranted in deciding that the alterations of the buildings which would result from taking down the walls would materially affect the external appearance of the buildings. No error of law is revealed.

In my view the Court of Appeal came to the correct conclusion. I would dismiss the appeal.

LORD GUEST

My Lords, prior to 1939 the War Department constructed an ammunition depot near the village of Hampton-in-Arden in Warwickshire. It consisted of four magazines, some 70 feet by 30 feet, and two explosive stores, 40 feet by 30 feet. Each of the buildings was about 11 to 13 feet high. Around each of the six buildings there were blast walls about nine feet high and standing about four feet out from the outside walls of the stores and magazines. Against the walls on their outer side there were embankments consisting of bricks, rubble and soil which extended from near the top of the walls to a distance of 8 to 10 feet from their base. After the war the use of the ammunition depot was ***757** discontinued. It was released by the War Department in 1958 and the freehold was acquired by the appellants in 1964. The buildings have, by a decision of the responsible Minister, an existing storage use. The appellants were minded to make use of the buildings for this purpose. The embankments were covered with grass and weeds which concealed the unsightly nature of the walls and to some extent obscured the stores and magazines.

The question in the appeal is whether the removal of the embankments and the blast walls constitutes "development" within the meaning of section 12 (1) of the Town and Country Planning Act, 1962 .The question of the embankment arises in consequence of an appeal by the appellants to the Minister against an enforcement order served upon them by the second respondents under section 45 of the Act of 1962: the question of the blast walls arises from an appeal by the appellants against a determination by the Minister under section 43 of the Act that their removal required planning permission.

Section 12 of the Town and Country Planning Act, 1962 , provides, inter alia, as follows:

"12. —

(1) In this Act, … 'development', subject to the following provisions of this section, means the carrying out of building, engineering mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:-

(a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works … which do not materially affect the external appearance of the building …;"

Section 221 (1) of the Act provides:

> "In this Act, … the following expressions have the meanings hereby assigned to them respectively, that is to say:- …
>
> 'building' includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building; …
>
> 'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder; …
>
> 'engineering operations' includes the formation or laying out of means of access to highways; …"

The Minister treated the two cases differently. In the case of the embankment the Minister decided that the operation of removing the earth was an "engineering operation" within the meaning of section 12 (1) of the Act as defined in section 221 (1) . Whereas in regard to the proposed removal of the blast walls the Minister decided that this operation was a "building operation" under section 12 (1), as consisting of the removal of part of a building — the blast wall being part of the composite building constituted by the magazine building and blast walls and, as such, was a development requiring planning permission.

The courts below have approached the questions from different angles. Widgery J. gave the judgment of the Divisional Court in which he expressed the view that it was unnecessary to decide the "fascinating problem" of planning law, whether the demolition of a building is a building operation within section 12 (1). He decided that the scale of operations in question — "this little job of shifting a few cubic yards of ***758** soil with a digger and a lorry," as he described them could not be dignified by any of the qualifying words in section 12 (1). He also referred with approval to an observation of Lord Parker C.J. in *Cheshire County Council v. Woodward [1962] 2 Q.B. 126* , 133, where he said that the operations contemplated by the section must change the physical character of the land. But the underlying principle of the decision appears to be that de minimis non curat lex.

The Court of Appeal reversed the decision of the Divisional Court. Lord Denning M.R., with whom Diplock L.J. concurred, treated the structure consisting of magazine or store, blast walls and embankment as a composite building and applying the terms of section 12 (2) (a) held that the operations constituted an alteration to the building which affected its external appearance. It was thus "development" within the terms of section 12 (1) . The Master of the Rolls, however, said that it might be that if the whole building was demolished it might not be "development." Salmon L.J. also declined to decide the question whether the total demolition of a building would amount to "development," although he would appear to think that it would. He also treated the whole unit as a composite building.

The appeal from the Minister's decision to the High Court is only on a question of law (see sections 180 and 181 of the Act of 1962). The question, accordingly, is whether it has been shown to the satisfaction of the court that the Minister has erred in law in arriving at his decision.

Appellants' counsel urged on your Lordships as his primary submission that any demolition of a building or part of a building by itself not involving reconstruction or replacement could in no circumstances amount to "development" within the Act. He argued that the "other operations in, on, over or under land" in section 12 (1) must be construed ejusdem generis with the preceding categories of operations, namely, building, engineering and mining. The genus was the positive or constructional side of operations, and — as demolition was of a negative or destructive character "demolition per se," as he described it, could never come within this genus. He also referred to other sections in the Act of 1962, where he said that a distinction was drawn between "alteration," which was development, and "removal" or "demolition," which was not. I am unable to find that any help can be obtained from these sections which would assist his argument. I find it difficult to discover any common genus to building, engineering or mining operations. I am certainly unable to detect a positive or constructional genus in section 12 (1); "mining operations" are not constructive because the surface of the land is destroyed in the course of the operations.

Reference was also made to the Town and Country Planning General Development Order, 1963 , S.I. No. 709 in which by Schedule I certain development is permitted without the necessity of obtaining planning permission under the Act. Under Class 1 of Part I of Schedule I certain activities of a minor character in relation to a dwelling house are permitted. It was said that if demolition was comprehended by "development," one would have expected to find certain exemptions in this order. Otherwise every minor demolition, say of a garden wall of a private house, would require planning permission. The reasons for the omission of minor demolitions from the General Development Order are obscure, but it may stem from the Ministerial Circular No. 67 of February 15, 1949, in which it was stated that the Minister was advised that demolition of a building did not, of itself, involve development. However this may be, the General Development ***759*** Order affords no guide to the construction of section 12 (1) . I am not, therefore, able to accept the appellants' argument that demolition can never be development.

The question appears to me to be whether the operations in any particular case do or do not amount to development, having regard to the terms of section 12 (1). I should, perhaps say that I cannot find any aid to the construction of section 12 (1) by reference to the terms of section 12 (2) (a) . The operation must first qualify as development within section 12 (1). If it does, then the question arises whether, upon the basis that it is development, it is excluded by section 12 (2) .

If this be the correct approach to section 12 (1), for my part I do not find the answer in this appeal difficult. The question, as I have already indicated, is whether the Minister's decision betrays any error in law. First, as regards the embankment. The Minister had before him an inspector's report in which, after stating the relevant facts, he expressed his "conclusion" that the work of removal of the embankment was an engineering operation. The Minister followed his inspector's conclusion and held that it amounted to development. This decision was, in my view, a finding of fact in the sense that it was an inference from the primary facts as found by the Minister (see Denning L.J. in *British Launderers' Research Association v. Hendon Borough Rating Authority [1949] 1 K.B. 462* . 471).

I am unable to say that the Minister erred in law in his decision or that it was a conclusion which could not reasonably be drawn. It was peculiarly a matter within his competence to decide whether the removal of the embankment was an engineering operation. References were made to *Hudson on Building Contracts* , 6th ed. (1933) at p. 8 and 9th ed. (1965) at pp. 64, 65, and to the definition of "engineering" in the *Oxford English Dictionary* , but the Minister had sufficient evidence, in my view, on which he could reach his decision unassisted by these references.

The next point concerns the removal of the blast walls. The Minister had before him the view of the local planning authority that "the blast walls were all part of the original design of the buildings used for storing explosives and together they constituted a magazine." The Minister accepted this view, adding

> "It is noted that the buildings were erected shortly before the last war, some were used for the storage of ammunition and some for the storage of explosives. The blast walls and soil embankments were provided to prevent damage from explosion and to conceal the internal structure."

The Minister accordingly held that the blast walls formed part of the building and that their removal would materially affect the external appearance of the building and as such would constitute "development" within section 12 (1) . The appellant contended that as the blast walls were physically discontiguous from the magazines they could not in law form part of a unum quid. But in my opinion in considering this question it is legitimate to consider the functional test as well as the physical test. If they were built originally as an integral and necessary part of the building and at the same time as the magazines, the fact that they are physically discontiguous does not, in my view, prevent them from being part of the building.

There is, therefore, no ground upon which the Minister's decision on either case can be disturbed.

I would dismiss the appeal.

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LORD UPJOHN

My Lords, I have the opportunity of reading the speech about to be delivered by my noble and learned friend, Lord Pearson, who has set out the relevant facts in the greatest detail so that I do not propose to cover that ground again.

There are two questions which must be answered before one can approach a consideration of the submissions of law that arise upon section 12 of the Town and Country Planning Act, 1962 , (the Act):

1. Was the Minister correct in holding that the walls and supporting earth embankments surrounding the magazine buildings all formed part of one building, or did these walls and embankments, which were not architecturally part of the magazine buildings but were designed and placed there to limit and so far as possible contain the result of some internal explosion and also to act as camouflage against enemy air attack, form different buildings for the purposes of the Act?

2. When these outer walls and supporting embankments were removed by the appellants, was the Minister correct in holding that this was an "engineering … operation" for the purposes of section 12 (1) of the Act? While the enforcement notice under section 45 of the Act applied in terms to removal only of the embankments supporting the walls because the walls themselves had not by then been removed, very sensibly neither party has taken any point upon this.

My Lords, both these questions are largely matters of fact and inferences from facts and are questions of degree. Upon the first question, the magazines and the protecting walls and embankments were built in 1938 and 1939 these latter were separate but an integral and necessary part, by accepted standards of those concerned with these matters, of the structure of a magazine to contain ammunition and explosives. But the role of the walls and embankments was entirely functional. When the magazines ceased to hold these dangerous commodities and could be used for ordinary warehouse purposes without any change of user, it was obviously desirable, as a matter of reasonable everyday use, to remove these walls and embankments which made the former magazines ill lit, damp and inconvenient for everyday purposes. Upon the second question, upon the evidence it does appear to me that the appellants used comparatively unsophisticated methods, bulldozers, and so on, to remove these protecting walls and embankments.

Upon these two question I must confess that my mind has fluctuated considerably. Both of them seem to me to be borderline questions and I think that the Minister might easily have come to a different conclusion upon either or, indeed, both of them.

Where a case depends upon primary facts the court, it is clear, will hardly ever interfere with the findings of the trial judge unless satisfied that he has misdirected himself; but where the true conclusion depends not so much upon the primary facts which (as in this case) are not in issue but upon the inferences to be drawn from those facts the appellate court is less reluctant to interfere, but the degree of its reluctance must depend upon the inferences. Denning L.J. in the *Divisional Court, put the matter succinctly in British Launderers' Research Association v. Hendon Borough Rating Authority [1949] 1 K.B. 462* , 471, when he said:

> "On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents. Their ***761*** determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If, and in so far as, those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact: and the only questions of law which can arise on them are whether there was a proper direction in point of law; and whether the conclusion is one which could reasonably be drawn from the primary facts: see *Bracegirdle v. Oxley [1947] K.B. 349* ."

The learned judge then went on to discuss the type of case where the correct conclusion required for its correctness its determination by a trained lawyer, which most emphatically this case is not.

My Lords, the two questions which I have adumbrated above are so much a question of fact and degree which are within the particular knowledge and experience of the Minister and his advisers, and upon which members of an appellate court have, in the absence of expert evidence (and there was none), no like knowledge or experience that, notwithstanding my doubts, I am not prepared to say that the Minister reached a wrong answer to either of these fundamental questions. It is, I think a great pity that there was no expert evidence upon the second question but the appellants preferred to rely on their legal point as to demolition. The question, then, is whether upon those findings the Minister reached a wrong conclusion of law in deciding that the removal of these walls and embankments constituted development as defined in section 12 (1) of the Act (which it is common ground did not materially differ from its precursor in the Town and Country Planning Act, 1947). If he reached a conclusion which was not erroneous in point of law, your Lordships have no power to correct him. Section 12 (1) is in these terms:

> "In this Act, except where the context otherwise requires, 'development,' subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

The main submission of the appellants pushed to its ultimate length was that no act of demolition "per se" or "simpliciter" (whatever those qualifications mean — I think they were intended to mean without a view to redevelopment), whether of a complete building or of a part of a building, could in law constitute development for the purposes of section 12 . I cannot understand this argument pushed so far. Counsel for the appellants rightly pressed your Lordships with the view that in the Act the word "demolition" was only used in relation to cases where corrective action was required after service of enforcement notices or in relation to specially "listed" houses of historical interest which may not be demolished without a special order. But there is nothing in section 12 or elsewhere which makes it plain that demolition per se or simpliciter is necessarily excluded from the very wide words of section 12 (1) if otherwise the relevant operation fits within those words as a plain matter of the use of the English language. In fact there is nothing to exclude demolition. In this case the Minister has decided that this demolition is an engineering operation and so within the section. I do not understand how, if this demolition he ***762*** properly so described, the fact that it is only demolition per se takes it out of that section.

But upon the Minister's finding, consequent upon his finding that the magazine and its protective walls and embankments were all part of one building, so that this was only demolition of part of a building, there is, I think, another answer to the appellants.

Section 12 (2) is, so far as relevant, in these terms:

> "The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:-
>
> > (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building and (in either case) are not works for making good war damage; …"

It was argued that you cannot look at subsection (2) , which was a clause of exclusion, to construe subsection (1) . This, however, states the principle too broadly. You cannot look at a clause of exclusion to extend the natural construction of the main section but you can, in my opinion, most certainly look at it to support the view which you may tentatively form as to the meaning of the main section. Subsection (2) only confirms the view which, assisted by the definition of "building" and "building operations" in section 221 , in my view subsection (1) naturally bears, namely, that a building operation in, on, over or under land includes an alteration to a building which would include mere demolition; the subsection, however, makes it clear that to fall within subsection (1) an alteration is limited to a building operation which materially affects the external appearance of the building. There is nothing to exclude an alteration which is no more than demolition per se.

As it is not in doubt that the removal of the walls and embankments affected materially the external appearance of the building (that was, indeed, the real ground of complaint by the inhabitants), that seems to be another ground upon which the decision of the Minister must be upheld.

My Lords, in these circumstances it does not seem to me that the question whether demolition per se or simpliciter is a development within section 12 (1) calls for determination by your Lordships. All that it is necessary to decide is that, if such demolition is covered, as in this case, by other provisions of that subsection, it is not saved from the application thereof merely by reason of the fact that it is only demolition per se or simpliciter.

The expression of opinion by the Minister upon the question of demolition in his Circular No. 67 dated February 15, 1949, has stood and has apparently been accepted by the profession for 20 years and there may be much common sense and practical utility in it. I do not criticise it but, in my view, it remains a matter of ministerial opinion and practice and its legal correctness does not arise for your Lordships' decision. For these reasons I would dismiss this appeal.

LORD WILBERFORCE

My Lords, I have had the benefit of reading in advance the opinion prepared by my noble and learned friend, Lord Pearson. I gratefully adopt his statement of the history and the facts of this case: I agree with his conclusions with regard to them and to the findings and decisions of the Minister. I desire only to add some observations ***763*** as to the scope of the Town and Country Planning Act, 1962 , and the concept of development.

"Development" is a key word in the planners' vocabulary but it is one whose meaning has evolved and is still evolving. It is impossible to ascribe to it any certain dictionary meaning, and difficult to analyse it accurately from the statutory definition.

In the Town and Country Planning Act, 1932 , we find this:

> Section 52. "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:- …

> ‘Building operations’ includes any road works preliminary, or incidental, to the erection of buildings; …
>
> ‘Development,’ in relation to any land, includes any building operations or rebuilding operations, and any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used:.”

Leaving aside the inaccuracy of using an inclusive formula to express the meaning assigned, “development” here was used, in relation to operations, in a normal sense to refer to those which in their nature are constructive. It would have been difficult to argue under this Act that an operation involving mere demolition of a building, or part of a building, constituted development and I think that the view that it did not was assumed, if not decided, in the case of *Marks and Spencer Ltd. v. London County Council [1952] Ch. 549* , affirmed sub nom. *London County Council v. Marks and Spencer Ltd. [1953] A.C. 535* .

In the Town and Country Planning Act, 1947 , the conception of development was greatly expanded. The relevant section, 12 (2) , was in the same form as section 12 (1) of the Act of 1962. The main changes, as compared with the Act of 1932, were that it was drafted in a “means” not “includes” form and that the operations referred to became “building, *engineering, mining or other operations in, on, over, or under land* .” Then there were six stated exceptions of operations or uses which were not to be deemed to involve development, of which the most important for the purposes of this appeal is —

> “(a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building; …”

This definition was amplified in section 119 (corresponding to section 221 of the Act of 1962) by definitions of “building,” “building or works,” and “building operations” which I need not quote.

It is relevant, I think, to recall that the Act of 1947 in Part VII provided for the levying of development charges in respect broadly of any development for which planning permission was required. But there was an exemption from these charges (by Schedule III) of specified types of development, one of which was “the enlargement, improvement or other alteration” of certain buildings. No mention was made, in the exemptions, of any demolition, total or partial, of any building, yet had demolition been considered to be, or possibly to be, developments such a mention would surely have been included. The development charge provisions are not repeated in the 1962 Act, but it is still legitimate to look back to that of 1947 in construing the definition of “development.”

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It is on the definitions now contained in sections 12 (1) and 221 of the Act of 1962 that the appellants seek an answer to the question whether demolition or, as the appellants call it, demolition per se, can constitute development.

Unfortunately I do not think that the question in this form can be answered because neither in the terminology of the Act, nor in its discernible policy as regards development, is it possible to segregate some identifiable operation, for which the description or label “demolition” is apt and to say of it that it does or does not amount to development under the Act. References, indeed, appear, in various contexts, as, for example, in the sections of the Act dealing with listed buildings, or in those which contain enforcement provisions, to demolition, removal, restoration or reinstatement, but these bear meanings which, while appropriate for their subject-matter, carry no consistent implications as regards the meaning of expressions in other contexts. The Act seems to be drafted empirically rather than logically.

One must start with section 12 . It is not easy to construe, and certain negative propositions are easier to state than positive.

1. I think it is clear that the exception stated in section 12 (2) (a) cannot be used to establish the meaning of "development" in section 12 (1) . Though I endorse the result of the judgments in the Court of Appeal, I cannot agree with passages in the judgments which extract from section 12 (2) (a) the words "materially affect the external appearance of the building," say that the works in question do this, and so conclude that they are development within the meaning of section 12 (1). Qualifying words in an exception cannot be introduced into the rule so as to enlarge the scope of the rule: so, if an operation is not one of the kinds included in section 12 (1) it cannot be made into one merely because a condition of exemption is not complied with. Relevantly, if demolition is not included in section 12 (1), there is nothing for the exemption in section 12 (2)(a) to bite on and the question whether the external appearance is affected has no relevance or application. What is development must be ascertained from section 12 (1) aided by section 221 .
2. I do not find it possible to identify a genus in the words "building, engineering, mining or other operations." It is hardly good enough, when the Minister's decision is being reviewed for error of law, to say that "other operations" must be construed ejusdem generis: that the genus need not be defined in detail, but that it includes only operations of a certain scale. I agree with the Court of Appeal and your Lordships in thinking both that this is not an adequate test (if it is a test at all) of the genus and that in any event it led the Divisional Court to the wrong result. No more satisfactory was the test suggested by the Minister who said that the genus was identified by the word "development" — a word which he claimed everyone understands. But since the task on which we are engaged is to ascertain what "development," as defined, means, it hardly seems possible to interpret the words by which "development" is defined by reference to the, ex hypothesi, unknown meaning which "development" bears. Such a process is one of levitation by intellectual bootstrap.

Finally there is the appellants' suggestion that the relevant operations must at least be of a constructive character, leading to an identifiable and positive result. I think that this is near the heart of the matter, and that there is an important element of truth in the argument. I would accept, and think it important to emphasise, that the planning legislation should be approached with a disposition not to bring within its ambit, unless ***765** specific words so require, operations in relation to land which do not produce results of this kind, that is to say, results (I deal only with operations, not with use) of a positive, constructive, identifiable character. In my opinion, the appellants succeed in showing that neither the development of the legislation, nor the successive descriptions of "development," nor the policy of control and, while it lasted, of charge on development, nor common sense or common expectation, require or suggest that the mere removal of a structure, or a building, or of a part of a building should be subject to the code. And I think that they derive important support for this argument from the Minister's circular No. 67 of February 15, 1949, in which he stated that he was

> "advised that the demolition of a building does not of itself involve development, although, of course, it may form part of a building operation, or lead to the making of a material change in the use of the land upon which it stood."

The advice referred to may not have been quite correct (I return to this point) but in giving this information to planning authorities, the Minister was undoubtedly reflecting a common sense and accepted opinion as to the general nature of development. I accept of course that, as an interpretation of the Act of 1947, under which it was issued, the circular had no legal status: but it acquired vitality and strength when, through the years, it passed, as it certainly did, into planning practice and text books, was acted on, as it certainly was, in planning decisions, and when the Act of 1962 (and I may add the Town and Country Planning Act of 1968) maintained the same definition of "development" under which it was issued.

So far, for the appellants, so good: they establish, in my opinion, this general approach to the construction of "development" and I think that it assists them in the limitation of the words "other operations." But, as I said above, this can only be so unless specific words so require. The governing statutory words remain those of sections 12 and 221 , and where these fairly apply, they must prevail. They cannot be prevented from applying to a particular operation, which comes within them, by the mere fact that, in addition, the descriptive label "demolition" would fit that operation.

The Minister's circular to be fully accurate, should then have said not that it (the demolition of a building) may form part of a building operation, but that, what might be described as demolition may fall within one of the specific types of operation described in section 12 (1) and rank as development accordingly.

The Minister has held here that the removal of the embankments was an engineering operation, and that removal of the walls would be a building operation. Neither of these conclusions appears to me to have been inevitable: he might have held that both or either would be demolition and that neither the one fell under "engineering" nor the other under "building." But both were marginal decisions given in relation to a very special case, and I think were open to him to make as he did. The Act, in general, as the subject-matter, probably requires, is drafted with a wide mesh; its use of expressions, particularly those relating to building, demolition; alteration and the reverse of these operations, is not precise or consistent — as to engineering or mining there is no definition at all — and the sections conferring power of decision on the Minister, in particular section 43 , show that decisions on marginal questions as to development — what it is and what it is not — are intended to be left to him through or with his ***766** expert and professional staff. I am of opinion that the decisions he reached were within his permitted field and were not wrong in law. This leads to the conclusion that the appeal must be dismissed.

LORD PEARSON

My Lords, this appeal relates to a group of six buildings near Meriden, which is a village in the countryside between Birmingham and Coventry and about nine miles from each. These buildings were constructed in 1938 or 1939 as magazines, two for the storage of explosives and four for the storage of ammunition. Each consisted of a central block, surrounding blast walls about four feet away from the central block and sloping embankments extending outwards for about eight to ten feet from near the top of the blast walls to ground level. The two magazines for explosives were made of brick, and each of them was about 25 to 30 feet long, 12 feet wide and 11 feet high, and had a narrow entrance at each end. The four magazines for ammunition were made of concrete and each of them was about 70 feet long, 30 feet wide and 11 feet high rising to 13 feet at the roofs centres and had two narrow entrances at each end, and at the sides had windows with their tops about level with the tops of the blast walls. The embankments consisted partly of soil and partly of ash and brick rubble, and the sloping surfaces were covered with vegetation.

In 1962 the Minister on appeal decided that the magazines possessed an existing use on the appointed day within Class X of the Use Classes Order, 1950 . I understand that under section 12 (2) (f) of the Town and Country Planning Act, 1962 , the effect of the Minister's decision was that use of the magazines for storage of any kind was permitted.

The magazines, however, were purpose-built. They had been specially designed and constructed for use as magazines for storing explosives and ammunition. The blast walls, supported by the embankments, would tend to confine the effect of any explosion that might occur. The embankments with their green vegetation tended to camouflage the group of buildings — the explosives and ammunition depot — against possible enemy air attack. Also the green embankments largely concealed the otherwise unsightly buildings from the view of local residents and passers-by. The magazines were not suitable for use as warehouses for general storage. The entrances were very narrow, being only about four feet wide and seven feet high and preventing loading and unloading of large-sized goods. The presence of the embankments made access to the roofs of the central blocks very easy, and intruders could break the windows and steal goods from inside. The blast walls kept light from the windows. There was dampness in the narrow passages between the central blocks and the blast walls.

The appellants acquired the group of buildings in 1964. Early in 1966, without having obtained planning permission, they set out to remove the embankments, demolish the blast walls and enlarge the entrances to the central blocks. The effect would have been to convert the purpose-built magazines into warehouses for general storage. But when they had removed, or begun to remove, the embankments, there was local opposition on the ground that the ugly buildings were being exposed to view. On March 30, 1966, the Meriden Rural District Council, exercising planning control powers delegated to them by the Warwickshire County Council, served on the appellants an enforcement notice under section 45 of the Act of 1962, describing the removal of the embankments as unauthorised development and requiring it to be discontinued and requiring steps to be taken to replace the embankments. The appellants, on April 9, 1966, appealed to the Minister against the enforcement notice. The appeal was **767* initially under paragraph (d) of section 46 (1) of the Act, and later was under paragraph (c) also. Paragraph (c), so far as material, is “that no planning permission was required in respect of that development.” Paragraph (d) is “that what is assumed in the enforcement notice to be development did not constitute or involve development.” The enforcement notice and the appeal to the Minister against it related only to the embankment. The blast walls were still standing.

In July, 1966, however, the appellants under section 43 of the Act of 1962 applied to the Meriden Rural District Council for a determination whether in the opinion of the council certain proposed works, including removal of the blast walls, would constitute development. In October, 1966, under the provisions of section 43 (2) and sections 23 and24 of the Act of 1962, there was an appeal by the appellants to the Minister on the basis that the council had not made a determination within the appropriate period.

Thus, there were two appeals by the appellants to the Minister, one raising in relation to the enforcement notice the question whether the actual removal of the embankment was development requiring planning permission, and the other raising under section 43 the question whether the proposed removal of the blast walls would be development requiring planning permission.

In December, 1966, a ministry inspector held an inquiry into the appeal relating to the enforcement notice and the removal of the embankments. The inspector's report, dated January 11, 1967, included a description of the appeal site and surroundings, the gist of the representations made at the inquiry, and his findings of fact, conclusions and recommendations. Representations on behalf of the appellants were made by Mr. S. J. Williams, a director of the appellants. The report shows that he agreed in cross-examination

> “that the blast walls and soil embankments were probably an integral part when built, the embankments making the blast walls stronger and deadening blast effect, and that the blast walls were probably an integral part of the construction of a building which contained ammunition.”

The inspector set out his finding of fact in paragraph 100 of his report and in paragraphs 101 and 102 his conclusions, including the following:

> “The legal implications of the above facts are matters for consideration by the Minister and his legal advisers, but it appears to me that:-
>
> > (1) Surrounding embankments and blast walls are a necessary and integral part of buildings used for storing explosives and together they constitute a magazine. … Their appearance has been materially affected by the removal of the embankments, which work was an engineering operation constituting development. … On the planning merits of the case I am of the opinion that the exposure of the concrete blast walls and buildings forming these magazines, by the removal of the grass and vegetation covered embankments, has resulted in these ugly structures being much more prominent in the rural surroundings. The quality of the countryside here, and its effectiveness as a part of a proposed green belt, has accordingly deteriorated to an unacceptable extent. …”

The inspector's recommendation was that: “If it is decided that development requiring planning permission is involved, planning permission be not granted”

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In a letter of decision dated May 16, 1967, the Minister considered the representations made at the inquiry, and the inspector's findings of fact and conclusions and recommendations. In the course of the letter the Minister said:

> "The council maintained that the blast walls and the embankments were an integral part of each of the buildings. This latter view is accepted as the correct one in this case. … The removal of the embankments was an engineering operation clearly falling into section 12 (1) of the Act. This operation constituted material development for which planning permission was required. …"

The Minister upheld the enforcement notice, refused planning permission for the development to which it related (i.e., the actual removal of the embankments) and dismissed the appeal.

In the other appeal, that relating to the proposed removal of the blast walls, no inquiry was held but written representations were made to and considered by the Minister. In a second letter of decision dated May 16, 1967, the Minister dealt with this appeal. In the course of his letter he said:

> "With regard to the removal of the walls, the company argued that the blast walls were separate from the storage units and that as they in no way afforded any support to the buildings their removal could not be said to affect the external appearance of the buildings and further that demolition of itself does not involve development. In the opinion of the local planning authority the blast walls (and the earth banks which previously surrounded them) were all part of the original design of the buildings and their removal would therefore materially affect the external appearance of the buildings. It is noted that the buildings were erected shortly before the last war, some were used for the storage of ammunition and some for the storage of explosives. The blast walls and soil embankments were provided to prevent damage from explosion and to conceal the internal structure. The council's view that the blast walls form part of the buildings is accepted as a fact and it is considered that the removal of the blast walls would therefore constitute an alteration of the buildings, and that it would materially affect the external appearance of the buildings. In these circumstances the provisions of section 12 (2) (a) of the Act do not apply to the proposal which therefore constitutes development of the land for which planning permission is required. …"

The Minister determined accordingly and dismissed the appeal.

The appellants under sections 180 and 181 of the Act appealed to the High Court against both decisions of the Minister. The Queen's Bench Divisional Court allowed the appeal, deciding in favour of the appellants, but the Court of Appeal reversed that decision.

Under sections 180 and 181 of the Act an appeal to the High Court against a decision of the Minister can only be made on a point of law. There could be no such appeal against findings of primary facts. The Minister has, however, drawn inferences from the primary facts on the following important points which are in dispute:

(1) He held that the blast walls and the embankments were integral parts of the magazines;

(2) He held in effect that the removal of the blast walls would be a structural alteration of the magazines and would therefore constitute ***769** building operations as defined in the Act and (not being within section 12 (2)(a)) would be development requiring planning permission; and

(3) He held that the removal of the embankments was an engineering operation within the meaning of the Act and so was development requiring planning permission.

These inferences involve an element of construction of the Act and, therefore, of law, and so are in principle appealable. But an appeal cannot succeed unless it is shown that there is some error of law. In dealing with questions of mixed fact and law, such as those which arise in this appeal, it should be borne in mind that the Minister, advised by his department, is likely to have the benefit of expert knowledge and experience of building and engineering matters.

(1) I cannot see that there is any error of law in the Minister's view, agreeing with that of the local authority and the inspector, that the blast walls and the embankments were integral parts of the magazines. He did not take into account any irrelevant factors or leave out of account any relevant factors, and it cannot be said that his view is manifestly wrong or unreasonable. The gap between the central block and the blast walls is quite small, but was duly taken into account. I think the character of the whole structure in each case as a purpose-built magazine is an important reason for treating it as a single unit (unum quid in the convenient Scottish phrase). If you take away the blast walls and embankments you deprive the structure of its character as a magazine and convert it into a warehouse for general storage.

(2) The second point requires consideration of section 12 (1) and (2) (a) and the definitions of "building" and "building operations" in section 221 . Section 12 (1) and (2) (a) are as follows:—

> "12. —
>
> (1) In this Act, except where the context otherwise requires, 'development', subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.
>
> (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:-
>
> (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building and (in either case) are not works for making good war damage."

The definitions of "building" and "building operations" in section 221 are as follows:

> "'building' includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building; …
> "'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder; …"

Now as the whole magazine in each case has been treated as a unum quid, that is to say as a single building or structure or erection, the removal of its blast walls would very clearly constitute a structural alteration of it. The exception provided by section 12 (2) (a) is not applicable because the removal of the blast walls would materially affect the external appearance ***770** of the building or structure or erection. Accordingly the Minister's decision under section 43 with regard to the blast walls should be upheld.

(3) Thirdly, there is the removal of the embankments. I would have been inclined to regard this also as a structural alteration of the magazine treated as a single building, structure or erection, and on that basis there would be a building operation within the definition and it would be development requiring planning permission. There is also the possibility that the removal of the embankments might come within "other operations normally undertaken by a person carrying on business as a builder," but without expert knowledge or expert evidence I do not feel able to form a view on this possibility. The Minister, however, did not decide on either of these grounds. He decided on the ground that the removal of the embankments was an "engineering operation." There is in the Act no definition of "engineering operation" except that the expression includes the formation or laying out of means of access to highways. In the *Divisional Court [1968] 1 All E.R. 62* Widgery J., with whom Lord Parker C.J. and Chapman J. concurred, said, at p. 65:

> "… this little job of shifting a few cubic yards of soil with a digger and a lorry, is not, in my judgment, an operation of a kind which could ever be dignified with the title of an engineering operation."

If I were able to agree with that description of the operation on the facts of this case I would agree that it was not an engineering operation. But the evidence shows, to my mind, that the removal of the embankments from the six magazines of the sizes previously described was not "a little job of shifting a few cubic yards of soil." It was rather a large job. There were large quantities of soil and ash and brick rubble to be moved. The appellants, naturally, would, and in fact did, employ contractors to perform the operation. The materials did not only have to be moved: they also had to be disposed of. The contractors were Bencif (Construction) Ltd., sports ground and tarmacadam contractors, and they stated in a letter that they had hired transport from various firms, and that the content of the embankments was made up of one-third top soil and sub-soil and two-thirds ash and brick rubble, and that the top soil was delivered to the new incinerator site at Castle Bromwich, the ash and brick rubble to various sites and the sub-soil to Barston. It was an operation of some magnitude. In my opinion, there was evidence on which the Minister could reasonably accept the view of the local authority and the inspector that the removal of the embankments constituted an engineering operation and, therefore, was development requiring planning permission.

The argument for the appellants was mainly based on the proposition that demolition, or demolition in or by itself, or demolition per se, does not constitute development. I think there is in this proposition some truth but only a limited amount of truth. On the one hand, there is in section 12 and in the relevant definitions in section 221 no mention of or reference to demolition or removal or any such operation. Therefore, an operation does not qualify as development by virtue of being a demolition or removal operation. It is not right to say "This is a demolition or removal operation: therefore, it is development." On the other hand, there are not in section 12 or in the relevant definitions in section 221 any words excluding operations from being development if they are demolition or removal operations. An operation is not disqualified for being development because it is a demolition or removal operation. It is not right to say "This is a demolition or removal operation: therefore, it cannot be development." Notwithstanding ***771** that an operation is a demolition or removal operation, one still has to see whether it comes within the scope of development as defined in section 12 assisted by section 221. It may be within the definition of "building operations," e.g., because it constitutes a structural alteration of a building or because it is such an operation as to be normally undertaken by a person carrying on business as a builder. It may be an engineering operation. Whether it is or not any of those things depends on the facts of the particular case.

The argument for the appellants also sought to apply the ejusdem generis rule to the words in section 12 (1) "the carrying out of building, engineering, mining or other operations in, on, over or under land." It was contended that there must be one single genus comprising building, engineering and mining operations, and that the other operations must belong to this genus. It was further contended that the single genus was of positive, constructive operations and, therefore, could not include any negative, destructive operations and, therefore, could not include any operations of demolition or removal. I think there is a first step which can properly be taken along this line of argument: the "other operations in, on, over or under land" must be in some way restricted by the juxtaposition of these words with the words, "building, engineering, mining": if the "other operations" were any operations whatsoever in, on, under or over land, there would be no need to mention specifically building, engineering or mining: therefore, it is to be inferred that the draftsman or Parliament intended to deal primarily with building, engineering or mining operations but also intended secondarily to bring in some other operations similar to these specified operations or to some of them. This first step would be covered by the maxim noscitur a sociis. I doubt whether in construing this subsection — seeking the intention to be found in it — it is safe to say that there must be a single genus comprising building operations, engineering operations and mining operations and the other operations must be fitted into that genus. Another possible construction which can be suggested is that there are three genera and the other operations must be similar to building operations or to engineering operations or to mining operations. However this may be, I think the sufficient answer in this case is that if there is a single genus it cannot be of the kind suggested, because it has to include mining operations, which so far as they affect the land are not positive and constructive but negative and destructive operations. For instance, coal-mining demolishes and removes the seam of coal, leaving behind in the land a subterranean hole partly filled with waste and perhaps shored up but not having any utility and possibly causing disturbance and eventually subsidence of the upper strata. Secondly, there are operations which are both destructive and constructive. If a piece of ground is cleared of buildings and levelled for use as a sports ground or aerodrome, there is a destruction of the buildings and the mounds of earth but there is created the useful flat surface. In some circumstances it could be regarded as a positive and constructive operation.

In my opinion, the appellants' arguments cannot prevail. I would dismiss the appeal.

C. J. E.

Representation

Solicitors: Keen Marsland & Co. for Tompkins & Co., Birmingham; Solicitor, Ministry of Housing and Local Government; Sharpe, Pritchard & Co.

Appeal dismissed with costs.

Footnotes

1 Town and Country Planning Act, 1962, s. 12 : "(1) In this Act, except where the context otherwise requires, 'development' … means the carrying out of building, engineering, mining or other operations, in, on, over or under land, or the making of any material change in the use of any buildings or other land. (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land … (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which … do not materially affect the external appearance of the building …" S. 221 (1) : "… 'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder …"

Eatherley v London Borough of Camden v James Ireland

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
2 December 2016

Case No: CO/3055/2016

High Court of Justice Queen's Bench Division Planning Court

[2016] EWHC 3108 (Admin), 2016 WL 06989230

Before: The Hon. Mr Justice Cranston

Date: 02/12/2016

As Approved by the Court

Hearing date: 22 November 2016

Representation

Mr Martin Westgate QC , Mr Gwion Lewis and Mr Matthew Fraser (instructed by Hodge Jones & Allen Solicitors) for the Claimant.
Mr Timothy Straker QC and Ms Sappho Dias (instructed by Mr Pritej Mistry) for the Defendant.
Mr Meyric Lewis (instructed by Ashtons Legal) for the Interested Party.

Approved Judgment

The Hon. Mr Justice Cranston

Introduction

1. This is a challenge to the decision of the London Borough of Camden ("the Council") to grant a lawful development certificate under section 192 of the Town and Country Planning Act 1990 ("the 1990 Act") to the interested party, Mr James Ireland. It was for a development described in it as the excavation of a single story basement under the footprint of what is a terrace house in north London. The challenge is brought by a neighbour, Mr Michael Eatherley.

2. The challenge is by means of a claim for judicial review and raises a question about the extent to which subterranean development can be carried out relying on the current regime of permitted development rights. The question is of general interest but arises particularly frequently in central London because of economic and social factors, in general terms, the increasing pressure for space. It is a matter of controversy in the planning world and there is a split between local planning authorities as to the correct answer: Lisle-Mainwaring v. Royal Borough of Kensington and Chelsea [2015] EWHC 2105 (Admin), [43]-[45], per Lang J.

Background

3. On 18 December 2015, Mr Ireland applied for a lawful development certificate for the formation of new basement accommodation. He had applied in November 2013 with a basement proposal including a front lightwell, but that application was withdrawn. An application for a lawful development certificate was made in March 2014, but that was rejected by the Council's development control (planning) committee in October 2014. An appeal against that decision was later withdrawn.

4. The December 2015 application was accompanied by a series of drawings and a design and access statement dated March 2014. The proposal was submitted under permitted development rights as set out within the Council's policy *CPG4 Basement and Lightwells* "which allows such applications that are not within Conservation Areas or subject to Article 4 Directions." The Council's director of culture and environment referred Mr Ireland's application to the planning committee.

5. The officer's report for the meeting of the planning committee recorded that the existing floor space of Mr Ireland's house was 128 square metres; the proposed floor space with the basement would be 161 square metres. The report described the site as comprising a two storey, mid-terrace, single family dwellinghouse with rooms in the roof located on the north side of the street. The site was not listed nor was it located within a conservation area. The proposal was outlined as follows:

> "The proposed works comprise the excavation of a basement beneath the footprint of the existing dwellinghouse. The proposed depth of the basement is approximately 2.85m, with the width (side to side of the house) a maximum of 4.5m and length (front to back of house) a maximum of 7.5m. A single internal staircase is proposed to link the existing ground floor with the proposed basement. To clarify, the proposed basement does not include any lightwells or associated works which would allow natural light to this space."

6. The officer's report moved on to review the inspectors' decisions in two other basement cases in the borough, when appeals by applicants against the Council's refusals were allowed. It also mentioned three approvals of basements by the Council – one basement, one basement extension and one wine cellar below a basement. The officer's report stated that there were 15 objections from adjoining occupiers, including a petition with 32 signatories. Among the objections were that:

- the construction work will be very disruptive to residents
- as the street is so narrow the impact of the dirt and noise from the excavations is going to be exaggerated
- road access will be limited due to the builders' vehicles, diggers, skips, etc.
- the excavating of the ground, design of the retaining walls and propping arrangements are an "engineering operation"
- there will be a loss of parking for residents
- there will be structural damage to adjacent houses
- the works will create instability to the houses and street given the fragility of these mid-nineteenth century workers' cottages
- the creation of the basement will set a precedent and ruin an attractive street.

The ward councillor, Cllr Kelly, supported the residents.

7. The officer's report noted that what was involved was a legal determination. No account could be taken of policy or guidance within the Camden development plans or the planning merits of the scheme in terms of issues such as its impact on hydrogeology, structural stability, neighbour amenity, and transport.

8. Under the heading "Assessment", the report first noted that the Council had had a number of appeals allowed for the construction of a basement under permitted development rights. Costs had been awarded against it. The report then turned to consider in tabular form the limitations, conditions and exceptions of Class A, Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 , SI 2015 No 596 ("the GPDO"). It was satisfied that the proposal met them.

9. Under the sub-heading "Engineering", the officer's report considered whether the engineering activities associated with basement construction were within the Class A right. Earlier it had noted that the local residents' association had claimed that the proposals involved excavation works which, as a matter of fact and degree, constituted "an engineering operation" which did not benefit from any permitted development right under section 55 of the 1990 Act. After further discussion of the two recent appeal decisions by planning inspectors, and legal advice which had been given on the issue, the report reached an overall conclusion on the engineering aspects as follows:

> "6.24 The proposals [are] for a new basement under the footprint of the house with a depth of 2.8m from ground floor to top of basement slab. The basement footprint would be c33sqm. No lightwells are proposed. The basement works will, by necessity, involve temporary engineering works associated with protecting the structural stability of the house and neighbouring building. However it is considered that these works would be entirely part of the basement works to [the house], and they do not constitute 'a separate activity of substance that is not ancillary to the activity that benefits from permitted development rights.'"

The quotation in the passage was from the inspector's decision in one of the two appeals.

10. The officer's report concluded that the proposal could be considered permitted development as it fell under Class A in the GPDO and that the committee should grant a certificate of lawfulness, subject to a section 106 legal agreement.

11. The section 106 agreement arose because Mr Ireland had offered to enter into it as a measure of goodwill to secure a construction management plan. The report had welcomed this and, on that basis, included it in the recommendation.

12. In the section 106 agreement the construction management plan is defined in terms of the construction phase of the development. It is to include details of the environmental protection, highway safety and community liaison measures proposed to mitigate potential impacts of the works; how the health effects and amenity of local residences and others are to be ameliorated and monitored; and traffic measures, including procedures for notifying residents in advance of major operations. Under the section 106 agreement, Mr Ireland agrees that, amongst other things, the Council will not approve the construction management plan unless it demonstrates to the Council's reasonable satisfaction that the construction phase of the development can be carried out safely and with minimal possible impact and disturbance to the surrounding environment and highway network.

13. Once the section 106 agreement between the Council and Mr Ireland was in place, the Council granted the certificate of lawfulness dated 5 May 2016.

14. Meanwhile, the claimant, Mr Eatherley, had obtained a *Commentary on Mr Ireland's proposal* ("the Commentary") from a chartered civil engineer employed by the consultant engineers, Arup. In an overview of the nature of the engineering involved, the Commentary stated:

> "A basement dug beneath an existing building within a terrace is one of the riskiest situations in which to construct a basement. Because the property shares its existing foundations with its neighbours and also because it provides lateral support to its neighbours, any movement of the existing house resulting from the works will directly impact on its neighbours."

The Commentary continued that construction of the proposed basement could not be considered simply as a building operation. Both the permanent and temporary works needed to be designed by a qualified civil engineer to ensure that the balance of forces in both directions was understood and controlled. There may be works involved in fitting out the basement which could be defined as building operations, it explained, but these would come later, once the permanent basement box and its permanent structural supports were in place.

15. There was then a discussion in the Commentary of the possible design of the basement and the potential ground movements and damage. Typically with basements, it said, an underpinning solution was adopted. Temporary and permanent lateral support measures had to be considered, the vertical loads on the existing foundations and bearing capacity needed assessing, and the design developed sufficiently "to result in a robust ground movement and damage assessment for the adjacent and nearby properties and any critical infrastructure…". In addition, said the Commentary, any impact on the groundwater flow and the drainage system local to the site had to be assessed as not significant.

16. There was also a section in the Commentary on the need to assess the impact of the construction on the street. The work would probably take several months to complete. Demolition material from the existing ground floor and any other internal demolition, and excavated ground from within the new basement area, would need to be removed. Excavation of the underpins and the internal basement space would lead to an in situ volume of ground of about 8m long x 5m wide x 3m deep = $120m^3$ being excavated. Allowing a typical bulking factor from in situ to back of lorry of 1.4 to 1.5, this would lead to a volume of excavated material of about $180m^3$. New materials and concrete would need to be brought in. The construction vehicles would need space to park on the street, at least for certain periods. There would be noise and potentially dust associated with the works. Public safety would need to be ensured.

The 1990 Act, the GPDO and case law

17. Planning permission is required for carrying out any development of land: Town and Country Planning Act 1990 ("the 1990 Act"), s.57(1) . Section 55(1) of the 1990 Act defines "development" as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of buildings or other land". Section 55(1A) defines "building operations" as including: (a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder. "Engineering operations" are not defined by the 1990 Act, except that in section 336 the term is defined to include "the formation or laying out of means of access to highways."

18. Section 55(2)(a) makes clear that works begun after 5 December 1968 for the alteration of a building by providing additional space in it underground constitutes development for the purposes of the 1990 Act. So far as relevant that section provides:

> "(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land
>
> (a) the carrying out for the maintenance, improvement or other alteration of any building of works which –
>
> (i) affect only the interior of the building, or
>
> (ii) do not materially affect the external appearance of the building, and are not works for making good war damage or works begun after 5 th December 1968 for the alteration of a building by providing additional space in it underground."

19. Certificates of lawfulness of a proposed development are dealt with in section 192 of the 1990 Act. If the local planning authority is provided with information satisfying it that the use or operations described would be lawful if begun at the time

of the application, it must issue a certificate: s.192(2) . The lawfulness of any use or operations for which a certificate is in force is conclusively presumed unless there is a material change in any of the relevant matters before the use or operations are begun: s.192(4) .

20. Under the 1990 Act, planning permission may be granted in various ways, including by means of a development order made by the Secretary of State pursuant to section 59 . Section 60(1) provides that permission granted by a development order may be subject to conditions.

21. One such development order made under section 59(1) is the GPDO. As the *Encyclopaedia of Planning Law and Practice* explains, general development orders had their origin in the Housing, Town Planning etc Act 1919. They were designed to give the local government board power to permit the development of estates and buildings to proceed, pending the adoption of a town planning scheme: para. 3B-1001.3. The idea behind such orders in the Town and Country Planning Act 1947 was that, being revocable, they could relax or tighten restrictions in such a way as to encourage forms of development which were from time to time the most necessary or desirable. The first such order under that Act in 1948 was replaced in 1950 by an order which broadened development rights so as to remove from the need to obtain express planning permission a number of minor operations. This had occupied an amount of time and resources out of all proportion to their importance to planning: para. 3B-1001.4.

22. The Explanatory Memorandum to the current GPDO states that it

> "grants permission for a range of predominantly minor development, subject to certain limitations and conditions."

23. Article 3 of the GPDO provides for permitted development.

> "(1) Subject to the provisions of this Order and regulations 73 to 76 of the Conservation of Habitats and Species Regulations 2010 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2 .
>
> (2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2 ."

Generally speaking, Article 3 does not permit development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations"): Article 3(10) .

24. The Secretary of State or a local planning authority may make directions under Article 4 of the GPDO so that what would otherwise fall within Article 3 may not be carried out unless specific planning permission is granted.

25. On 3 October 2016 the Council confirmed a direction made under Article 4(1) of the GPDO, covering the whole of the borough. From 1 June 2017 planning permission will be required for basements. The direction covers:

> "The enlargement, improvement or other alteration of a dwellinghouse by carrying out below the dwellinghouse or its curtilage of basement or lightwell development integral to and associated with basement development, being development comprised within Class A, Part 1 of Schedule 2 to the Order and not being development comprised within any other Class."

26. Schedule 2 to the GPDO, "Permitted development rights", is divided into a number of parts. Part 1 covers "Development within the curtilage of a dwellinghouse". Class A of part 1 is entitled "enlargement, improvement or other alteration of a dwellinghouse". It provides, in part:

"Permitted Development

A. The enlargement, improvement or other alteration of a dwellinghouse.

Development not permitted

A.1 Development is not permitted by Class A if –

(a) …

(b) as a result of the works, the total area of ground covered by buildings within the cartilage of the dwellinghouse (other than the original dwellinghouse) would exceed 50% of the total area of the curtilage (excluding the ground area of the original dwellinghouse);

(c) the height of the part of the dwellinghouse enlarged, improved or altered would exceed the height of the highest part of the roof of the existing dwellinghouse;

(d) the height of the eaves of the part of the dwellinghouse enlarged, improved or altered would exceed the height of the eaves of the existing dwellinghouse;

(e) the enlarged part of the dwellinghouse would extend beyond a wall which –

(i) forms the principal elevation of the original dwellinghouse; or

(ii) fronts a highway and forms a side elevation of the original dwellinghouse;

(f) subject to paragraph (g), the enlarged part of the dwellinghouse would have a single storey and –

(i) extend beyond the rear wall of the original dwellinghouse by more than 4 metres in the case of a detached dwellinghouse, or 3 metres in the case of any other dwellinghouse, or

(ii) exceed 4 metres in height;

(g) …

(h) the enlarged part of the dwellinghouse would have more than a single storey and –

(i) extend beyond the rear wall of the original dwellinghouse by more than 3 metres, or

(ii) be within 7 metres of any boundary of the curtilage of the dwellinghouse opposite the rear wall of the dwellinghouse;

…

(i) the enlarged part of the dwellinghouse would be within 2 metres of the boundary of the curtilage of the dwellinghouse, and the height of the eaves of the enlarged part would exceed 3 metres;

(j) the enlarged part of the dwellinghouse would extend beyond a wall forming a side elevation of the original dwellinghouse, and would –

(i) exceed 4 metres in height,

(ii) have more than a single storey, or

(iii) have a width greater than half the width of the original dwellinghouse; or

(k) it would consist of or include –

(i) the construction or provision of a verandah, balcony or raised platform,

(ii) the installation, alteration or replacement of a microwave antenna,

(iii) the installation, alteration or replacement of a chimney, flue or soil and vent pipe, or

(iv) an alteration to any part of the roof of the dwellinghouse.

…

Conditions

A.3 Development is permitted by Class A subject to the following conditions

…

(c) where the enlarged part of the dwellinghouse has more than a single storey, the roof pitch of the enlarged part must, so far as practicable, be the same as the roof pitch of the original dwellinghouse."

27. Class B of Part 1 deals with additions to the roof of a dwellinghouse, Class C with other alterations to its roof, Class D with porches, Class E with a building, enclosure, or swimming pool required for a purpose incidental to the enjoyment of the dwellinghouse, Class F with hard surfaces, Class G with chimneys, and Class H with antennae.

28. Part 2 to Schedule 2 provides for minor operations. Class A covers gates, fences and walls.

29. Part 6 of Schedule 2 is headed "Agricultural and forestry". Class A is concerned with agricultural development on units of 5 hectares or more. It provides in part:

"Permitted development

A. The carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of –

(a) works for the erection, extension or alteration of a building; or

(b) any excavation or engineering operations, which are reasonably necessary for the purposes of agriculture within that unit.

Development not permitted

A.1 Development is not permitted by Class A if –

…

(c) it would consist of, or include, the erection, extension or alteration of a dwelling…"

30. *West Bowers Farm Products v. Essex County Council (1985) 50 P & CR 368* concerned what was the counterpart to Part 6 of Schedule 2 regarding agricultural and forestry development in the 1977 GPDO. The farm's planning proposal in that case was for an irrigation reservoir on a farm of some 18 acres in extent and 6.5 metres in depth. The construction of the reservoir necessitated the extraction of large quantities of sand and gravel, which were to be sold. The issue was whether this extraction fell within permitted development in the GPDO or constituted the use of the land for the winning or working of minerals for which planning permission was required. Nolan J rejected the farmers' case that the proposal constituted only the carrying out of engineering operations requisite for the purposes of agriculture.

31. The Court of Appeal agreed. It held that whether a single process amounted for planning purposes to two activities was a question of fact and degree. Nourse LJ said that the test was objective, not subjective, so that the purpose and motive of the developer were irrelevant. What was needed was that the characteristics of a hybrid had to be recognisable in a substantial degree. The farm had submitted that the impossibility of constructing the reservoir without extracting the gravel demonstrated that the latter activity was an integral part of the former and there was one indivisible process. Nourse LJ said (at 374):

> "I accept the premise of that submission but reject the conclusion. The planning legislation is not impressed by the indivisibility of single processes. It cares only for their effects. A single process may for planning purposes amount to two activities. Whether it does so or not is a question of fact and degree. If it involves two activities, each of substance, so that one is not merely ancillary to the other, then both require permission.
>
> Applying that test to the facts of this case, I am left in no doubt that the construction of the reservoir will involve two activities, each of substance. The extraction of so much gravel will not merely be ancillary to the carrying out of the engineering operations, as it would usually be, for example, where foundations were dug for a bridge or a building…"

32. Neill LJ agreed, highlighting that the development would yield many thousands of tons of minerals. Sir John Donaldson MR said that purpose was a factor to be taken into account and added (at 378):

> "It is a question of fact and degree in each case. Looking at the facts of this case, which involves the removal of so large a quantity of minerals, the only possible conclusion is that the development would consist of a mining operation followed by an engineering operation."

33. In *Wycombe DC v. Secretary of State for the Environment [1995] JPL 223* , Class F of the GPDO then in force was at issue. The front garden of a dwellinghouse in an elevated position on the north side of a road was almost totally excavated, leaving a hard standing for vehicles on level with the road - 6.8 metres wide, 4.5 metres deep and 2 metres in height at the rear. The Secretary of State decided on appeal that there was no breach of planning control because what was done was permitted under Class A.

34. In the High Court Nigel Macleod QC, sitting as a judge of the High Court, agreed that the proper approach to the application of Class F was to look first at what the order permitted, and then to consider as a matter of fact and degree

whether anything done or to be done beyond that specific permission was incidental to what was specifically permitted. He said (at 225-226):

> "In the present case the Secretary of State had not determined what was incidental to the provision of a hard surface, but went straight to the purpose and the indivisibility of the operation. He had substantial regard to purpose. For example he referred to the "sole purpose of the excavations" and went on to find that "the removal of the necessary quantity of earth to achieve that aim took place as an integral part of the operation …" In that way he had reached his overall conclusion…[T]he Secretary of State was fatally in error in omitting to consider the correct test, and in applying tests which were not appropriate."

Policy and policy development

35. Camden Planning Guidance, *CPG4 Basements and Lightwells* , July 2015, states that while basement developments can help to make efficient use of the borough's limited land, in some cases they may cause harm to the amenity of neighbours, affect the stability of buildings, cause drainage or flooding problems, or damage the character of areas and the natural environment. The guidance considers the principal impacts of basements in Camden such as groundwater flow, land stability, surface flow and flooding and the impacts on neighbours of demolition and construction.

36. The Department of Communities and Local Government's ("DCLG") website, the "Planning Portal", described as a one-stop shop for processing planning applications, includes guidance on various aspect of the planning system, including basements. It reads:

> "Converting an existing residential cellar or basement into a living space is in most cases unlikely to require planning permission as long as it is not a separate unit or unless the usage is significantly changed or a light well is added, which alters the external appearance of the property.
>
> Excavating to create a new basement which involves major works, a new separate unit of accommodation and/or alters the external appearance of the house, such as adding a light well, is likely to require planning permission."

37. The issue of permitted development rights for basements has been on the agenda of central government for some time. In 2007 the DCLG published *Housing Development Consents Review: Implementation of Recommendations* ("the Review"). That stated that the planning system was underpinned by the concept of "impacts". If the impact of a development proposal was acceptable it should proceed; if the impact was not acceptable, ways had to be found to mitigate it, failing which the proposal should not proceed. Such an approach, the Review said, could be applied equally to large and small development proposals. The way in which the planning system dealt with proposals to extend or otherwise alter dwellinghouses mirrored the impact approach. The Review continued:

> "1.13 All additions to dwellinghouses, apart from very minor changes and purely internal alternations, are classed as 'development'. However, not all 'developments' require express planning permission, because many smaller additions to dwellinghouses are granted a "deemed" consent by the GPDO provided they comply with specific criteria relating to their size and position. This creates a situation whereby larger or more prominent additions to dwellinghouses are fully tested through the planning application process to discover whether adverse impacts occur; whilst smaller developments are deemed to be acceptable provided specific tolerances are complied with."

38. As to basements, the Review stated:

> "7.2 Basement extensions are an increasingly popular method of extending houses, particularly in urban areas characterised by terraced houses where other forms of extension may not be possible. The excavation of basements is a

> form of development, but the GPDO is silent as to whether there are circumstances in which basements can be viewed as 'permitted development'. Notwithstanding this silence, the volume limitations imposed by Class A of Part 1 are capable of being interpreted to include basement extensions, and anecdotal evidence suggests that many local authorities do this. A small minority of design guides published by local authorities contain guidance on designing basement extensions, suggesting that a set of tolerances to guide basement extensions could be designed."

39. The DCLG released a consultation paper 2, of the same year, *Changes to Permitted Development: Permitted Development Rights for Householders* , which stated that work was being undertaken to test possible limitations.

40. In November 2008 the Department published *Supplementary Reports: Basement Extensions* . It said that given that roof extensions were covered by a specific category, it was arguable whether basement extensions were simply overlooked when the GPDO was formulated. The document stated:

> "[T]he overwhelming majority of local authorities (see questionnaire results below) interpret Part 1 of the GPDO to include underground extensions. Basement lightwells, on the other hand, being classed as an engineering operation rather than the enlargement of a dwellinghouse, do not benefit from 'permitted development' rights."

Later, the document recommended the creation of a new basement extensions class with limitations on length, breadth and depth, to resolve the anomalous situation in the current GPDO where, unlike roof extensions, basement extensions "are simply not referred to".

41. Most recently, in November 2016, the DCLG published *Basement Developments and the Planning System – Call for Evidence* . This noted that the permitted development rights for householder development allow limited alterations or extensions to dwellinghouses. That provided certainty for householders wishing to carry out development and helped to reduce the administrative burden on local authorities through a reduction in the number of planning applications coming forward. The document also said:

> "Where it is considered that a smaller basement development falls within the specific limitations set out in the Order an application for planning permission is not required."

The arguments

42. The claimant's case is advanced on three grounds: (1) the proposed development includes a substantial engineering operation which is not within the permitted development right relied upon in the certificate; (2) the Council misdirected itself before concluding that the engineering works proposed were not a separate activity of substance, alternatively, if this was a question of planning judgment, the Council's judgment was infected by public law errors and/or in any event irrational; and (3) the interpretation of the Class A permitted development right as including the engineering works proposed in this case frustrated the legislative purpose of section 59 of the 1990 Act or the GPDO and was therefore ultra vires.

43. These grounds reduced in argument mainly to the correct interpretation of the 1990 Act and the GPDO, in particular to the meaning of the permitted development in Class A of Part 1, Schedule 2 , "enlargement, improvement or other alternation of a dwellinghouse". In summary, Mr Westgate QC for the claimant contended that these words did not encompass this basement development because it involved a separate engineering development requiring separate planning permission. By contrast, both Mr Straker QC, for the Council, and Mr Lewis, for Mr Ireland, submitted that his basement proposal fell

squarely within this description of permitted development: it constituted the enlargement, improvement and other alteration of his dwellinghouse.

44. Before turning to what, in my view, is the essential issue, let me consider five other issues between the parties as to the interpretation of this Class A permission, the "enlargement, improvement or other alternation of a dwellinghouse".

45. First, it was put to me that the question in interpreting a permission in the GPDO was how a reasonable reader would understand it, regard being had to any conditions and reasons for them. That was the approach to interpreting planning conditions adopted in *Trump International Golf Club Scotland Limited v. Scottish Ministers [2015] UKSC 74, [2016] 1 WLR 85* , [34], per Lord Hodge (with whom the other judges agreed) and the authorities culminating in it such as *Barnett v. Secretary of State for the Communities and Local Government [2009] EWCA Civ 476; [2010] 1 P & CR 8 [8]* , per Keene LJ; *R v. Ashford Borough Council, exp Shepway District Council [1999] PLCR 12* , pp 19C-20B, per Keene J; and *Carter Commercial Developments Ltd v. Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1994; [2003] JPL 1048, [13]* , per Buxton LJ and [27], per Arden LJ.

46. Although in practice it may not matter, I do not accept this as the governing principle. These cases concerned permissions granted by planning authorities, not those laid down in a statutory instrument. It seems to me that in interpreting a permission in the GPDO one applies the ordinary rules of statutory interpretation. The words, their context and the statutory purpose are relevant to that task.

47. A second area of dispute concerned the purpose behind this development order. Mr Westgate's submissions were, in outline, that there was nothing to indicate that it was intended that the Class A right should extend to include substantial engineering activity. Not only did Mr Straker reject this specific submission, but he contended that the purpose of GPDOs has been expansive, to ensure development happens, thereby encouraging economic activity. It would not facilitate development if local planning authorities were clogged up with applications by householders for permission to build a basement. In any event, development orders were not confined to minor activities and could well have a wider ambit: for example, R (on the application of the Licensed Taxi Drivers Association) v. Transport for London [2016] EWHC 233 (Admin) (the cycle super highway in London).

48. The width of the GPDO (which Mr Straker conceded) to my mind makes the task of determining its overall purpose well nigh impossible. Mr Straker was undoubtedly correct in pointing to its coverage of aerodromes (defined in Article 2(1) of the order) and the specific provision in Article 3 for the Habitats and Species Regulations. That was to fortify his contentions that the GPDO extended beyond minor developments so that basements could fall within Class A of Part 1 . Against that are the permissions in Part 1 of Schedule 1 addressed to chimneys and antennas, and to the minor operations covered in Part 2 with permissions for matters such as gates, fences and walls. To my mind, the GPDO covers a disparate collection of topics, minor and not so minor. One is driven to the words of each individual permission, its attendant conditions and, if it is possible to detect, its underlying purpose.

49. The next area of debate concerned the discussions in the various DCLG documents. Mr Westgate used the recommendation in the 2008 DCLG Supplementary Reports for a new basements class in the GPDO (which was never taken forward) to support his argument that the substantial engineering operation in this case was not within Class A. On the other hand, Mr Straker underlined the document's reference to the fact that, at the time, the overwhelming majority of local authorities interpreted the GPDO to include underground extensions. Mr Straker suggested that, by not making specific provision for basement development when it made the 2015 GPDO, Parliament could be taken to have endorsed that majority view.

50. In the absence of any indication as to Parliament's intention, for instance in an Explanatory Memorandum, there is no way that a Parliamentary intention can be divined from a failure to act. In this case all the documents show is that the issue of basements and permitted development rights has been on the political agenda for some considerable time but that for some reason (perhaps its controversial nature) no clear Parliamentary intention had ever been formulated. To my mind the DCLG documents are of no assistance in interpreting the GPDO, even if they do not fall within the category of extrinsic material which the courts should eschew in interpreting a statutory instrument.

51. A fourth area of contention was over the light thrown on the meaning of this Class A permission because the Council had recently made the direction under Article 4(1) of the GPDO, so that after June next year specific permission for basement developments in Camden will be required. Mr Straker contended that the direction would have been unnecessary if the claimant were correct.

52. To my mind the controversy about the subject over many years, and the differences of opinion, cannot give the making of this Article 4 direction the force Mr Straker suggested. The fact is that Camden, and I understand from Mr Straker other London boroughs, have seized the bull by the horns in the light of central government inactivity and local controversy to make such Article 4 directions.

53. Finally, there was debate about whether reading the Class A permission in the context of its exceptions, limitations and conditions assisted in the resolution of its meaning. Mr Westgate submitted that the limitations, exceptions and conditions to this Class A permission are directed to constraining above-ground building operations. That seems to me to be correct. Mr Straker's response that "storey" could be construed to include a basement does not seem to follow, especially when used in the context of the A.3 condition, quoted earlier in the judgment. However, acceptance of Mr Westgate's premise that none of the limitations, exemptions or conditions to Class A are suitable for basement development does not lead to any conclusions about its application to basements. Because they contemplate above ground development to my mind casts no light on the ordinary meaning of the words of this permitted development, namely, the enlargement, improvement or other alteration of a dwellinghouse.

The crucial issue

54. In my view the issue reduces to one of the meaning of the plain words of the planning permission: Article 3(1) of the GPDO provides that planning permission is granted for the classes of development described as permitted development in Schedule 2 ; Part 1 of Schedule 2 addresses development within the curtilage of a dwellinghouse; and Class A records as permitted development the enlargement, improvement or other alteration of a dwellinghouse. So, the issue is one of the meaning of the planning permission to enlarge, improve or alter a dwellinghouse.

55. For the Council, Mr Straker's submissions in this regard had an attractive simplicity. He proceeded as follows. Development as defined in section 55 covers underground development. Planning permission granted for development includes permission under the GPDO. The words of the permission in Class A of Part 1 of the GPDO are straightforward, English words intended to be understood and utilised by, amongst others, householders. The words embrace domestic basements in that a basement undoubtedly enlarges, improves, or alters a dwellinghouse. Thus when Mr Ireland asked the local planning authority to certify that the formation of new basement accommodation within the curtilage of his residential dwelling was lawful, he was asking for what he already had planning permission to do.

56. Mr Straker drew the analogy with a grant of planning permission for a house. Different parts of its construction may be labelled as building, engineering or other operations. In his submission, the essential point was that the permission to construct a house carries the implication that those operations necessary for its construction are permitted, be they engineering,

building, or other works. The same, in Mr Straker's submission, applied here. The engineering operations for the basement are not gratuitous but necessary for the enlargement, improvement or other alteration of the house. They are part and parcel to the development which has planning permission. There is no separate activity for which planning permission is required, rather activity for the enlargement, improvement and alteration of the dwellinghouse.

57. To my mind the difficulty with these submissions with a basement development is the absence of any boundaries to the permission. Apart from the point about applying the storey limitations in Class A to basements, Mr Straker suggested none. Yet there must be a point where the excavation, underpinning and support for a basement for a dwellinghouse becomes an activity different in character from the enlargement, improvement and alteration of that dwellinghouse. For that reason, engineering operations for the basement are at some point different in character to those involved in the preparation of foundations for a house.

58. Although imprecise, the answer about boundaries drawn from the legal authorities is whether, as a matter of fact and degree, the single process of making the basement amounts to different activities, each of substance, so that the one is not merely ancillary to the other: *West Bowers Farm Products v. Essex County Council* , applied in *Wycombe District Council v. Secretary of State for the Environment* . Mr Lewis protested that to apply a "substantial engineering" test (to put it in broad terms) would be extra-statutory, but that is the law I must apply.

59. In the context of an original "two up two down" terrace house in suburban London, it seems to me that the development of a new basement, when there is nothing underneath at present, could well amount, as a question of fact and degree, to two activities, each of substance. There is the enlargement, improvement and alteration aspect, but there is potentially also an engineering aspect of excavating a space and supporting the house and its neighbours. That is the position, even though the latter is necessary to achieve the developer's aim, indeed is indivisible from it. If there is this separate aspect in the development, it requires planning permission. The Class A right grants planning permission for one of the two activities of the development but not for the engineering aspect.

60. With this as background, let me consider the grounds advanced on the claimant's behalf.

Grounds

Ground 1: proposed development includes a substantial engineering operation that is not within the permitted development right relied upon.

61. Mr Westgate's argument on this ground was that what was involved here was the excavation of a large volume of ground and soil underneath the house, and the necessary underpinning and support, to enable the building works involved in constructing the basement to take place. The Council's decision to grant a certificate was an error of law because the Class A permission did not cover this.

62. In advancing this argument, Mr Westgate highlighted that the drawings Mr Ireland provided in support of the application showed only the space to be created through the building works, not the engineering works required to enable the excavation to take place, for example, the support required for party walls. The design and access statement was, as he pointed out, also silent on this. In Mr Westgate's submission, the Arup report demonstrated the true nature of the engineering works required. Extensive works of structural support would be required, in conjunction with the excavation of a considerable volume of ground and soil. In planning terms, the Arup report said, this was an engineering operation in its own right with its own material planning impacts in terms of noise, dust, visual impact, impact on groundwater and associated traffic movements, besides the planning impacts of the building works.

63. These were persuasive submissions. However, in my view this ground fails. This is a judicial review and it is not for me to decide whether as a question of fact and degree all this constituted a separate activity of substance to the making

of the basement under the permitted development right. That was for the planning committee. It had the responsibility of considering the type of matters Mr Westgate raised and deciding whether the requisite engineering operation for the basement was a separate activity of substance requiring its own planning permission.

Ground 2: (a) the Council misdirected itself before concluding that the engineering works proposed were not a "separate activity of substance"; (b) Alternatively, if this was a question of planning judgment, the Council's judgment was infected by public law errors and/or in any event irrational.

64. At paragraph 6.24, quoted earlier in the judgment, the officer's report, advising the Council to grant the certificate, accepted that the basement works will, "by necessity", involve temporary engineering works associated with protecting the structural stability of the host and neighbouring buildings. However, it added, these would be "entirely part of the basement works", and did not constitute a separate activity of substance that is not ancillary to the activity that benefits from permitted development rights.

65. Mr Straker defended this formulation since the permission in Class A of Part 1 of the GPDO carries the necessary implication that operations for the making of the basement, be they engineering, building, or otherwise, are permitted. The engineering operations were, in his submission, part of the enlargement, improvement or alteration of the dwellinghouse. They were no more than necessary to carry into effect the permission. The planning committee were asked the correct question whether the construction of a domestic basement constitutes an enlargement, improvement or other alteration to enable them to grant a certificate of lawful development. To that question, he submitted, there was only one answer.

66. In my judgment the planning committee asked itself the wrong question with its focus on the works being "entirely part" of the overall development, which would "by necessity" involve engineering works. It concluded that because this was the case it followed that the works did not constitute a separate activity of substance. That is not the approach laid down in the authorities. The Council's conclusion that the engineering works were not a separate activity of substance followed from a misdirection. It should not have asked itself whether the engineering works were part and parcel of making a basement but whether they constituted a separate activity of substance. The Council needed to address the nature of the excavation and removal of the ground and soil, and the works of structural support to create the space for the basement.

67. In other words, if the planning committee had asked itself the right question, it would have needed to assess the additional planning impacts of the engineering works to decide whether they amounted to a separate activity of substance. It would have been in a somewhat difficult position in undertaking that task without any description of the engineering works required in support of the application, although it may have been able to draw on its own experience of the common and predictable ramifications of this type of basement development with this type of terrace house in this area. It was only afterward, with the construction management plan secured by the section 106 agreement, that the Council gave attention to some of the impacts of the development. At that point it was too late. The issue was one of planning judgment, but since the planning committee misdirected itself as to the issue it never got as far as properly exercising that judgment.

Ground 3: An interpretation of the Class A right as including the engineering works proposed in this case would frustrate the legislative purpose of section 59 of the 1990 Act and/or the Gpdo

68. Mr Westgate's argument here is that the overall purposes of the 1990 Act are that planning permission is required for development and that decisions about planning permission should be made based on relevant planning considerations. Given this, the exercise of the power to make a general permitted development order can only be compatible with the objects of the Act if the permission is limited to cases that, as a class, do not involve development impacts of a degree that demand individual consideration of the planning merits, as with this sort of basement.

69. Mr Westgate's premise is difficult to accept, given that section 59 allows the making of general development orders. In any event, as Mr Straker pointed out, this ground overlooks Article 4 of the GPDO, which enables local planning authorities to make a direction removing the grant of permission otherwise given by Article 3 . As with the Council's recently made direction on basements, if thought necessary Article 4 can be used to require an individual application for planning permission. I am not persuaded by this ground.

Conclusion

70. For the reasons given I grant judicial review and quash the certificate of lawful development the Council granted Mr Ireland earlier this year.

Review of Grouting and Compaction Method Statement for Thames Farm, Shiplake

Final Report

October 2021

www.jbaconsulting.com

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Revision History

Revision Ref/Date	Amendments	Issued to
15/10/2021	Draft Report	Shiplake Parish Council, Harpsden Parish Council, Henley-upon-Thames Town Council
01/11/2021	Final Report	Shiplake Parish Council, Harpsden Parish Council, Henley-upon-Thames Town Council
16/12/2021	Reviewed following issue of Rev D of the Method Statement	Shiplake Parish Council, Harpsden Parish Council, Henley-upon-Thames Town Council

Contract

This report describes work commissioned by Peter Boros of Thames Farm Action Group, on behalf of Shiplake Parish Council, by email dated 30 September 2021.

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Abbreviations

BGL	Below Ground Level
CMP	Construction Management Plan
HIA	Hydrogeological Impact Assessment
mAOD	metres Above Ordnance Datum
PWS	Public Water Supply

1 Introduction

JBA Consulting were commissioned by Shiplake Parish Council, working in collaboration with Harpsden Parish Council, Henley-upon-Thames Town Council, to prepare a technical review of the Outline Project Method Statement for the proposed grouting and compaction works at Thames Farm, Shiplake. That report was prepared by Vertase FLI for the site promoters Taylor Wimpey plc and is dated 13 September 2021.

Please note that this review is focussed on the hydrogeological and geotechnical aspects of the method statement, as well as their implications for the site drainage. Those sections and appendices dealing with ecological, arboricultural and archaeological impacts have not been reviewed by specialists in those fields, however a check was made as to whether their analysis is relevant to the proposed groundworks scheme, or to the subsequent housing scheme.

Following completion of this review, a revised version (Rev D (Final) 26th October 2021) was submitted by Taylor Wimpey with an application for a certificate of lawfulness P21/S4749/LDP). This has been checked and no material technical changes were identified, therefore our review remains relevant to Rev D. No appendices were submitted with Rev D, and therefore it is assumed that these remain unchanged from those reviewed herein.

2 Hydrogeological review

2.1 Introduction

JBA Consulting were commissioned by Shiplake Parish Council to complete a hydrogeological review of the proposed planning application Ref P20/S2808/DIS under consultation for a housing development at Thames Farm, Shiplake, focusing on elements of the scheme that could affect groundwater and groundwater dependent receptors. The hydrogeological review focused on the proposed drainage proposals for Thames Farm, and was completed in January 2021. This also included review of the accompanying Hydrogeological Impact Assessment (HIA) completed by H Fraser Consulting (April 2020). Following this review the following key points were made:

- An updated HIA would be needed for the proposed grouting and updated drainage scheme.
- Groundwater levels and quality should be monitored across the site for at least 12-months prior to grouting works, as well as during and following construction.
- The HIA should include a hydrogeological conceptual model of the site, including the long-term monitoring.
- A detailed grouting scheme should be developed that ensures that this will not extend below the water table, and limits the potential for pollution of the aquifer.
- Residual impacts following any mitigation measures would include:
    - Increase in the catchment of the water supply borehole due to loss of recharge to the aquifer across the site.
    - Inherent loss of voids and associated potential aquifer storage within the Chalk.
    - Should groundwater rise above the base of the finished grouting works the groundwater flow will be altered and may lead to more rapid saturation of the ground surface.

This review considers the Outline Project Method Statement for the proposed grouting and compaction, and an updated HIA (HFC, 2021) completed for the proposed works.

2.2 Method statement review

The method statement executive summary states that in relation to hydrogeology 'the proposed ground improvement works have been determined to have a negligible impact on the public water supply and rainfall infiltration.' This has been determined by the HIA (HFC, 2021), although the conclusions of the HIA state that 'the effects of the grouting operation on the PWS are thought to be low' rather than negligible. The analysis and conclusions of the HIA are discussed in 2.3.

2.2.1 Hydrogeology

This section of the method statement is very limited in detail, giving only two approximated groundwater levels. These groundwater levels have been taken from the HIA (HFC, 2021), which states that the timing of these dip measurements is unknown, and it's not possible to know if the PWS was pumping at the time. The groundwater levels at the site may vary significantly to those measured if they were taken when the PWS was not active.

There is no detail on the aquifer properties, or the groundwater level variability. Groundwater levels may naturally vary significantly within Chalk aquifers, as well as variation due to pumping rates at the nearby PWS. It is therefore necessary to monitor levels over a full year, to properly assess the upper boundary of the Chalk aquifer water table. As the grouting proposal relies on the principal of not grouting below the water table to minimise risk this information is critical.

2.2.2 Grouting methodology

The method statement describes that 'no hole will proceed deeper than 2 metres from the top of the groundwater level' followed by 'stiff mortar grout is then delivered into the hole at a prescribed pressure where it produces an expanding grout bulb which rapidly compresses the loose/ weak ground around the point of injection.' There is no indication of how far the grout bulb or compressed material can extend to, and whether this can potentially reach the water table below, even if the bottom of the borehole is 2m above the water table.

In regard to drilling procedures there is very limited information, only the basic technique is described. There is no information on the standards that will be incorporated, or how the aquifer will be protected during the drilling works.

Where compaction grouting boreholes penetrate voids within the Chalk it is unclear how the depth and extent of these voids will be assessed during the grouting works. If voids and any connecting fractures extended below the water table for instance, it is not stated how the grouting compaction would be prevented from filling these voids/fractures, and thus impacting sections of the aquifer (e.g., contamination and/or reduction in groundwater flow and storage). Although the boreholes themselves are proposed to terminate at 2m above the current water table it is not acknowledged that some voids were found to be present down to 16m below ground level, and neither is it stated how downward migration of grout through these voids will be prevented to ensure no contamination of the aquifers takes place.

'Grouting procedures near groundwater table' states that 'grout injection works will not be undertaken within 2.0m of the mapped groundwater surface'. It is unclear what data has been used to establish this groundwater surface, which is also shown on drawing D1827_61 Indicative Grouting Depths, as previously only two questionable groundwater level dip measurements have been presented. The contour mapping appears to suggest far more detailed data has been used. It may be that groundwater contours have been inferred from topography rather than actual groundwater data. The drawing legend simply states, 'Groundwater level – indicative depth 32.5mAOD'. The drawing also appears to be contradictory to the proposed 2m standoff from the water table level, as it shows grouting bands above groundwater levels potentially just 1m above the water table. For example, the 10.5 to 12mbgl grouting depth colour band overlays beyond the 13mbgl groundwater level contour, suggesting the grouting could potentially be less than 1m to the water table should they grout to 12m in these areas.

Groundwater monitoring is proposed for 'several' months prior to the works to 'ensure that any seasonal fluctuations are considered'. However, it is impossible to ensure this possible variation is known from only several months of data, as the hydrological cycle is 12-months, and can vary year on year. The seasonal maximum may not be captured. At the least it would be expected that a full year of monitoring is completed to get an initial estimate of the true seasonal variation. This should ideally be carried out via continuous monitoring (i.e., data loggers installed in monitoring boreholes) rather than just the monthly dip measurements proposed, so that any rapid rises in groundwater level associated with significant rainfall events are captured.

There is no mention of the variation that may be caused by changes in the pumping regime at the nearby PWS and how this may affect the data. Furthermore, there is no detail on how the seasonal variation of groundwater levels will affect the proposed grouting methodology, and whether the 2m standoff will apply to the seasonal range or not. Previous information suggests that the drilling depths will be based on maintaining 2m from groundwater levels at the time of drilling, rather than a seasonal maximum.

In the validation of treatment works there is no mention on validation criteria for the assessment of the impact on groundwater. This includes confirmation that the grouting works has not had an impact on groundwater levels or quality, and that grouting has not occurred below the water table.

2.2.3 Groundwater monitoring

Groundwater level and quality monitoring is proposed at six locations across the site, including five new monitoring locations as well as an existing borehole. It is proposed that five visits take place prior to commencing the works, however there is no indication as to the timeframe of these visits. Further in the monitoring it mentions that 'we then propose continuing with monthly sampling visits' which suggests that only five months of monitoring is proposed prior to grouting works. As previously stated, a minimum of 12 months of groundwater data would be expected as an absolute minimum to understand the complete seasonal variation.

It is briefly mentioned that groundwater monitoring would occur after grouting works are completed but there are no further details of any monitoring proposals, such as duration and frequency of monitoring, and who would carry this out. Overall, there is a lack of any details regarding the validation of works relating the to the impact on the aquifer. Although a monitoring network is proposed there are no details given regarding the implications of variations in level or quality, and how this data will be implemented. There is no rationale provided for the selection of the water quality suite, or how trigger levels will be established. There are no details on any contingency plans should monitoring show a failure to protect the aquifer during works, or any necessary remedial works and remedial actions.

2.3 Hydrogeological Impact Assessment review

As part of the method statement for the ground stabilising works an update HIA was completed (HFC, 2021), which has informed the associated risk to the Chalk aquifer and nearby Thames Water public water supply (Harpsden PWS).

2.3.1 Groundwater levels

Within the hydrogeology section there is very limited groundwater level data, with only questionable dip measurements provided, stating that the timing of these dip measurements is unknown, and it's not possible to know if the PWS was pumping at the time (the water level is indicated to vary by up to 8m with pumping). Further assessments based on this level data, including the groundwater contour mapping provided within the Method Statement, are therefore highly estimated, and as such is of questionable value or accuracy. There is no attempt to describe the potential seasonal variation, which can be substantial within the Chalk.

Thames Water have proved a groundwater level graph for water levels at the Engbers Farm Borehole (north of the site) to TFAG in July 2021. The water levels for the period 2009-2017 are between approximately 15 to 18mbgl (33-36mAOD). From 2017 groundwater levels have remained within a similar range, of approximately 16 to 18 mbgl. The observation borehole is a similar distance and elevation to the Thames Farm site from the Thames Water public water supply site, and the two groundwater levels provided from ground investigation on the Thames Farm site of 32 to 33.3 mAOD are a in similar range. The higher maximum groundwater levels within the observation borehole could be an indication that water levels may also have been higher within the Thames Farm site historically, although this would need to be confirmed through on-going monitoring within the site itself.

2.3.2 Source Protection Zones (SPZs)

The Source Protection Zones for the Thames Water public water supply (Harpsden PWS) are briefly mentioned with a figure. There is no discussion regarding the location of the proposed development relative to this, and that the majority of the site is located in the most sensitive zone (Zone 1), and the associated implications of this. The policies associated with SPZs are set out in 'The Environment Agency's approach to groundwater protection' (EA, 2018). Within the context of the proposed development the following EA Position Statements are considered relevant:

- G4 - Inside SPZ1 we will object to any new trade effluent, storm overflow from sewer system or other significantly contaminated discharges to ground where the risk is high and cannot be adequately mitigated. If necessary, we will use a prohibition notice to stop any such existing discharge.
- G12 - The discharge of clean roof water to ground is acceptable both within and outside SPZ1 provided that all roof water down-pipes are sealed against pollutants entering the system from surface run-off, effluent disposal or other forms of discharge. The method of discharge must not create new pathways for pollutants to groundwater or mobilise contaminants already in the ground.
- G13 - Where infiltration SuDS are proposed for anything other than clean roof drainage (see G12) in a SPZ1, a hydrogeological impact assessment should be undertaken, to ensure that the system does not pose an unacceptable risk to the source of supply.
- N8 - Within SPZ1, the Environment Agency will normally object in principle to any planning application for a development that may physically disturb an aquifer.

2.3.3 Groundwater quality

The HIA considers the impacts on the permeability of the Chalk and unsaturated zone (reduced recharge). There is limited consideration for the impact on groundwater quality within the assessment. Without a full assessment and understanding of the potential risk of contamination of the aquifer (and the PWS) during the works it is unclear how the risks can be monitored, managed and mitigated. The composition of any leachate from the grout material should be specified within the HIA and whether this could impact upon the aquifer water quality arriving at the PWS, especially if there is significant rainfall and recharge during the grouting works.

A comparison is made of the slotted casing depth (27.38-29.55mAOD) and the proposed grouting depth (lowest 31 mAOD), to suggest that the grouting mixture is not a risk to the PWS. However, groundwater flow (and thus potential contamination flow) within the aquifer is unlikely to be completely lateral, as there is a cone of depression around any abstraction. Previously in the report it was stated that groundwater levels were at 32 to 33.3 mAOD across the site, suggesting that groundwater levels are above the proposed maximum depth of the grouting. There will be a hydraulic gradient from the site to the PWS, providing a contamination pathway should it be present within the groundwater at the site.

The conclusion that the risk of the grouting is 'low' therefore appears to be unfounded based on the limited risk assessment provided, which does not include any form of hydrogeological conceptual model or industry standard source-pathway-receptor risk assessment methodology. We consider this to be a major omission in the information submitted for consideration.

2.3.4 Loss of Chalk permeability and recharge

In the discussions regarding the reduction in Chalk permeability it is initially stated that 'if there were loss of a significant volume of grout to features below the water table, there would be the potential to reduce flows to the PWS', which is scoped out based on the methodology proposal of remaining 2m above the water table. However, as previously discussed it is uncertain how effective this will be, as it is unclear as to whether the 2m standoff includes the seasonal maximum (which may not be captured regardless given only 'several' months of monitoring), or purely the water level at the time of drilling. If only the water level at the time of drilling determines the depth of grouting then it may be that the water table rises further following the works, at which point the grouted Chalk will now limit the permeability and storage of the aquifer.

It appears that the conclusion that 'the permeability of the saturated Chalk aquifer is not considered to be significantly affected by the proposals' is therefore based upon various assumptions and limited information included within the method statement, as previously discussed. There is no hydrogeological conceptual model to support the conclusions, and discussion of the potential groundwater variability, and how this will affect the permeability/flow pathways should it rise above the proposed grouting depths. Again, we regard this as a significant omission in the detail provided for review.

The potential loss of recharge to the aquifer has been calculated, based on a loss of recharge across the whole site area, which would result in a loss of 0.38% of the total abstraction for the average daily abstraction rate. There is no discussion regarding the impact of recharge reduction on the SPZ catchment, and the potential impacts of this.

2.3.5 Change in infiltration due to ground treatment

Section 3.4 of the HIA assesses the impact of the proposed works on the permeability of the ground. Reducing permeability could result in increased runoff from permeable areas of the developed site (gardens and public green spaces), which could lead to localised flooding or contribute to off-site surface water flooding. The HIA includes a calculation of the potential impacts of the compaction, by calculating a 5% reduction in ground porosity and an 18% reduction in the rate of infiltration. This indicates that, for the 1 in 100 year plus 40% climate change allowance rainfall design event, the post-treatment site has sufficient infiltration and storage capacity to not result in excess runoff, assuming average permeability rates across the site (6.3×10^{-5}m/s). For context, this is considered a good infiltration rate typical of a sandy loam (CIRIA, 2019). However, when the minimum observed infiltration rate for all of the measured sites (3.1×10^{-7}m/s, indicative of poor permeability, silt-loam soil) was applied, some significant volumes of surface runoff could be generated in excess of what would be generated in the untreated state. The analysis points out that these volumes would be infiltrated into the ground in a short time and therefore the impact is minor given the frequency of the design event. However, it does not consider the eventuality that excess surface water will run into the site's drainage systems and therefore will generate volumes of water in excess of what the storage is designed to accommodate. It is our understanding that no allowance has been made in the storage design for surface runoff from green spaces both within the site and upstream. This has the potential to increase the likelihood of local flooding.

2.3.6 Lack of a hydrogeological conceptual model

The HIA includes limited mapping and does not include any form of hydrogeological conceptual model, which is an industry standard requirement for any groundwater risk assessment, especially in a sensitive area such as an SPZ1. A conceptual model is critical to adequately assess the risk to the Chalk aquifer and the Thames Water public water supply (Harpsden PWS). As described in the JBA review of their earlier HIA (HFC, 2020) the HIA needs to include a good spatial and 3D understanding of the hydrogeological setting of the site and surrounding area, which would be improved with the following inclusions.

- Mapping:
  - Geology: BGS mapped geology (including any faults or structural features, fracture directions/bedding plane orientation) and also the geology encountered on site with the probing (and any differences).
  - Hydrogeology: including aquifers, depth to water, SPZs, surface water. Actual distance of the boreholes to the site (unless actual location of boreholes is confidential). It would be useful to know how close the grouting is to the actual borehole - is it clearly within fissure / fracture location. Could use observation borehole locations. Consideration of the typical fracture length in the Chalk and proximity to the PWS.
- A conceptual model of the site including:
  - PWS boreholes and key depths - base of casing, screen depths. Depths of known flow.
  - Depth of Chalk rock head, superficial horizons and any bedding plan horizons (may be level of preferential flow).
  - Depth of groundwater levels and degree of seasonality and uncertainty in this.
  - Level of nearby surface waters, e.g., pond, streams, river etc.
  - Depth of unstable/ground improvement ground - i.e., maximum depth of proposed grouting or areas where the grout may migrate to through voids.

This should pull together all the information spatially and demonstrate how this works to protect the PWS and to clearly demonstrate any level of risk to the PWS.

The original HIA (HFC, 2020) report includes location of observation boreholes - if long term data is available from the EA for any of these this should be included in any new HIA update if available (e.g., Shiplake OBH, Engbers OBH, Kilnpits OBH).

3 Geotechnical review

3.1 Geology

The Stantec (2019) Ground Stability Assessment report, provided as Appendix B of the Vertase FLI, Outline Project Method Statement, September 2021, reviewed the British Geological Survey (BGS) 1:50,000 map for the site, (Reading, Solid and Drift, Sheet 268, 2000). The geological map indicates that the eastern extent of the site is underlain by Taplow Gravel Member, overlying Cretaceous Chalk Group of the Seaford and Newhaven Chalk Formation (Undifferentiated). Towards the west of the site the superficial deposit is thin, exposing the underlying chalk. The mapping shows Head Deposits on the south-western extent of the site.

The Vertase FLI method statement (2021), provides a summary of the ground conditions found across the site during previous ground investigations. The site is underlain by Topsoil, to 0.3m below ground level (bgl), overlying Head Deposits and sand and gravels of the Taplow Gravel Member. No superficial deposits are recorded on the western extent of the site. The underlying bedrock is recorded as Seaford and Newhaven Chalk Formation (Undifferentiated), the bedrock was encountered at approx. 4m bgl in the eastern extent of the site and 6m bgl in the western extent of the site. Made Ground was not recorded during any of the site investigations.

The ground conditions encountered on the site during the investigations is generally in agreement with the published mapping. However, borehole logs were not available for review and therefore the information provided above relies on the reports provided.

Vertase FLI method statement (2021) states that the groundwater levels for the site were recorded at approximately 12.5m bgl (32.5m above ordnance datum) in the eastern extent of the site and 21m bgl (34m AOD) in the western extent of the site. Groundwater monitoring results were not provided in the reports for review, the available reports do not note the period of time that groundwater monitoring was undertaken, therefore it is unknown if the monitoring results capture the seasonal variation of the groundwater.

3.2 Cavities and Mining Records

The Stantec (2019) report identified eight known solution pipes on site based on a review of the Peter Brett Associates (PBA) Mining Cavities Database, the exact locations are not provided in the report. A further ten solution pipes are known to be within 1km of the site. The PBA Mining Cavities Database indicated there are no known man-made mining cavity locations within 1km of the site. It is important to note that mining records are incomplete, and that unrecorded mining might have occurred at the site.

The Stantec (2019) report indicates that the area, South Oxfordshire, is known to be a very high risk of solution features. The Stantec (2019) report indicated that this is due to the overlying Taplow Gravels Member which provide a cover deposit where surface water can accumulate and percolate downwards into the chalk, creating favourable conditions for the development of solution features.

Additionally, the Stantec (2019) report indicated that the area has a history of chalk mining, the report states that there is no recorded mining known on the site. However, a review of the historical maps presented in the Stantec (2019) report identified a gravel pit adjacent to the eastern boundary and chalk pits and 'kilnpits' within 500m of the site on the 1878 – 1:2,500 map. The report identifies that the mining risk is moderately high due to the shallow depth to chalk and the deep groundwater level within the chalk. Local street names such as Quarry Lane being a relatively recent addition would suggest that the winning of gravel has occurred very close to the site.

An internet search by JBA Consulting, October 2021, found that the site had a recorded sinkhole or collapse in the chalk in the south eastern extent of the site, which was exposed as part of the 2019 investigations.

3.3 Previous Site Investigations

There have been three ground investigations on the site, each investigation recorded evidence of dissolution features in the chalk. The factual reports for the Terramech Investigations (March 2019) and the Zetica Ltd (August/September 2019) was not available for review by JBA at the time of this report. The Vertase FLI method statement (2021) summarised each of the previous reports in relation to the dissolution features encountered and stated that the Terramech Investigations found dissolution features with a soakaway pit (pit number not specified), and the Zetica Ltd report undertook geophysical surveys on the site which recorded voids in four locations, again the position of these voids is not provided.

Stantec (2019) undertook a dynamic probing survey across the site, the positions were based on a 6m grid, and over 1,200 holes where undertaken. The Stantec report provides drawings showing the locations of each probe and shows the indicative dissolution features as different colours. The disturbed ground was often recorded between 10m to 13m bgl, with the maximum depth of disturbed ground at 16m bgl. In the western extent of the site there was an area recorded with shallow refusal, Stantec indicates this is likely flint cobbles, however as they were unable to progress the evidence of dissolution features is unknown. Some of the probes showed disturbed ground from as shallow as 3.5m bgl.

No geo-environmental testing was undertaken in any of the site investigations. As the site is to be regarded using existing superficial deposits geo-environmental testing will be required to ensure that any contaminated ground will not be reused to ensure that a pathway is not created into the chalk aquifer below the site.

3.4 Proposed Grouting and Compaction

The Vertase FLI method statement (2021) has based the proposed grouting and compaction primarily on the Stantec report (2019). The process is to re-density loose granular areas, reducing pore spaces and improving the strength of the ground to allow for construction of a proposed residential development. Drawing D1827_57, provided in Appendix A of the Vertase FLI method statement (2021), shows the areas requiring grouting, these areas are based on the disturbed/relaxed ground reported in the Stantec Report (Figures 2 and 3) (2019). The grouting is to be completed on a 3-4m grid within the areas shown.

Drawing D1827_61, shows the proposed depth of the grouting, varying from 6m in the eastern extent of the site, up to 18m in the western extent of the site. The depths appear to corelate to the depth of recorded disturbed or relaxed ground shown on figures in the Stantec report (2019).

The Vertase FLI method statement (2021), outlines that the compaction grouting is to be undertaken using a stiff grout to limit the spread of the grout in the chalk. The grouting process is to be monitored as it progresses including the slump of the grout and the flow. Once completed the grouting will be validated by attempting to regrout the hole. Holes will be chosen based on observations during the works.

The Vertase FLI method statement (2021) states that the grouting will stay 2m above the ground water level. To ensure this level, five monitoring wells are to be installed across the site and will be monitored during the works to ensure the grouting maintains this level. This method does not ensure grout stays where it is input, and it will only identify the existence of contamination after it has already occurred.

The positions of the monitoring wells are shown on Drawing D1827_60, provided in Appendix A of the Vertase FLI method statement (2021), this drawing also shows the soakaway borehole locations undertaken by Terramech.

Drawing D1827_60 shows that the area of proposed woodland plantation will not require grouting. The report outlines that the remediation for this area will comprise of the topsoil being stripped and stockpiled, vibro compaction will be undertaken using a vibratory roller to return soft spots to undisturbed ground conditions, loosing of subsoil and removal of large stones and replacing the topsoil.

The top three meters of superficial deposits will be compacted using vibro compaction and dynamic rolling. This will not be undertaken within the exclusion zone for the known utility services. The report does not indicate what parameters the compaction will need to achieve.

There is no investigation near the current watermain, due to exclusion zones, however as water pipes often experience leakage there is a risk of dissolution features below the pipe. Drawing D1827_57 shows that limited grouting is to be undertaken near the pipe.

4 Review of supporting information

4.1 Appendix A Drawings

Reviewed in sections 2 and 3.

4.2 Appendix B Previous SI Reports

Reviewed in section 3.

4.3 Appendix C Transport statement

The transport assessment has been prepared specifically for the proposed groundworks in isolation. No technical review of this assessment was carried out by JBA.

4.4 Appendix D Hydrological Impact Assessment

Reviewed in section 2.

4.5 Appendix E Construction Management Plan

This appendix contains a Construction Management Plan (CMP) dated 2019. We note that this plan was prepared for the housing development and not for the grouting and compaction works. The main document states that the ground works will follow the principles set out in the CMP, however it is noted that this does not address the specific risks associated with these works. A specific CMP for the ground works should be prepared given the magnitude and extent of the grouting proposals.

4.6 Appendix F Construction Environmental Management Plan for Biodiversity

This appendix contains a Construction Environmental Management Plan for Biodiversity originally prepared in 2016 based on surveys conducted 2012 to 2015, and updated following a walkover survey in January 2019. Whilst this plan has not been reviewed by a professional ecologist, it is prudent to note that:

- It is almost three years since the site was surveyed by an ecologist, during which time the flora and fauna within the site may have changed.
- The advice is specific to housing construction. As a minimum, we would expect to see a confirmation from the report's authors that it is also relevant to the proposed compaction and grouting activities.

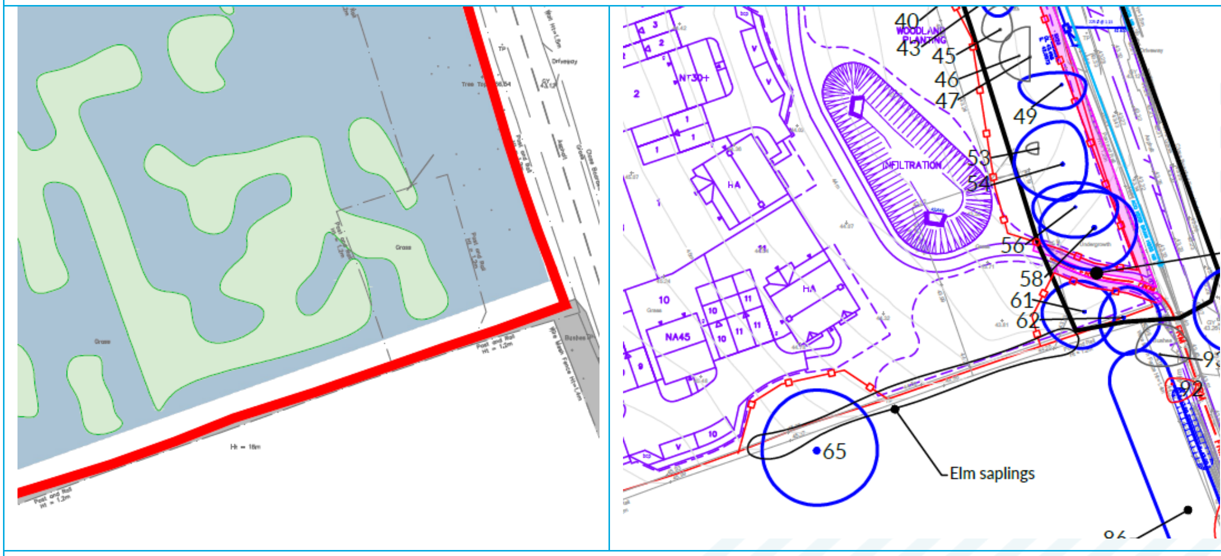
4.7 Appendix G Arboricultural Plans

This appendix contains a tree constraints plan, a tree protection plan and a woodland project plan. These have not been reviewed by a professional arboriculturist, and therefore the comments below relate only to the question of whether these plans are relevant to the groundworks scheme or to the housing development:

- The tree constraints plan identifies what trees exist on the pre-developed site, their canopy areas and root protection areas. It is, therefore, applicable irrespective of the type of development proposed.
- The tree protection plan shows those areas requiring protection from construction activities. It is underlain by the plans of the housing development, and therefore is not specific to the grouting and compaction works.
- The main document (section 11) states that "no ground improvement works are proposed within root protection areas." Whilst this could be achieved at ground

level by following the tree protection plan, it is not stated how subsurface grout will be prevented from spreading and encroaching into the root protection areas. Indeed, in some locations, the areas requiring compaction grouting appear to encroach into the root protection areas shown:

Eastern boundary, small area of proposed grouting appears to encroach upon the root protection area of tree 39



Southern boundary, proposed grouting appears to encroach upon the root protection area of tree 65

Figure 4-1: Comparison of grouting areas with tree protection areas

- Working from different plans with different base layers, it is difficult to say for certain if the grouting areas overlap with root protection areas, however it appears that they may do. The pre protection plan is not suitable as it overlays the plan of the proposed housing development, not of the grouting and compaction works. It should be updated in order to demonstrate that grouting will not be carried out within the root protection areas, both at the surface and sub-surface.

4.8 Appendix H Archaeological Statement

This appendix contains an archaeological evaluation report for the site. 42 trenches covering 4% for the site were investigated, with no evidence of historic objects or activities, and therefore the site is considered to be of low archaeological potential. Whilst this report has not been reviewed by a professional archaeologist, we consider that it would be prudent to include confirmation from the report's authors that it is relevant to the proposed compaction and grouting activities.

4.9 Appendix I Grout Composition

Reviewed in section 3.

5 Conclusions

5.1 Hydrogeology

There is limited understanding of the hydrogeological setting in both the Method Statement and the associated Hydrogeological Impact Assessment (HFC, 2021). Only two historical groundwater levels are provided for the basis of understanding the water table across the site, which are unreliable due to having an unknown date and time of measurement and not knowing whether pumping was occurring at the nearby Thames Water public water supply (Harpsden PWS).

Although the grouting method statement states that no grouting will take place below 2m above the water table, the details of how this will be achieved are unclear. A groundwater surface map is provided, but it is unclear how this was established given the limitation in available groundwater data. The mapping presents a fixed groundwater table, but in reality this may vary considerably seasonally, naturally and due to changes in the pumping regime at Harpsden PWS. The extent of groundwater variation will be unknown without long-term monitoring of at least a year. The grouting procedures state that the 2m standoff will be achieved by groundwater monitoring at the time of drilling, but later in the groundwater monitoring section it states that groundwater levels will be monitored several months prior to the works to obtain seasonal variations. This appears contradictory and it is unclear whether the grouting will be terminated above the water table on the day of drilling or above the maximum level. It is also unclear how the grouting will be prevented from extending into the water table where boreholes penetrate significant voids and fractures extending down below the water table and grout has the potential to migrate down towards the water table.

To obtain the likely maximum groundwater level across the site, monitoring would need to occur throughout a 12-month period prior to starting grouting works. This should ideally be carried out via continuous monitoring (i.e., data loggers installed in monitoring boreholes) rather than just the monthly dip measurements proposed, so that any rapid rises in groundwater level associated with significant rainfall events are captured.

The HIA is unsupported by any form of hydrogeological conceptual model, to establish a baseline understanding of the characteristics of the aquifer or the interaction with the PWS and the impacts of the proposed works. A conceptual model is an industry standard for a groundwater risk assessment, and should include all available data, and be an iterative process including additional data provided by the proposed groundwater monitoring scheme. The conclusion that the risk of the grouting on groundwater quality is 'low' appears therefore to be unfounded and based on the limited risk assessment provided, which does not include any form of hydrogeological conceptual model or industry standard source-pathway-receptor risk assessment methodology or definition of what low impact is.

In the validation of treatment works there is no mention on validation criteria for the assessment of the impact on groundwater, or any details for a post-grouting monitoring scheme. This includes confirmation that the grouting works has not had an impact on groundwater levels or quality, and that grouting has not occurred below the water table. There are no details of any proposed methods for establishing trigger levels (for groundwater levels or water quality) and no contingency plans should monitoring show a failure to protect the aquifers during or following the works.

The HIA indicates that, at least in less permeable areas of the site, there is a potential for the ground treatment to result in increased surface water runoff volumes. These could enter the site's drainage system, which hasn't been designed with any allowance for runoff from green spaces, and could therefore increase the frequency of the sites drainage storage being exceeded.

5.2 Geotechnical

The proposed area of grouting does not include the area in the western extent of the site, which was an area which recorded shallow refusals. Stantec recommended that further investigation was undertaken to understand if there are dissolution features in this area. Based on the available information this work has not been undertaken and therefore the extent of dissolution features in this area will need to be assessed to confirm if grouting will be required.

Additionally, the Stantec report (2019) indicates that there was evidence of shallow disturbed ground, this may indicate that although the bulk of the dissolution features are thought to be deep into the chalk, there could be shallow features which may not be strengthened by the compaction grouting or the compaction of the superficial deposits.

Also, due to the spacing of the grid during the probing survey, there is a risk that not all voids were identified. As the provided grouting plan is based on this grid, some voids may be missed during grouting. The proposed grouting may need to be reassessed to ensure this risk is mitigated. Using a lower viscosity grout will fill more holes but will be uncontrolled whereas a higher viscosity grout may not fill all holes/voids.

The report does not indicate what strength the chalk will need to achieve to ensure that chalk is 'competent' ground below proposed foundations. The depth of competent material required below a foundation is outlined in BS EN 1997:2004 + A1:2013.

Compaction of sand and gravel material does not necessarily significantly reduce the permeability of the material and therefore there is a risk of cavities occurring in the chalk in areas without hardstanding (gardens, green areas etc) and sustainable urban drainage features. The report also does not indicate the parameters the compaction of the superficial deposits needs to achieve to be suitable for the proposed development. The level of compaction will need to be defined and validated during the works.

The Vertase FLI method statement (2021) does not discuss the risk of leakage from the current and/or new services. Leakage from water pipes can release a large volume of water into the ground over time, given the underlying chalk is prone to dissolution, this risk should be assessed, and mitigation measures may be required.

There is no mention in the report of how to avoid contamination leeching into the chalk other than maintaining a 2m exclusion zone above the known groundwater level. The report outlines the need for a baseline groundwater sample from the monitoring wells and proposes to continue groundwater testing on a monthly basis over the grouting works (proposed 20 -25 weeks). This method is unlikely to prevent contamination and is more likely to identify when contamination has already occurred. Additionally, the rate of testing may need to be increased to the whole construction phase to ensure the grouting does not impact the principal aquifer at a later stage.

There is no consideration of how the grouting works will influence groundwater flow within the chalk. There appears to be significant risk that groundwater infiltrating from the surface will flow around the grouted volumes and, over time, result in dissolution of currently intact chalk. There is also the risk that groundwater will rise or exhibit greater fluctuation in level in future due to the impact of climate change and increased rainfall. This might bring groundwater up to the grouted zone and the impact of the grout on groundwater flow within and adjacent to the site should be considered.

5.3 Version changes

Following completion of this review, a revised version (Rev D (Final) 26th October 2021) was submitted by Taylor Wimpey with an application for a certificate of lawfulness P21/S4749/LDP). This has been checked and no material technical changes were identified, therefore our review remains relevant to Rev D. No appendices were submitted with Rev D, and therefore it is assumed that these remain unchanged from those reviewed herein.

6 Recommendations

6.1 Hydrogeology

It is recommended that the Hydrogeological Impact Assessment includes a detailed hydrogeological conceptual model, including maps and cross-section. This should pull together all the information spatially and demonstrate how this works to protect the PWS and to clearly demonstrate any level of risk to the PWS. This should include data from the proposed monitoring once available. The conceptual model should inform a source-pathway-receptor methodology for the assessment of risks to groundwater quality and the PWS.

Groundwater monitoring should be carried out at least 12-months prior to the commencement of works, ideally with continuous monitoring (i.e., data loggers) to establish the likely variability and maximum water table elevation across the site relative to the proposed grouting.

The validation process should include details regarding the protection of the aquifer and PWS, including information on water quality trigger levels, and procedures that will be put into place should there be a breach.

An allowance should be made in the site's drainage calculations for runoff from green spaces within the developed site. The compaction works have the potential to increase the volumes of surface runoff from these spaces.

6.2 Geotechnical

It is recommended that further investigation is carried out across the western extent of the site to identify if there are dissolution features in the area which will need remediation. Long-term groundwater monitoring should also be undertaken to understand the seasonal variation of groundwater levels within the chalk.

The method statement should provide the required parameters that the grouting and compaction need to achieve to ensure that the mitigation measures can be tested and verified.

Geo-environmental testing should be undertaken on the superficial deposits to assess if the site material is suitable for reuse/regrading.

The long-term risk of dissolution from surface water and potential leakage from water pipes should be assessed.

The exclusion zone above the groundwater needs to be assessed once further monitoring is available as the current method does not ensure the grout will stay where it is input and is more likely to only identify contamination once it has already occurred.

6.3 Other

The Construction Management Plan, Construction Environmental Management Plan for Biodiversity, Arboricultural Plans and Archaeological Statement all relate specifically to the proposed housing development and not to the ground treatment works. These should be reviewed and where necessary updated or modified to make them relevant to the propose ground treatment.

References

CIRIA. (2019). The SuDS Manual v6. London: CIRIA.

H Fraser Consulting (HFC, 2020). Hydrogeological impact assessment for proposed development works near Harpsden Water Treatment Works.

H Fraser Consulting (HFC, 2021). Hydrogeological impact assessment for ground improvement works, Lower Shiplake.

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Appendix 3

TECHNICAL NOTE

JBA Project Code	2022s1056
Contract	Thames Farm Application for a Certification of Lawfulness
Client	Thames Farm Action Group
Date	September 2023
Author	Benjamin Brière De L'Isle
Reviewer / Sign-off	Paul Eccleston
Subject	Review of supporting evidence documents in appeal (APP/Q31115/X/23/3325922)

1 Introduction

A development appeal form was submitted by Taylor Wimpey West London (TWWL) on 13 July 2023 with Appeal reference APP/Q3115/X/23/3325922 in relation to the planning application P21/S4749/LDP to South Oxfordshire District Council (SODC) decided on 13/01/2022. Thames Farm Action Group requested JBA (email dated 22/09/2023) to review the technical documents submitted as part of the appeal and related to the hydrogeological assessment of the site.

2 Documents reviewed

The applicant, TWWL, submitted the appeal form alongside reports and drawings in support of the appeal. The documents list below has been submitted as part of the appeal statement and, due to time constraints and relevance to hydrogeological matters, only those identified as reviewed have been assessed. No documents from the planning application has been reviewed as part of this work or is commented within this technical note. JBA technical note (January 2021) should be read in conjunction with this technical note for any previously submitted documents as part of the planning application.

Table 1: List of documents

Document name	Relevance to hydrogeology	Reviewed
Appeal Form		Yes
Grounds of Appeal.pdf		Yes
Location Plan drwgno C11748.16.001.pdf	Yes	Yes
Landscape Strategy drwgno C11748.16.701.pdf	Yes	Yes
Tree Woodland Planting Plandrwgno C11748.16.705.pdf	Yes	Yes
Strategic Landscaping Plan drwgno C11748.16.801.pdf	Yes	Yes
Shiplake - Program Rev2.pdf		
A253-TN06 Rev C - Traffic Impact Assessment of Grouting Exercise.pdf		
Indicative Foundations.pdf		Yes
30438R3.2 Shiplake Grouting HIA-Non-technical summary.pdf		Yes
Approved Highway Plan.pdf		
30438R3.2 Shiplake Grouting HIA_Part1.pdf	Yes	Yes
30438R3.2 Shiplake Grouting HIA_Part2.pdf	Yes	Yes
30438R3.2 Shiplake Grouting HIA_Part3.pdf	Yes	Yes
30438R3.2 Shiplake Grouting HIA_Part4.pdf	Yes	Yes

The grounds of appeal discussed in this technical note relates only to the nature of the ground remediation works and the potential risk to the public water supply, commenting in particular on Ground of appeal document Section 5. ix) paragraph (6) "*The site lies approximately 130 m from the Harpsden Water Treatment Works, where* *groundwater is abstracted from the Chalk aquifer from two boreholes for public water supply. A Hydrogeological Impact Assessment has been produced which considers whether it is possible that grouting the ground could have an effect on how rainfall infiltrates down to the water table and also how water flows through the ground towards the boreholes. It also investigates the possibility that grouting could create turbidity, or cloudiness, in the water supply, by creating a suspension of fine particles in the water.*

The Hydrogeological Impact Assessment demonstrates that the ground stabilisation works will have no effect on the nearby groundwater abstraction borehole."

The key document related to the appeal is the Hydrogeological Impact Assessment (HIA) produced by H Fraser Consulting dated 10/07/2023.

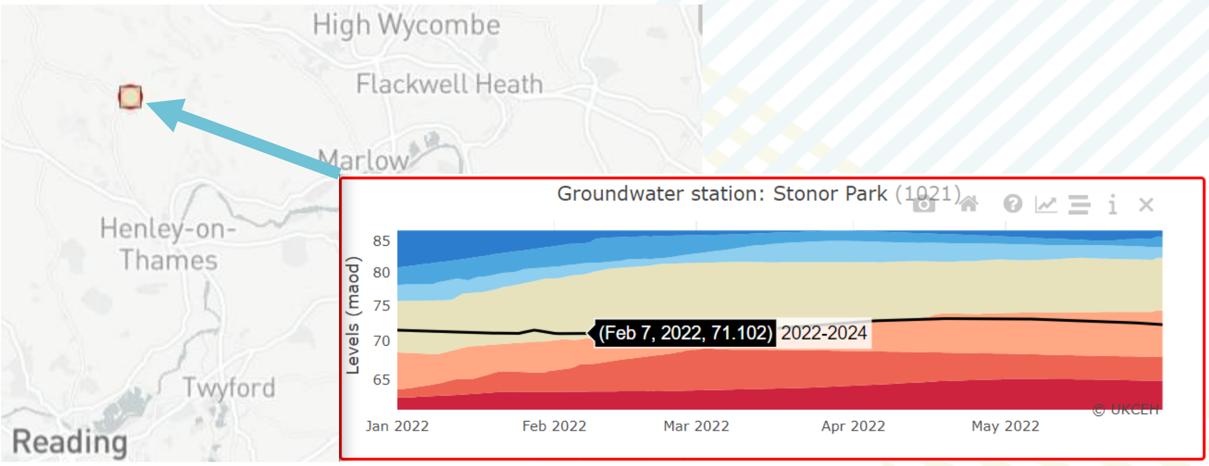
3 Hydrogeological Impacts Considerations

The sections below provide a technical review of the HIA. The objectives stated by the HIA is to "*assess the potential impacts of the grouting operation on groundwater abstraction at the PWS abstractions, and on the potential to increase flooding at the site."*

3.1 Potential impact of the grouting operation on groundwater abstraction

A network of monitoring boreholes has been installed over several rounds of ground investigation works and is considered sufficient to establish groundwater level over the proposed development. Piezometric levels have been monitored over winter 2022/2023 which have been used to establish groundwater levels although the HIA mainly relies on February 2022 to derive groundwater levels. February 2022 groundwater levels records from Stonor Park borehole; in the Chalk, c.10km North of the proposed development and presented in Figure 1 below; indicates general groundwater level was low at the time. The HIA fails in general to consider higher groundwater levels or varying groundwater levels effects on the risks identified.

Figure 1 : Stonor Park groundwater levels



A hydrogeological conceptual site model (CSM) was developed and presented in Section 5 of the HIA. The CSM indicates that soft ground, potentially with relatively higher capacity for infiltration, are present on the proposed site linking drift deposits (gravels base at 49.4 to 38.6 mAOD, unstructured Chalk (base at 32.5 to30.3mAOD) and structured Chalk.

The grouting plan specified by Stantec and submitted in Appendix 6 of the HIA indicates most of the grouting would take place to the South of the proposed development (Phase 1). The Ground Stabilisation by Compaction Grouting – Specification (Stantec, March 2020) provides no consideration of the environmental impacts from grouting and potential effect of the grouting on adjacent (80m distance) potable water supply.

The grouting mix described by Stantec (March 2020) and reproduced by H Fraser Consulting (July 2023) consist in a mix of Portland cement, pulverised fuel ash (PFA), sand, pea gravel and a thixotropic admixture or either bentonite or other admixture of chemicals approved by the Engineer. The composition that could be used for the grouting mix is described as "*The Contractor will supply the Engineer with all relevant details and material data sheets of grout mix constituents to demonstrate their quality and compliance at the start of the works.*" in Section 5.2 of the HIA (Fraser Nash, 2023). In the absence of clear specification of the proposed grouting mix, it is difficult to establish the potential for release of chemicals into the principal aquifer, how they can be mobilised in the future and their fate potentially affecting the public water supply.

The HIA is assessing the risk of grouting reaching the public water supply by assessing movement of grouts through fractures identified during the site investigation (Section 6.2). The risk assessment uses 1mm and 10mm fractures to determine potential conservative travel distance of 3.4m and 33.4m respectively based on a number of justifications including that "*there will be groundwater in the fractures*". In assessing the turbidity caused by grouting (Section 6.3), the HIA states that "*In the unlikely event that grout mixture interacts with a chalk fractures (potentially causing turbidity in the groundwater contained in those fractures)*" turbid water would be blocked within this fractures and seep through the Chalk matrix rather than following fractures. It is also stated that "*in the worst-case scenario the grout could flow 130 m to the abstraction point.*" (Section 6.2 3rd paragraph).

As the purpose of grouting is to reduce fractures void, it is in fact rather probable that the grout will move to fractures up to a certain distance and not fill entirely fractures allowing the bleed water or the leachate from the grout to be mobilised from the end position within the fracture to other connected fractures and to the public water supply. No assessment is made within the HIA for this source – pathway – receptor linkage other than for turbidity.

With regards to Section 6.3.1 related to the potential reduction in permeability of the Chalk affecting groundwater flow to the public water supply or to Section 6.4 related to the reduction in recharge to the Chalk aquifer, the absence of a definitive drainage strategy for the site reduces significantly the validity of the arguments made. The HIA provides calculations estimating the reduction of water level at the PWS, the drawdown, due to the reduced infiltration using a local approach to recharge as a function of the pumping rate. Although a catchment approach may have been better suited, the results associated with using the Dupuit-Forchheimer equation indicates the extent of grouted area will reduce water available at the PWS. There is no justification why a reduction of 7cm or 3cm in the drawdown at the PWS is considered insignificant and this results as well as the uncertainty associated with the calculation should be considered by Thames Water. It is unclear whether cumulative impacts on the water supply have been considered in the significance of the effects.

3.2 Potential increase of flooding

The potential increase of flooding is dealt with in the HIA by Section 6.5 (total of 2 paragraphs). The HIA indicates that the proposed development works is expected to reduce permeability over the site. However, the assessment is dependent on the approval of SUDS plan taking "*account for areas of reduced permeability due to grouting*".

4 Conclusion

Based on the above discussion, the applicant's environmental consultant's consideration of the grouting effects on the Harpsden Water Treatment Works concluded that no significant effects are expected.

However, in the absence of a definitive drainage strategy by the applicant there is a significant gap in what has been assessed and should include a robust determination of contamination sources potentially affecting the Source Protection Zone from the grouting works and consideration of drainage to assess effects of the development during its operational phase. Due to the sensitive location of the proposed development, a more comprehensive assessment is expected to assess risks to the public abstraction.

The HIA focuses on risks associated with turbidity, grouting reaching the abstraction borehole and the reduction in permeability over the proposed development. It doesn't provide a chemical assessment of the substances that would be used to support the grouting. No Material Safety Datasheets have been provided for the grouting or for substances that could be added to the grouting mix.

Inconsistencies within the report have been noted, the most significant relating to the actual distance of the Harpsden Water Treatment Works to the site stated at 80m in Section 2.1 Background, or 130m in Section 7 Conclusions. With a worst-case scenario of grouting moving 130m, the proposed grouting would reach the public water supply.

Appendix 4

*368 West Bowers Farm Products v Essex County Council

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
17 June 1985

Report Citation
(1985) 50 P. & C.R. 368

Court of Appeal

Sir John Donaldson M.R. , Neill and Nourse L.JJ.

June 5 and 17, 1985

Town and Country Planning—Planning permission—Construction of reservoir for purpose of irrigating crops—General permission granted by General Development Order for engineering operations requisite for use of land for purposes of agriculture—Proposed reservoir to be some 18 acres in extent and 6.5 metres in depth—Construction necessitating extraction of large quantities of sand and gravel—Whether extraction would constitute use of land for winning or working of minerals for which planning permission required— Town and Country Planning Act 1971 (c.78), ss.26(2), 290 — Town and Country Planning General Development Order 1977 (S.I. 1977 No. 289), arts. 3, 8(1)(b), Sched. 1, Class VI, para.1

1

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The appellants were a partnership of farmers who wished to construct a reservoir on part of their farm for the purpose of irrigating their crops. The reservoir would be some 18 acres in extent and 6.5 metres in depth. It could not be dug without extracting large quantites of sand and gravel, and sand and gravel extracted in the course of constructing it would be removed from the site and sold. No grading, washing, dressing or sorting of the material extracted, nor any other operation ancillary to mineral extraction as such, would take place on site. The amount of material excavated would be enough to enable the proposed reservoir to be constructed and no more, and no operations were proposed beyond what would be necessary to construct it. The local planning authority directed that the general permission granted by article 3 of the Town and Country Planning General Development Order 1977 for the carrying out on agricultural land of engineering operations requisite for the use of land for the purposes of agriculture should not apply to the construction of the proposed reservoir. It thus became necessary for the appellants to apply for planning permission to construct it, and the local planning authority maintained that they would be unable to entertain the application until it had been advertised and a fee paid pursuant to section 26(2) of the Town and Country Planning Act 1971 . The question was, therefore, whether the construction of the reservoir would fall within the classes of development to which section 26(2) applied as constituting the use of land for the winning or working of minerals. The appellants contended that it would constitute solely the carrying out of engineering operations requisite for the use of the land for the purposes of agriculture and that the fact that incidentally minerals would be extracted would not result in the use of the land for the winning or working of minerals. Nolan J., in proceedings by the appellants for judicial review, rejected that contention and dismissed their application. They appealed.

Held, dismissing the appeal, that whether a single process amounted for planning purposes to two activities was a question of fact and degree; that, if it involved two activities, each of substance, so that one was not merely ancillary to the other, both required permission; that the construction of the appellants' ***369*** reservoir would involve two activities, each of substance, the extraction of minerals on such a scale not being merely ancillary to the carrying out of the engineering operation of constructing the reservoir; and that, accordingly, planning permission was required for the winning or working of minerals involved.

Per Neill L.J. I see no reason in principle why works that are carried out on land may not comprise development of more than one class. In many cases, building or engineering operations will involve as an incidental feature the extraction of gravel or other minerals. In such cases, it would often be quite inappropriate to treat the development as involving the winning or working of minerals within article 8(1)(b) of the Order of 1977.

Per John Donaldson M.R. Some activities may constitute a change of use or an operation, according to what is the object of the activity. Whether an engineering operation also constitutes a mining operation is a question of fact and degree in each case.

APPEAL from Judge Nolan.

By notice of motion dated January 10, 1985, the applicants, West Bowers Farm Products, sought against the respondents, the Essex County Council, (1) a declaration that the carrying out on agricultural land having an area of more than one acre and comprised in an agricultural unit of engineering operations requisite for the use of that land for agriculture, namely the construction of an agricultural reservoir, fell within Class VI of Schedule 1 to the Town and Country Planning General Development Order 1977 notwithstanding the fact that in the process of such construction minerals might be excavated and removed from the land; (2) a declaration that the applicants were not required to pay a fee or to advertise in respect of any planning application for such an agricultural reservoir; (3) an order of mandamus requiring the Essex County Council to consider and determine any planning application submitted by the applicants for such an agricultural reservoir notwithstanding that it was not accompanied by a fee and/or had not been advertised pursuant to section 26 of the Town and Country Planning Act 1971 , on the grounds:

> 1. The applicants wish to secure planning permission to construct a reservoir at West Bowers Farm, Woodham Walter, Essex. 2. That construction project is an engineering operation. 3. The land in question is agricultural land which has an area of more than one acre and which is comprised in an agricultural unit. 4. The works are requisite for the purposes of agriculture in that the proposal will enable consistent spray irrigation to take place during the summer growing season. This increases crop yield and protects against very dry weather. 5. The works are therefore within the scope of Class VI of Schedule 1 to the Town and Country Planning General Development Order 1977 . 6. The fact that the material excavated and removed from the site in the course of such works includes or consists of sand, gravel or other minerals is not sufficient to take the proposed operations outside the ambit of Class VI given that no grading, washing, dressing or sorting of the material extracted is to take place on site. 7. A ***370*** direction under article 4 of the Town and Country Planning General Development Order 1977 is in force in respect of the land in question withdrawing the permission granted under Class VI. 8. Accordingly, by reason only of that direction it is necessary for the applicants to make an application for express planning permission for development which is wholly within Class VI. Therefore, by reason of regulation 5 of the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1983 no fee is payable for that application. 9. Further, the operations in question are engineering operations for the construction of an agricultural reservoir. Therefore they do not fall within article 8 of the Town and Country Planning General Development Order 1977 and there is no obligation upon the applicants to comply with the requirements of section

26 of the Town and Country Planning Act 1971 . 10. Therefore, in deciding as set out in its letter of October 8, 1984, that if the reservoir proposal included the extraction of sand and gravel and its removal from the site on a sufficient scale to be on a commercial basis it was not within Class VI and an application accompanied by a fee was required together with compliance with section 26, the Essex County Council: (a) erred in law in its construction of the relevant statutory provisions, and (b) took into account an irrelevant consideration, namely that the material extracted and removed in the course of constructing the agricultural reservoir would include quantities of sand or gravel.

On February 13, 1985, Nolan J. dismissed the application. The applicants appealed, on the grounds:

(i) The learned judge erred in holding that where planning permission had been granted for engineering operations requisite for the use of land for the purposes of agriculture in circumstances where the carrying out of those operations necessarily involves the removal of minerals from the land such removal would, in the absence of another planning permission, nevertheless be a breach of planning control.

(ii) The learned judge erred in failing either to follow or to distinguish the reasoning of the *Divisional Court in Northavon District Council v. Secretary of State for the Environment* . [5]

Representation

Konrad Schiemann, Q.C. , and David Mole for the applicants.
David Keene, Q.C. , and Clive Newberry for the respondent council.

Cur. adv. vult.

June 17. Nourse L.J.

This is an appeal from a decision of Nolan J. given on February 13, 1985, in proceedings for judicial review. ***371*** It raises a short question of planning law that is one of some general importance.

The appellants are a partnership of farmers who wish to construct a large reservoir on part of their farm for the purpose of irrigating their crops. It is agreed that that construction, viewed in isolation, would fall within the general permission for engineering operations for agricultural purposes that is granted by article 3 of and paragraph 1 of Class VI of Schedule 1 to the Town and Country Planning General Development Order 1977 . However, the reservoir could not be dug without extracting large quantities of gravel in the process. Broadly stated, the question at issue is whether the extraction of the gravel would constitute a use of the land for the winning or working of minerals for which a further permission is required.

The appellants carry on their business under the name of West Bowers Farm Products at Woodham Walter in Essex. The area of land on which they wish to construct the reservoir is some 18 acres in extent, and its depth would be 6.5 metres. On September 20, 1981, pursuant to the powers conferred on them by article 3 of the Order of 1977, the respondent local planning authority, the Essex County Council, directed that the general permission granted by article 3 should not apply to the carrying out on the appellants' land of engineering operations for the construction of reservoirs for the purposes of agriculture. It is agreed that that means that the appellants must apply for planning permission. On the other hand, for reasons that will appear, it does not mean that paragraph 1 of Class VI ceases to be material.

The present position is that the appellants have not yet applied for planning permission. The reason for that is that the respondents maintain that they will be unable to entertain the application unless and until it has been advertised and a fee paid. The appellants maintain that they are required to do neither of those things. By this application, which was dismissed by Nolan J., they claim a declaration to that effect and an order of mandamus requiring the respondents to consider and determine the planning application notwithstanding that it has not been advertised and is not accompanied by a fee. I will refer to each of these requirements in turn.

Advertisement is dealt with by section 26 of the Town and Country Planning Act 1971 . Subsection (2) provides that an application for planning permission for development of any class to which the section applies shall not be entertained by the local planning authority unless it is accompanied (*inter alia*) by evidence that the application has been advertised. In order to see the classes of development to which section 26 applies, one then goes, via subsection (1) , to article 8(1) of the Order of 1977, paragraph (*b*) of which brings in (*inter alia*) the use of land for the winning or working of minerals. In order to get at the meaning of that word, ***372** one returns to the Act of 1971, section 290 of which defines it as including "all minerals and substances in or under land of a kind ordinarily worked for removal by underground or surface working, except that it does not include peat cut for purposes other than sale."

Fees are dealt with by the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1983 . [6] Regulation 3 provides that, subject to the provisions of regulations 4 to 7 , where an application is made to a local planning authority for planning permission for the development of land or for the approval of reserved matters, a fee shall be paid to that authority in accordance with the provisions of the Regulations. So far as material, regulation 5 is in these terms:

> (1) The provisions of regulation 3 shall not apply where the local planning authority to whom the application is made are satisfied:—(a) that the application relates to development which is within one or more of the classes specified in Schedule 1 to the General Development Order and solely to such development; and (*b*) that the permission granted by article 3 of that Order does not apply in respect of that development by reason of (and only by reason of):—(i) a direction made under article 4 of that Order which is in force on the date when the application is made; …

It is agreed that the requirement of regulation 5(1)(b)(i) is satisfied in the present case. The question, therefore, is whether the application would relate to development that is solely within paragraph 1 of Class VI .

As the final step in this review of the material provisions, I must set out the terms of the first part of paragraph 1 of Class VI , which reads as follows: "The carrying out on agricultural land having an area of more than one acre and comprised in an agricultural unit of building or engineering operations requisite for the use of that land for the purposes of agriculture. …" It is agreed that the rest of the paragraph is immaterial.

The position can be summarised as follows. Under section 26 , the application must be advertised if it is one for the winning or working of minerals. Under regulations 3 and 5 , a fee must be paid unless the application relates solely to the carrying out of engineering operations requisite for the use of the land for the purposes of agriculture. If the application is one for the first of these activities, it cannot relate solely to the second of them. Accordingly, the effect of the provisions in the present case is to rest the liabilities to advertise and pay a fee on the answer to a single question that can be formulated as follows: will the construction of the reservoir be (1) solely the carrying out of engineering operations requisite for the use of the land for the purposes of agriculture, or (2) a hybrid consisting partly of that activity and partly of the use of the land ***373** for the winning or working of minerals? The present case is complicated by the article 4 direction, but exactly the same question would arise if what had to be decided was whether the construction of the reservoir fell within the general permission granted by article 3 and paragraph 1 of Class VI .

Nolan J. referred to evidence sworn on behalf of the appellants to the effect that the sand and gravel that was believed to lie beneath the surface of the site of the proposed reservoir and that would be excavated in the course of constructing it would be removed from the site and sold. However, no grading, washing, dressing or sorting of the material extracted would take place on site nor any other operation ancillary to mineral extraction as such. The amount of material excavated would be enough to enable the proposed reservoir to be constructed and no more. No operations were proposed beyond what would be necessary to construct the reservoir in any event, whether or not there were mineral deposits on site. Nolan J. then stated the question and referred to the decision of the *Divisional Court in Northavon District Council v. Secretary of State for the Environment* . [7] Then he referred to the arguments of counsel on both sides and stated his reasons for refusing the application as follows:

> For my part, I would not accept that different tests can be applied at the application stage and the enforcement stage; either a separate permission is required for the mineral extraction or it is not. This must, to my mind, depend upon the essential character of the development be it proposed or completed. The test is objective. It must be applied from the standpoint of the community and not from the subjective viewpoint of the developer. The opposing arguments in the present case are fairly finely balanced, but in my judgment, on the available evidence, the essential character of the proposed development could properly be regarded by the respondents as [of] a dual character comprising both the Class VI development and mineral extraction. The facts of the present case are very different from those of the *Northavon* case, but in this case as in that the decision under attack of the local authority is one which cannot be faulted as a matter of law.

In seeking to answer the question for myself, I will start by stating some general propositions that appear to me to be free from doubt. First, I agree with Nolan J. that the same test is to be applied at both the application and the enforcement stages, although it is obvious that it is usually easier to apply it at the latter. Secondly, I agree with him that the test is an objective one and that the subjective purpose or motive of the developer is irrelevant. Thirdly, a hybrid does not cease to be such merely because the characteristics that it has inherited from its parents exist in it unequally. What is necessary is that each should be recognisable in ***374** a substantial degree. Fourthly, the definition of minerals, in particular by the exclusion of peat cut for purposes other than sale, is shown to be extremely wide. It includes all minerals under land of a kind ordinarily worked for removal, irrespective of whether they are won or worked for profit. Bearing in mind, for example, that clay is a mineral, I approach the question on the footing that it would in most parts of the country be impossible to construct a reservoir of any depth without extracting minerals in the process.

Mr. Schiemann, for the appellants, submitted that the impossibility of constructing the reservoir without extracting the gravel demonstrated that the latter activity was an integral part of the former. There was one indivisible process. Therefore, permission for the former was permission for the latter. I accept the premise of that submission but reject the conclusion. The planning legislation is not impressed by the indivisibility of single processes. It cares only for their effects. A single process may for planning purposes amount to two activities. Whether it does so or not is a question of fact and degree. If it involves two activities, each of substance, so that one is not merely ancillary to the other, then both require permission.

Applying that test to the facts of this case, I am left in no doubt that the construction of the reservoir will involve two activities, each of substance. The extraction of so much gravel will not merely be ancillary to the carrying out of the engineering operations, as it would usually be, for example, where foundations were dug for a bridge or a building, I take due account of the fact that it is only the extraction that will take place on the land and of the other evidence to which Nolan J. referred. Gravel will still be won and worked on a substantial scale. In my judgment, no other view of this case could reasonably be held.

I would dismiss this appeal.

Neill L.J.

The facts giving rise to the present appeal are set out in the judgments of my Lords. I need not repeat them.

Section 23(1) of the Town and Country Planning Act 1971 provides that, subject to the provisions of the section, "planning permission is required for the carrying out of any development of land." By section 22(1) , "development" means, subject to certain exceptions that are not material, "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

It is common ground that the construction of the reservoir at West Bowers Farm will constitute development of land. The dispute between the appellants and the council, however, is as to the classification of the development.

The appellants contend that the development will amount to no more than the carrying out of engineering operations requisite for ***375** the use of West Bowers Farm for the purposes of agriculture and that, in the absence of a direction under article 4 of the Town and Country Planning General Development Order 1977 , the development would not have required any express permission because it would have constituted permitted development within article 3 of and paragraph 1 of Class VI in Schedule 1 to the Order.

On behalf of the council, on the other hand, it is contended that, though the construction will certainly involve engineering operations falling within paragraph 1 of Class VI , it will also involve development of a class to which section 26 of the Act of 1971 applies and that, even in the absence of an article 4 direction, permission for *that* development would have been required.

The council rely on article 8(1) of the Order, which designates the classes of development to which section 26 applies, and they argue that the construction of the reservoir will involve the "winning or working of minerals," which is one of the classes of development set out in article 8(1)(b) .

It is therefore submitted that, by reason of section 26(2) of the Act of 1971, the council cannot entertain the planning application by the appellants until the requirements as to advertising in that section have been complied with.

It is also argued on behalf of the council that the appellants will have to pay a fee at the time when the application for planning permission is made. For this purpose, the council rely on regulation 3 of the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1983 and argue that the appellants do not fall within the exempting provisions of regulation 5 because the exemption only applies under regulation 5(1)(a) where the council are satisfied "that the application relates to development which is within one or more of the classes specified in Schedule 1 to the General Development Order and solely to such development."

It is the council's case that they are not satisfied that the application relates solely to development of a class specified in Schedule 1 .

It will be apparent that the issues that arise under section 26 of the Act of 1971 on the one hand and under regulation 5 of the Regulations of 1983 on the other hand are similar, though not identical. In the instant case, however, the essential question to be determined under both provisions is whether the development falls solely within paragraph 1 of Class VI in Schedule 1 to the Order of 1977 or whether it also comprises the winning or working of minerals.

The definitions contained in the Act of 1971 and in the Order of 1977 do not provide any clear guidance as to operations that are or may be of a hybrid character. Nevertheless, I should refer to some of these definitions, as they throw a limited amount of light on the matters in issue.

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Section 290 of the Act of 1971 contains no definition of "mining operations" as used in section 22(1) , and the definition of "engineering operations" is of no assistance.

In Article 2 of the Order of 1977, "mining operations" are defined as meaning "the winning and working of minerals in on or under land, whether by surface or underground working," and in section 290 of the Act of 1971 the word "minerals" is defined as including "all minerals and substances in or under land of a kind ordinarily worked for removal by underground or surface working, except that it does not include peat cut for purposes other than sale."

It is further to be observed that, under paragraph 3 of Class VI in Schedule 1 to the Order of 1977 a further class of permitted development is "the winning and working, on land held or occupied with land used for the purposes of agriculture, of any minerals reasonably required for the purposes of that use, …"

In seeking an answer to the question that I posed earlier in this judgment, I find some assistance in the width of the definition of "minerals" in section 290 of the Act of 1971. In my view, however, the answer to the question must depend in the end on a consideration of the nature and extent of the work that is to be carried out, looking at the matter objectively.

I see no reason in principle why works that are carried out on land may not comprise development of more than one class. In many cases, building or engineering operations will involve as an incidental feature of the operations the extraction of gravel or other minerals. In such cases, it would often be quite inappropriate to treat the development as involving the winning or working of minerals within article 8(1)(b) of the Order of 1977. In the present case, however though no treatment of the minerals on site is contemplated, the amount of material that is to be "won or worked" is very substantial. An area of 18 acres is to be opened to a depth of nearly 20 feet, and beyond question this operation will yield many thousands of tons of minerals.

Looking at the matter objectively, development of this size involving the winning or working of minerals on this scale can and should be classified as development falling within the class set out in article 8(1)(b) of the Order of 1977 and not merely or solely as an engineering operation.

For those reasons, I, too, would dismiss this appeal.

Sir John Donaldson M.R.

Subject to exceptions that are immaterial for present purposes, section 23(1) of the Town and Country Planning Act 1971 requires that planning permission be obtained for the carrying out of any "development" of land. "Development" is defined by section 22 as meaning "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or **377* other land." As was pointed out by Lord Denning M.R. in *Parkes v. Secretary of State for the Environment* , [8] "… in the first half 'operations,' comprises activities which result in some physical alteration to the land, which has some degree of permanence to the land itself: whereas in the second half 'use' comprises activities which are done in, alongside or on the land but do not interfere with the actual physical characteristics of the land." To this it may be added that some activities may constitute a change of use or an operation, according to what is the object of the activity. The most obvious example is the introduction on to land of waste material, either to be rid of that material, which can constitute a change of use, or to alter the character of the land, which can constitute an "operation" (see *Northavon District Council v. Secretary of State for the Environment* [9]). The same activity may also constitute both an operation and a change of use.

This broad dichotomy between "operations" and "use" within the general concept of "development" is important, but it is not the only classification that is necessary for planning purposes. Thus under article 3 of and Schedule 1 to the Town and Country Planning General Development Order 1977 permission is given for development that falls within Class VI , namely, so far as is material:

> 1. The carrying out on agricultural land having an area of more than one acre and comprised in an agricultural unit of … engineering operations requisite for the use of that land for the purposes of agriculture … 3. The winning and working, on land held or occupied with land used for the purposes of agriculture, of any minerals reasonably required for the purposes of that use, …

If reliance is to be placed on this general permission, the developer must be able to show that the development is, *and is only* , an engineering operation or other activity described in Class VI .

In this case, the applicant proposes to remove minerals from the land to a depth of 6.5 metres over an area of about 18 acres, which I believe to be something like half as big again as the open space of Lincoln's Inn Fields. The minerals would be removed from the site and sold. Having created this hole (to use a neutral word), the sides and bottom would be made watertight and a reservoir for water thereby created. Viewed as a whole, and bearing in mind that the purpose is said to be to create a reservoir, the activity clearly constitutes an engineering operation and, *to that extent* , would, subject to various other complications to which I will return, be authorised by that part of the Order of 1977 to which I have referred. Taking account of the scale of the excavation, however, it **378* would also constitute a mining operation, which curiously is not defined, and that is not authorised by the Order.

Mr. Konrad Schiemann, Q.C., who has appeared for the developers, has submitted that, if this is right, every engineering operation that incidentally involves the extraction of minerals from the land will also constitute a mining operation and the scope of Class VI of the Order of 1977 will be greatly reduced. In his submission, the test is the purpose for which the activity is undertaken. If minerals are removed for the purpose of facilitating an engineering operation, the development is to be classified as such an operation and not as a mining operation. I am unable to accept this argument. Purpose is undoubtedly a factor to be taken into account. Scale, however, is also relevant, as is what happens to the extracted materials. Thus, the digging of foundations for a building, which incidentally involves the extraction of relatively small quantities of minerals, could not possibly be described as a mining operation. Nor could most "cut and fill" operations involved in road building. It is a question of fact and degree in each case.

Looking at the facts of this case, which involves the removal of so large a quantity of minerals, the only possible conclusion is that the development would consist of a mining operation followed by an engineering operation. That was the view taken by the Essex County Council as local planning authority. The legal consequence is that the developers would in any event be unable to rely on Class VI of the Order of 1977. I say "in any event" because of the complications to which I have already referred and to which I must now turn.

On September 24, 1981, the Essex County Council, as the local planning authority, gave a direction under article 4 of the Order of 1977 that the general permission granted by article 3 should not apply at the site in question to development of the following description, namely "the carrying out of engineering operations for the construction of reservoirs being development comprised within paragraph 1 of Class VI referred to in Schedule 1 to the said Order and not being development comprised within any Class." One effect of that direction was that if, contrary to the view that I have already expressed, it would otherwise have been possible for the applicants to rely on a general Class VI permission, following the giving of the direction they would have to make a specific application for planning permission.

It is now necessary to look at the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1983 . Under regulation 3 , the applicant for planning permission has to pay a fee (in this case about £3,500), unless exempted by regulations 4, 5 or 6 . If any of these regulations apply it is regulation 5(1) , which is in the following terms:

> 5
> (1) The provisions of regulation 3 shall not apply where the local planning authority to whom the application is made ***379*** are satisfied:—(a) that the application relates to development which is within one or more of the classes specified in Schedule 1 to the General Development Order and solely to such development; …

The Essex County Council was not satisfied that the application related to development that was within one or more of those classes and solely to such development, because it considered that the development included the performance of mining operations. That decision is no doubt reviewable on *Wednesbury* principles, [10] but in my judgment is was plainly right. It follows that the fee is payable.

The remaining complication arises out of article 8 of the Order of 1977, which provides: "8(1) The following classes of development are designated for the purposes of section 26 of the Act:—(a) … (b) … other operation … for the winning or working of minerals." I am fully satisfied that the proposed development involves not only mining operations but, if this be different, an operation for the winning of minerals. Accordingly, section 26 of the Act of 1971 applies and the county council is prohibited from entertaining the application for planning permission unless and until the developers comply with the notice provisions contained in that section.

For those reasons, in my judgment the appellants are not entitled to relief by way of judicial review and I too would dismiss the appeal.

Representation

Solicitors— Stamp Wortley & Co. , Chelmsford; C. J. Trowhill , Essex County Council, Chelmsford.

Order

[*Reported by Michael Gardner, Barrister* .]

Appeal dismissed with costs. ***380**

Footnotes

1 See *post* , pp.371, 372.
2 Art. 3 : "(1) Subject to the subsequent provisions of this order, development of any class specified in Schedule 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or of the Secretary of State: …"
3 Art. 8(1)(b) : see *post* , p.379.
4 Sched. 1, Class VI, para. 1 : see *post* , p.372.
5 *(1980) 40 P. & C.R. 332, D.C.*
6 S.I. 1983 No. 1674 .
7 *(1980) 40 P. & C.R. 332, D.C.*
8 *[1978] 1 W.L.R. 1308* , 1311; *[1979] 1 All E.R. 211* ; *36 P. & C.R. 387* , 395; *77 L.G.R. 39, C.A.*
9 *(1980) 40 P. & C.R. 332*
10 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680; 45 L.G.R. 635, C.A.*

*746 Coleshill & District Investment Co. Ltd. v Minister of Housing and Local Government and Another

Positive/Neutral Judicial Consideration

Court
House of Lords

Judgment Date
6 May 1969

Report Citation
[1969] 1 W.L.R. 746

House of Lords

Lord Morris of Borth-y-Gest, Lord Guest , Lord Upjohn , Lord Wilberforce and Lord Pearson

1969 March 11, 12, 13, 17, 18, 19; May 6

Town Planning—Development, meaning—Operations on land—Demolition—Partial demolition—Removal of embankment and blast walls surrounding magazines—Whether "engineering ... operations"—Whether works "alteration of ... building which ... materially affects ... external appearance"—Whether "development"— Town and Country Planning Act, 1962 (10 & 11 Eliz. 2, c. 38), s. 12 (1) (2) .

An ammunition depot, constructed for use during the 1939–1945 war, consisted of six separate buildings, four magazines and two explosive stores, round each of which were erected blast walls about nine feet high. Against the walls were substantial sloping embankments which extended from the top of the walls to some eight to ten feet from their base. They were all grass-covered. In 1962 the Minister determined that user of the buildings for commercial storage would not constitute development, and the buildings were so used. In 1966, the owners decided to remove the embankments and walls. The embankments were removed by using a mechanical excavator and the material was transported away in lorries. The *747 local planning authority served an enforcement notice on the owners, alleging development without planning permission and requiring them to restore the land to its prior condition. The owners appealed to the Minister, also asking, pursuant to section 43 of the Town and Country Planning Act, 1962 , for a determination whether planning permission was required to remove the blast walls. An inquiry was held; the inspector reported to the Minister. The Minister concluded that the blast walls and embankments were an integral part of each of the buildings, that the removal of the embankments was an engineering operation within the definition of "development" in section 12 (1) of the Act [1] ; he also held that the removal of the blast walls would constitute an alteration of the buildings, materially affecting the external appearance of the buildings, and constituting "development." He, accordingly, upheld the enforcement notice and refused planning permission. On appeal on a point of law the Divisional Court allowed the appeal, but the Court of Appeal restored the Minister's order.

On the owners' appeal:—

Held, that there was no error of law in the Minister's conclusions that the walls and embankments were an integral part of each building (post, pp. 754C–D, 769C); that the removal of the embankment was an engineering operation (post, pp. 756C, D, 770F); that pulling down the blast walls would involve structural alterations to the buildings affecting the external appearance (post, pp. 756E–G, 769H — 770A); and that, accordingly, there was no error of law in the Minister's decision that both operations constituted "development" within section 12 (1) , requiring planning permission (post, pp. 759D, 761C, D, 766A).

Per Lord Morris of Borth-y-Gest, Lord Guest, Lord Upjohn and Lord Wilberforce. You cannot look at a clause of exclusion to extend the natural construction of the main section: qualifying words in section 12 (2) (a) of the Act of 1962 cannot be introduced into section 12 (1) to enlarge the scope of it (post, pp. 756F, 759A, B, 762C–E, 764C–E).

Per Lord Guest. In considering whether, as the blast walls were physically discontinguous from the magazines, they could in law form part of a unum quid, it is legitimate to consider the functional as well as the physical test. If they were built originally as an integral and necessary part of the building and at the same time as the magazines, the fact that they are physically discontinguous does not prevent them from being part of the building (post, p. 759G, H).

Per Lord Upjohn. There is nothing in section 12 or elsewhere which makes it plain that demolition per se or simpliciter is necessarily excluded from the very wide words of section 12 (1) if otherwise the relevant operation fits within those words as a plain matter of the use of the English language (post, p. 761H). The question whether demolition per se or simpliciter is development within section 12 (1) does not call for determination. All that it is necessary to decide is that, if such demolition is covered, as in the present case, by other provisions of that subsection, it is not saved from the application thereof merely by reason of the fact that it is only demolition per se or simpliciter (post, p. 762F).

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Decision of the Court of Appeal [1968] 1 W.L.R. 600; [1968] 1 All E.R. 945, C.A. upheld.

The following cases are referred to in their Lordships' opinions:

British Launderers' Research Association v. Hendon Borough Rating Authority [1949] 1 K.B. 462; [1949] 1 All E.R. 21, C.A.
Cheshire County Council v. Woodward [1962] 2 Q.B. 126; [1962] 2 W.L.R. 636; [1962] 1 All E.R. 517, D.C.
Marks & Spencer Ltd. v. London County Council [1952] Ch. 549; [1952] 1 All E.R. 1150, C.A. ; *[1953] A.C. 535; [1953] 2 W.L.R. 932; [1953] 1 1 All E.R. 1095, H.L.(E.)* .

The following additional cases were referred to in argument:

Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326, H.L.(E.) .
Howell v. Sunbury-on-Thames Urban District Council (1963) 62 L.G.R. 119, C.A.
Lord Advocate v. Reliant Tool Co. [1968] 1 W.L.R. 205; [1968] 1 All E.R. 162, H.L.(Sc.) .
Luke v. Minister of Housing and Local Government [1968] 1 Q.B. 172; [1967] 3 W.L.R. 801; [1967] 2 All E.R. 1066, C.A.
Magnhild (Owners) v. McIntyre Brothers & Co. [1920] 3 K.B. 321 .
Maurice (C.) & Co. Ltd. v. Minister of Labour [1968] 1 W.L.R. 1337; [1968] 2 All E.R. 1030, C.A.
Nelsovil Ltd. v. Minister of Housing and Local Government [1962] 1 W.L.R. 404; [1962] 1 All E.R. 423, D.C.
Newcastle City Council v. Royal Newcastle Hospital [1959] A.C. 248; [1959] 2 W.L.R. 476; [1959] 1 All E.R. 734, P.C.
Tillmanns & Co. v. S.S. Knutsford Ltd. [1908] 2 K.B. 385, C.A.

APPEAL from the Court of Appeal.

This was an appeal by Coleshill and District Investment Co. Ltd., by leave of the House of Lords, from an order of the Court of Appeal (Lord Denning M.R., Diplock and Salmon L.JJ.) dated December 19, 1967, allowing the appeal of the Meriden Rural District Council from, and setting aside, the order of the Divisional Court (Lord Parker C.J., Widgery and Chapman JJ.) dated November 24, 1967, and restoring the decision of the Minister of Housing and Local Government given on May 16, 1967.

The question arising on the appeal was whether the operations which the appellants carried out (without planning permission), and which they wished to carry out, constituted "development" within the meaning of section 12 (1) of the Town and Country Planning Act, 1962 , for which planning permission was required.

On December 8, 1966, an inspector held an inquiry into an appeal by the appellants under section 46 (2) of the Act of 1962 against an enforcement notice, dated March 30, 1966, served by the Meriden Rural District Council acting on behalf of the Warwickshire County Council, relating to the removal of embankments which had materially affected the external appearance of magazines at Hampton-in-Arden, and requiring the appellants to restore the land to its prior condition. The appeal against the notice was made on ground (d) of section 46 (1) but ground (c) was added at the inquiry. The following description of the site and surroundings is taken from the inspector's report:

> "Hampton-in-Arden is a pleasant village containing a good deal of … residential development, in the countryside between Birmingham and Coventry and about nine miles from each. … The site is a ***749*** former ammunition depot extending in an elongated shape southerly from Meriden Road beyond development in the village. It has a total area of about 8¾ acres. On the northerly part of this, about five acres, are six well spaced buildings within encircling blast walls extending singly southerly from Meriden Road, which were used formerly as magazines (four) and explosive stores (two). They are prominent in the surroundings. The explosive stores, which are nearer the road, are each about 25 to 30 feet long and about 12 feet wide and constructed of brick, and the magazines are each about 70 feet long and about 30 feet wide and constructed of concrete. They are all about 11 feet high, the magazines rising to about 13 feet at the roof centres. Around and about four feet away from all the buildings are concrete blast walls about nine feet high. Through these at each end are two narrow entrances to the magazines and one to the explosive stores. The tops of windows along the sides of the magazines are at about the same level as the tops of the blast walls. On the outside of the blast walls were formerly embankments, most of which have now been removed, although around the magazines broken and whole loosely stacked bricks, which formed part of these, still remain in places. … The embankments appear to have extended from near the tops of the blast walls down to about eight to ten feet out from their base. The site is surrounded with agricultural land, which westerly and north-westerly, apart from a detached post-war bungalow about 200 feet away along Meriden Road, extends in about 550 feet to dwellings in the village, including medium and large detached inter- and post-war houses along a private cul-de-sac road, The Crescent."

After hearing evidence and submissions the inspector found the following facts:

> "(1) The site is in the countryside beyond development in the nearby village and is surrounded with agricultural land which westerly and northwesterly extends in a short distance to houses.
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> (2) On part of it are six buildings about 11 feet to 13 feet high, formerly used as magazines or explosive stores.
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> (3) Around these and about four feet away are concrete blast walls about nine feet high.
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> (4) Broken and whole bricks are stacked against the exteriors of the blast walls in places.
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> (5) There are narrow entrances through the blast walls to narrow doors in the buildings and along the sides of the four largest buildings there are windows, the tops of which are about level with the tops of the blast walls.
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> (6) The blast walls and the tops of the buildings are prominent in the surroundings.

(7) In the development plan the site is within white land and within the proposed green belt.

(8) The buildings have an existing use for storage.

(9) Formerly there were embankments covered with vegetation against the exteriors of the blast walls, which extended from near the tops to about eight to ten feet out from the base.

(10) Around [four] buildings … these consisted of bricks and brick rubble and ash covered with soil, the soil constituting about one-third of the whole.

(11) Around [the fifth] building … it consisted of ash and around [the sixth] building … of ash covered with soil.

(12) The embankments were removed during 1966 by means of a mechanical excavator loading into lorries.

(13) The embankments and vegetation thereon screened from view the blast walls and much of the buildings protruding above them."

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The inspector came to the following conclusions:

"The legal implications of the above facts are matters for consideration by the Minister and his legal advisers, but it appears to me that:- (1) Surrounding embankments and blast walls are a necessary and integral part of buildings used for storing explosives and together they constitute a magazine. That the buildings here now have a different storage use, which does not require embankments and blast walls, is immaterial as the enforcement notice is directed towards 'the magazines.' Their appearance has been materially affected by the removal of the embankments, which work was an engineering operation constituting development. Nevertheless, it could be regarded as demolition of part of the magazine and planning permission is not required for demolition of a building.…

"On the planning merits of the case I am of the opinion that the exposure of the concrete blast walls and buildings forming these magazines, by the removal of the grass and vegetation covered embankments, has resulted in these ugly structures being much more prominent in the rural surroundings. The quality of the countryside here, and its effectiveness as a part of a proposed green belt, has accordingly deteriorated to an unacceptable extent. Removal of the embankments has not enlarged the accesses, or improved the lighting to any appreciable extent, as the blast walls remain. Even had it done so, it is doubtful if that would have been sufficient justification for accepting the removal."

The inspector recommended that if it was decided that development requiring planning permission was involved, planning permission should not be granted.

On the appeal against the enforcement notice the Minister in his letter of decision dated May 16, 1967, stated that the evidence given at the inquiry and the inspector's findings of fact and conclusions had been considered and continued:

"The appeal site is a narrow strip of land occupied by six buildings surrounded by concrete blast walls, four of which were formerly used as magazines and the remaining two as explosive stores.

> On the outside of the blast walls were formerly embankments made up of two-thirds ash and brick rubble, the remaining third being soil, except in the case of one explosive store where there was no soil covering. The development alleged in the enforcement notice is the removal of … the embankments.…
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> "… In support of the appeal on grounds (c) and (d) it was submitted that the removal of soil did not constitute development as it was not against the buildings themselves but against the surrounding blast walls and that its removal did not affect the external appearance of the actual magazines. The council maintained that the blast walls and the embankments were an integral part of each of the buildings. This latter view is accepted as the correct one in this case. The blast walls surrounding the inner buildings cannot be regarded simply as means of enclosures. They were erected as essential features of the structures as erected and without them the inner buildings would have been ineffective for the use for which the magazines were built. The soil and other materials (ash, rubble etc.) which formed the embankments to the walls were similarly parts of the magazines which description is regarded as covering also the explosive stores. The Ministers ***751** decision in 1962 that the premises had a use within Class X of the Use Classes Order 1950 , which is a use as a warehouse or repository for any purpose, does not affect this situation. The removal of the embankments was an engineering operation clearly falling into section 12 (1) of the Act. This operation constituted material development for which planning permission was required and the appeal therefore fails on grounds (*c*) and (*d*). On the planning merits of the case no reason is seen for disagreeing with the inspector's conclusions and it is not proposed to grant permission for the operations in question, on the application deemed to be before the Minister under section 64 (2) of the Act."

Accordingly the Minister upheld the enforcement notice, subject to variations not relevant to the present appeal, refused planning permission for the development to which it related, and dismissed the appeal.

On the application under section 43 of the Act of 1962 to determine whether an application for planning permission was necessary for the removal of the blast walls, the Minister in his letter of decision dated May 16, 1967, stated:

> "With regard to the removal of the walls, the company argued that the blast walls were separate from the storage units and that as they in no way afforded any support to the buildings their removal could not be said to affect the external appearance of the buildings and further that demolition of itself does not involve development. In the opinion of the local planning authority the blast walls (and the earth banks which previously surrounded them) were all part of the original design of the buildings and their removal would therefore materially affect the external appearance of the buildings. It is noted that the buildings were erected shortly before the last war, some were used for the storage of ammunition and some for the storage of explosives. The blast walls and soil embankments were provided to prevent damage from explosion and to conceal the internal structure. The council's view that the blast walls form part of the buildings is accepted as a fact and it is considered that the removal of the blast walls would therefore constitute an alteration of the buildings, and that it would materially affect the external appearance of the buildings. In these circumstances the provisions of section 12 (2)(a) of the Act do not apply to the proposal which therefore constitutes development of the land for which planning permission is required since such development is not within any of the classes set out in Part I of Schedule 1 to the Town and Country Planning (General Development) Order, 1963 …"

Accordingly the Minister determined that the removal of the blast walls would constitute development requiring planning permission.

On appeal against those decisions of the Minister on a point of law, the Divisional Court allowed the owners' appeals. The Court of Appeal reversed that decision.

The owners appealed.

Representation

Sir Derek Walker-Smith Q.C. and S. Goldblatt for the appellants.
S. C. Silkin Q.C. and Gordon Slynn for the Minister.
A. Cripps Q.C. and A. E. Holdsworth for the local planning authority.

LORD MORRIS OF BORTH-Y-GEST

Their Lordships took time for consideration.

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May 6. My Lords, one question that was persistently raised in this appeal was formulated as being whether demolition constitutes development for the purposes of the Town and Country Planning Act, 1962 . Neat and arresting as the question so expressed may seem to be it is not in fact the direct question which calls for our decision. If someone propounded a question of comparable generality such as whether modernisation constitutes development someone else might ask for a ruling as to whether renovation constitutes development. No one of these inquiries has precision. If development needs permission, which in most cases it does, and if development is defined, as in the Act it is, the true path of inquiry first involves ascertaining exactly what it is that it is desired to do, or exactly what it is that has been done, and then to see whether that comes within the statutory definition of development. Once some completed or projected work or operation is fully and clearly described then the words of definition can be applied. It is unnecessary and may be misleading to give the work or operation some single labelling word and then to try to apply the definition to that word. We are here concerned with actual operations and not with possible operations or with those which can for the future be imagined. Why, then, introduce and interpose some general word of description when precise words of description are at hand? Why gaze into the crystal when one can read the book?

The present case relates to certain structures which are on a site having an area of about eight and three-quarter acres near Hampton-in-Arden. The structures themselves occupy about five acres. They consist of a number of buildings or magazines constituting, and during the last war used as, an ammunition depot. There are six separate buildings: four of them were magazines and two of them explosives stores. Around each one of them blast walls were erected which were about nine feet in height. Against these walls there were substantial sloping embankments consisting of rubble and brick and ash and soil. They extended from near the top of the walls to a distance of eight to ten feet from their base. They were all grass covered.

The War Department released the depot in 1958. In 1962 the Minister determined that user of the buildings for purposes of commercial storage (for which permission was then sought) would not constitute or involve development. In the early part of 1966 the appellants decided that they would like to remove the embankments and the walls which were felt to be unnecessary and a cause of inconvenience when the buildings were used for civilian purposes. So as a first step they set about removing the embankments. They instructed contractors to undertake the work. The contractors used a mechanical excavator. The material after being loaded into lorries (which the contractors hired from various firms) was transported away to be delivered at various different sites.

When those who lived in houses near to the depot saw that the embankments were being removed they were aggrieved. The grass-grown or vegetation covered green banks had blended with the countryside and had so camouflaged the depot as to screen the blast walls as well as much of the buildings from view. As the embankments were removed the buildings became starkly exposed and the general result, so the people felt, was that the whole place became an eye-sore which marred the locality and detracted from the amenity to be expected in a green belt. The result was that complaints were expressed to the

Meriden Rural District Council and following upon them the clerk of the council wrote to the appellants ***753** pointing out that the operations being undertaken constituted development and that no application for planning permission had been made. An enforcement notice dated March 30, 1966, followed. The appellants were required to discontinue their operations and to restore the land to its prior condition. The appellants took the view that their operations did not constitute development and that no planning consent had been needed. So they appealed against the enforcement notice. An inquiry before an inspector (pursuant to section 46 of the Town and Country Planning Act, 1962), was held on December 8, 1966. The inspector made a full report to the Minister dated January 11, 1967. The Minister gave his decision in a letter dated May 16, 1967. Subject to making certain variations, which do not now call for consideration, in the wording of the enforcement notice the Minister upheld the notice and, refusing planning permission, dismissed the appeal. The appellants exercised (see section 180 of the Act of 1962) their right to appeal to the High Court against the decision "on a point of law."

The appeal which, by a notice of motion dated June 12, 1967, they lodged was related also to the kindred question whether they could without planning permission take down the walls. The removal of the embankments had only been intended to be the first stage in the operation of completely removing the embankments and walls. So when the appellants were confronted with the question whether planning permission was needed to remove the embankments it was manifest that a similar question arose or would arise in regard to the walls. Pursuant to section 43 of the Act they asked the council, as the local planning authority, to determine that question. They so asked by a letter dated July 4, 1966. There was no determination within the prescribed time and accordingly the appellants appealed to the Minister. He gave his decision in a separate letter dated May 16, 1967. Other matters were involved but the only determination that is for present purposes relevant was that the removal of the walls would constitute or involve development and that planning permission was required. The appellants claiming to be "dissatisfied with the decision in point of law" (see section 181) therefore appealed to the High Court on this issue also.

Though there was but the one local inquiry the facts relating to the whole site were fully and carefully set out in the inspector's report of January 11, 1967. The report was made a part of the Minister's first letter of decision of May 16, 1967. The report contained a description of the site and its surroundings: it set out the contentions of the appellants, of the council, and of interested parties: it made specific findings of fact. I do not propose to refer to these in detail. Suffice it to say that it set out that the explosive stores which are brick built are each 25 to 30 feet long and about 12 feet wide: the magazines which are constructed of concrete are each about 70 feet long and about 30 feet wide and are about 11 feet rising to 13 feet high. Around, and about four feet away from each one of the buildings are the blast walls which are also constructed of concrete and are about nine feet high.

Having set out his findings of fact the inspector concluded that the legal implications from them were matters for consideration by the Minister and his legal advisers. He considered, however, that the embankments and blast walls were a necessary and integral part of buildings which constituted a magazine. He further thought that the work of removing embankments was an engineering operation constituting development though he added that it could be regarded as demolition of part of the ***754** magazine "and planning permission is not required for demolition of a building." He recommended that if the Minister decided that development requiring planning permission was involved, such permission should not be granted.

The Minister had the issues fairly and fully placed before him for his decision. As regards the buildings the Minister considered whether the blast walls and the embankments were an integral part of each of the buildings. He concluded that they were. He said that they could not be regarded simply as means of enclosures because they were erected as essential features of the structures which were erected. What had been built were magazines and the inner buildings would have been ineffective in use without the walls and embankments.

Pausing there, I cannot see how it can possibly be said that the Minister made a wrong decision on a point of law. In effect he was saying that the blast walls and embankments were an integral part of each of the buildings and could not be divorced from the internal buildings. The view might be held that his conclusion was not only one of fact but was on the evidence almost the inevitable one. There is, however, no need to consider whether or not that was so. It is enough to say that no error of law was involved.

The next part of the Minister's decision was that the removal of the embankments was an engineering operation and so was within the definition of development. He upheld the enforcement notice, refused planning permission and dismissed the appeal.

In the Minister's other decision, i.e., that relating to the appellants' application under section 43 , the first conclusion was again "accepted as a fact" that the blast walls form part of the building. The further conclusion was that the removal of the blast walls would constitute an alteration of the buildings and one which would materially affect the external appearance of the buildings. The removal of the walls would constitute development requiring planning permission: such development was not within any of the classes set out in Part I of Schedule 1 to the Town and Country Planning General Development Order, 1963 .

On appeal to the High Court the various grounds of appeal covered both the contention that neither what had been done nor what was proposed constituted development and also the contention that the embankments and walls were not part of the magazines. In allowing the appeal and setting aside the Minister's decision the *Divisional Court [1968] 1 All E.R. 62* took the view that the removal of the embankments could not be described either as a building operation or as an engineering operation: nor was it an operation of the scale, complexity and difficulty which would require a builder or an engineer or some mining expert. The view was held that the operation was a "simple removal of soil" or a "little job of shifting a few cubic yards of soil with a digger and a lorry" though it was said that earth moving on a grand scale requiring the intervention, supervision and planning of qualified engineers might well be an engineering operation.

The *Court of Appeal [1968] 1 W.L.R. 600* restored the order of the Minister and held that the operation of removing the embankments and also the operation of removing the walls constituted development.

As appears from the judgments in the Court of Appeal, argument was in that court presented on behalf of the appellants to the effect that demolition of a building is not development and that no proper distinction can be drawn between demolition of a building and demolition of part of a building. Arguments to the like effect were fully and attractively developed on behalf ***755** of the appellants in support of their appeal in this House. Supported by a careful and painstaking analysis of very many sections in the Act of 1962 the contention was urged that throughout the Act there is a clear, consistent and logical distinction between demolition and alteration. The term "alteration" when used in the Act may sometimes denote development and sometimes corrective action: the term "demolition," on the other hand, so the argument ran, is not used in the Act as denoting development but is only used in the context of corrective action or in reference to procedures for the preservation of special buildings. It was contended that there are very many indications pointing to the conclusion that Parliament has deliberately excluded demolition (as opposed to alteration) from the scope of planning control and from the concept of development. Thus, the need to protect certain buildings (such as those of historic or architectural interest) from demolition is met by special provisions. I do no more than summarise some of the steps in a very carefully constructed argument. If the contention is once accepted that demolition is not development then further steps (or jumps) in the argument run as follows: removal of the embankments or of the walls is demolition: demolition is not development: therefore, the removals are not development. Alternatively, even if the embankments and walls were parts of the buildings, since, by the definition section (section 221), a part of a building is a building, each removal of an embankment or of a wall is removal of a building: but as removal is demolition and as demolition is not development the result is that there was not and would not be any development.

My Lords, these arguments, however persuasive, must not compel a diversion from the facts as ascertained and from the statutory terms as defined. It was for the Minister to make certain decisions. The appeals to the High Court from his decisions are only on points of law. I have already expressed the view that it is quite impossible to assert that there was any invalidity in law in the findings of the Minister to the effect that the embankments and walls were integral parts of each of the buildings. It is next necessary to consider his findings relating (a) to the removal of the embankments and (b) to the desired removal of the walls.

The definition of "development" is set out in section 12 (1) and section 221 of the Act. Subject to certain exceptions, and leaving aside the making of any material change in the use of any buildings or other land, "development" means the carrying out of building operations (which include rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder) or of engineering operations (which include the formation or laying out of means of access to highways) or of mining operations or of other operations, in, on, over or under land. "Land" means any corporeal hereditament, including a building (which includes any structure or erection, and any part of a building so defined but not including plant or machinery comprised in a building). "Erection" in relation to buildings includes extension, alteration and re-erection. Wide though the definition is, it does not include any and every operation on land. In section 43 is set out the procedure to be followed when it is desired to have a determination whether planning permission is required. Any person who proposes to carry out "any operations" on land may apply for a ruling. Had development meant "any" operations in, on, over or under land there would not have been included in section 12 (1) the words "building, engineering, mining or other." I think that the word "other" must denote operations which could be spoken of in the context of or in association with or as being in the nature of or as ***756*** having relation to building operations or engineering operations or mining operations.

It was submitted, on the one hand, that the underlying conception of development is that of change. A rival submission was that the conception is that of positive construction. Another submission was that everything is development which is within the framework of what a "developer" (whoever so anonymous and elusive a person might be) would understand as being development. My Lords, as Parliament has denoted what is meant by development I do not think that we should be tempted to enlarge upon or to depart from the statutory definition. It may well be that some operations which could conveniently be called demolition would not come within the definition. But we must not decide hypothetical cases. Here we have actual facts and findings. The Minister had a careful report before him. No suggestion has been made that the procedure deviated from that which is laid down in the Town and Country Planning (Inquiries Procedure) Rules, 1965 (S.I. 1965 No. 473). The question that now arises is whether the Minister erred in law. He decided that the removal of the embankments was an engineering operation clearly falling within section 12 (1) of the Act. He had certain primary facts found for him by the inspector. He did not differ from them. His conclusion from them was one that he could reasonably and properly make. It was really a conclusion of fact, and I can see no trace of any error of law. It was contended that the Minister was giving a wider meaning to "engineering" than it could in accepted or current use bear. I cannot accept this. The findings relating to the dimensions of the various embankments show that the task of their removal was one of some magnitude. I do not think that it can be said that the Minister erred in law in coming to the conclusion that their removal was an engineering operation.

Similar considerations apply to the Minister's decision that the removal of the blast walls would constitute or involve development and that planning permission for their removal was required. I think that it is inherent in the Minister's decision that the operation of pulling down the concrete walls (which were an integral part of the various buildings) would involve structural alterations to buildings and would therefore constitute development within the statutory definition. He then proceeded to consider section 12 (2) . That subsection does not enlarge subsection (1) ; but if an operation is covered by subsection (1) it may be taken out of the definition of "development" by subsection (2) . The Minister was, I think, amply warranted in deciding that the alterations of the buildings which would result from taking down the walls would materially affect the external appearance of the buildings. No error of law is revealed.

In my view the Court of Appeal came to the correct conclusion. I would dismiss the appeal.

LORD GUEST

My Lords, prior to 1939 the War Department constructed an ammunition depot near the village of Hampton-in-Arden in Warwickshire. It consisted of four magazines, some 70 feet by 30 feet, and two explosive stores, 40 feet by 30 feet. Each of the buildings was about 11 to 13 feet high. Around each of the six buildings there were blast walls about nine feet high and standing about four feet out from the outside walls of the stores and magazines. Against the walls on their outer side there were embankments consisting of bricks, rubble and soil which extended from near the top of the walls to a distance of 8 to 10 feet from their base. After the war the use of the ammunition depot was ***757** discontinued. It was released by the War Department in 1958 and the freehold was acquired by the appellants in 1964. The buildings have, by a decision of the responsible Minister, an existing storage use. The appellants were minded to make use of the buildings for this purpose. The embankments were covered with grass and weeds which concealed the unsightly nature of the walls and to some extent obscured the stores and magazines.

The question in the appeal is whether the removal of the embankments and the blast walls constitutes "development" within the meaning of section 12 (1) of the Town and Country Planning Act, 1962 .The question of the embankment arises in consequence of an appeal by the appellants to the Minister against an enforcement order served upon them by the second respondents under section 45 of the Act of 1962: the question of the blast walls arises from an appeal by the appellants against a determination by the Minister under section 43 of the Act that their removal required planning permission.

Section 12 of the Town and Country Planning Act, 1962 , provides, inter alia, as follows:

> "12. —
>
> (1) In this Act, … 'development', subject to the following provisions of this section, means the carrying out of building, engineering mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.
>
> (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:-
>
> (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works … which do not materially affect the external appearance of the building …;"

Section 221 (1) of the Act provides:

> "In this Act, … the following expressions have the meanings hereby assigned to them respectively, that is to say:- …
>
> 'building' includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building; …
>
> 'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder; …
>
> 'engineering operations' includes the formation or laying out of means of access to highways; …"

The Minister treated the two cases differently. In the case of the embankment the Minister decided that the operation of removing the earth was an "engineering operation" within the meaning of section 12 (1) of the Act as defined in section 221 (1) . Whereas in regard to the proposed removal of the blast walls the Minister decided that this operation was a "building operation" under section 12 (1), as consisting of the removal of part of a building — the blast wall being part of the composite building constituted by the magazine building and blast walls and, as such, was a development requiring planning permission.

The courts below have approached the questions from different angles. Widgery J. gave the judgment of the Divisional Court in which he expressed the view that it was unnecessary to decide the "fascinating problem" of planning law, whether the demolition of a building is a building operation within section 12 (1). He decided that the scale of operations in question — "this little job of shifting a few cubic yards of ***758** soil with a digger and a lorry," as he described them could not be dignified by any of the qualifying words in section 12 (1). He also referred with approval to an observation of Lord Parker C.J. in *Cheshire County Council v. Woodward [1962] 2 Q.B. 126* , 133, where he said that the operations contemplated by the section must change the physical character of the land. But the underlying principle of the decision appears to be that de minimis non curat lex.

The Court of Appeal reversed the decision of the Divisional Court. Lord Denning M.R., with whom Diplock L.J. concurred, treated the structure consisting of magazine or store, blast walls and embankment as a composite building and applying the terms of section 12 (2) (a) held that the operations constituted an alteration to the building which affected its external appearance. It was thus "development" within the terms of section 12 (1) . The Master of the Rolls, however, said that it might be that if the whole building was demolished it might not be "development." Salmon L.J. also declined to decide the question whether the total demolition of a building would amount to "development," although he would appear to think that it would. He also treated the whole unit as a composite building.

The appeal from the Minister's decision to the High Court is only on a question of law (see sections 180 and 181 of the Act of 1962). The question, accordingly, is whether it has been shown to the satisfaction of the court that the Minister has erred in law in arriving at his decision.

Appellants' counsel urged on your Lordships as his primary submission that any demolition of a building or part of a building by itself not involving reconstruction or replacement could in no circumstances amount to "development" within the Act. He argued that the "other operations in, on, over or under land" in section 12 (1) must be construed ejusdem generis with the preceding categories of operations, namely, building, engineering and mining. The genus was the positive or constructional side of operations, and — as demolition was of a negative or destructive character "demolition per se," as he described it, could never come within this genus. He also referred to other sections in the Act of 1962, where he said that a distinction was drawn between "alteration," which was development, and "removal" or "demolition," which was not. I am unable to find that any help can be obtained from these sections which would assist his argument. I find it difficult to discover any common genus to building, engineering or mining operations. I am certainly unable to detect a positive or constructional genus in section 12 (1); "mining operations" are not constructive because the surface of the land is destroyed in the course of the operations.

Reference was also made to the Town and Country Planning General Development Order, 1963 , S.I. No. 709 in which by Schedule I certain development is permitted without the necessity of obtaining planning permission under the Act. Under Class 1 of Part I of Schedule I certain activities of a minor character in relation to a dwelling house are permitted. It was said that if demolition was comprehended by "development," one would have expected to find certain exemptions in this order. Otherwise every minor demolition, say of a garden wall of a private house, would require planning permission. The reasons for the omission of minor demolitions from the General Development Order are obscure, but it may stem from the Ministerial Circular No. 67 of February 15, 1949, in which it was stated that the Minister was advised that demolition of a building did not, of itself, involve development. However this may be, the General Development ***759** Order affords no guide to the construction of section 12 (1) . I am not, therefore, able to accept the appellants' argument that demolition can never be development.

The question appears to me to be whether the operations in any particular case do or do not amount to development, having regard to the terms of section 12 (1). I should, perhaps say that I cannot find any aid to the construction of section 12 (1) by reference to the terms of section 12 (2) (a) . The operation must first qualify as development within section 12 (1). If it does, then the question arises whether, upon the basis that it is development, it is excluded by section 12 (2) .

If this be the correct approach to section 12 (1), for my part I do not find the answer in this appeal difficult. The question, as I have already indicated, is whether the Minister's decision betrays any error in law. First, as regards the embankment. The Minister had before him an inspector's report in which, after stating the relevant facts, he expressed his “conclusion” that the work of removal of the embankment was an engineering operation. The Minister followed his inspector's conclusion and held that it amounted to development. This decision was, in my view, a finding of fact in the sense that it was an inference from the primary facts as found by the Minister (see Denning L.J. in *British Launderers' Research Association v. Hendon Borough Rating Authority [1949] 1 K.B. 462* . 471).

I am unable to say that the Minister erred in law in his decision or that it was a conclusion which could not reasonably be drawn. It was peculiarly a matter within his competence to decide whether the removal of the embankment was an engineering operation. References were made to *Hudson on Building Contracts* , 6th ed. (1933) at p. 8 and 9th ed. (1965) at pp. 64, 65, and to the definition of “engineering” in the *Oxford English Dictionary* , but the Minister had sufficient evidence, in my view, on which he could reach his decision unassisted by these references.

The next point concerns the removal of the blast walls. The Minister had before him the view of the local planning authority that “the blast walls were all part of the original design of the buildings used for storing explosives and together they constituted a magazine.” The Minister accepted this view, adding

> “It is noted that the buildings were erected shortly before the last war, some were used for the storage of ammunition and some for the storage of explosives. The blast walls and soil embankments were provided to prevent damage from explosion and to conceal the internal structure.”

The Minister accordingly held that the blast walls formed part of the building and that their removal would materially affect the external appearance of the building and as such would constitute “development” within section 12 (1) . The appellant contended that as the blast walls were physically discontiguous from the magazines they could not in law form part of a unum quid. But in my opinion in considering this question it is legitimate to consider the functional test as well as the physical test. If they were built originally as an integral and necessary part of the building and at the same time as the magazines, the fact that they are physically discontiguous does not, in my view, prevent them from being part of the building.

There is, therefore, no ground upon which the Minister's decision on either case can be disturbed.

I would dismiss the appeal.

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LORD UPJOHN

My Lords, I have the opportunity of reading the speech about to be delivered by my noble and learned friend, Lord Pearson, who has set out the relevant facts in the greatest detail so that I do not propose to cover that ground again.

There are two questions which must be answered before one can approach a consideration of the submissions of law that arise upon section 12 of the Town and Country Planning Act, 1962 , (the Act):

> 1. Was the Minister correct in holding that the walls and supporting earth embankments surrounding the magazine buildings all formed part of one building, or did these walls and embankments, which were not architecturally part of the magazine buildings but were designed and placed there to limit and so far as possible contain the result of some internal explosion and also to act as camouflage against enemy air attack, form different buildings for the purposes of the Act?
>
> 2. When these outer walls and supporting embankments were removed by the appellants, was the Minister correct in holding that this was an "engineering … operation" for the purposes of section 12 (1) of the Act? While the enforcement notice under section 45 of the Act applied in terms to removal only of the embankments supporting the walls because the walls themselves had not by then been removed, very sensibly neither party has taken any point upon this.

My Lords, both these questions are largely matters of fact and inferences from facts and are questions of degree. Upon the first question, the magazines and the protecting walls and embankments were built in 1938 and 1939 these latter were separate but an integral and necessary part, by accepted standards of those concerned with these matters, of the structure of a magazine to contain ammunition and explosives. But the role of the walls and embankments was entirely functional. When the magazines ceased to hold these dangerous commodities and could be used for ordinary warehouse purposes without any change of user, it was obviously desirable, as a matter of reasonable everyday use, to remove these walls and embankments which made the former magazines ill lit, damp and inconvenient for everyday purposes. Upon the second question, upon the evidence it does appear to me that the appellants used comparatively unsophisticated methods, bulldozers, and so on, to remove these protecting walls and embankments.

Upon these two question I must confess that my mind has fluctuated considerably. Both of them seem to me to be borderline questions and I think that the Minister might easily have come to a different conclusion upon either or, indeed, both of them.

Where a case depends upon primary facts the court, it is clear, will hardly ever interfere with the findings of the trial judge unless satisfied that he has misdirected himself; but where the true conclusion depends not so much upon the primary facts which (as in this case) are not in issue but upon the inferences to be drawn from those facts the appellate court is less reluctant to interfere, but the degree of its reluctance must depend upon the inferences. Denning L.J. in the *Divisional Court, put the matter succinctly in British Launderers' Research Association v. Hendon Borough Rating Authority [1949] 1 K.B. 462* , 471, when he said:

> "On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents. Their ***761*** determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If, and in so far as, those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact: and the only questions of law which can arise on them are whether there was a proper direction in point of law; and whether the conclusion is one which could reasonably be drawn from the primary facts: see *Bracegirdle v. Oxley [1947] K.B. 349* ."

The learned judge then went on to discuss the type of case where the correct conclusion required for its correctness its determination by a trained lawyer, which most emphatically this case is not.

My Lords, the two questions which I have adumbrated above are so much a question of fact and degree which are within the particular knowledge and experience of the Minister and his advisers, and upon which members of an appellate court have, in the absence of expert evidence (and there was none), no like knowledge or experience that, notwithstanding my doubts, I am not prepared to say that the Minister reached a wrong answer to either of these fundamental questions. It is, I think a great pity that there was no expert evidence upon the second question but the appellants preferred to rely on their legal point as to demolition. The question, then, is whether upon those findings the Minister reached a wrong conclusion of law in deciding that the removal of these walls and embankments constituted development as defined in section 12 (1) of the Act (which it is common ground did not materially differ from its precursor in the Town and Country Planning Act, 1947). If he reached a conclusion which was not erroneous in point of law, your Lordships have no power to correct him. Section 12 (1) is in these terms:

> "In this Act, except where the context otherwise requires, 'development,' subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

The main submission of the appellants pushed to its ultimate length was that no act of demolition "per se" or "simpliciter" (whatever those qualifications mean — I think they were intended to mean without a view to redevelopment), whether of a complete building or of a part of a building, could in law constitute development for the purposes of section 12 . I cannot understand this argument pushed so far. Counsel for the appellants rightly pressed your Lordships with the view that in the Act the word "demolition" was only used in relation to cases where corrective action was required after service of enforcement notices or in relation to specially "listed" houses of historical interest which may not be demolished without a special order. But there is nothing in section 12 or elsewhere which makes it plain that demolition per se or simpliciter is necessarily excluded from the very wide words of section 12 (1) if otherwise the relevant operation fits within those words as a plain matter of the use of the English language. In fact there is nothing to exclude demolition. In this case the Minister has decided that this demolition is an engineering operation and so within the section. I do not understand how, if this demolition he ***762*** properly so described, the fact that it is only demolition per se takes it out of that section.

But upon the Minister's finding, consequent upon his finding that the magazine and its protective walls and embankments were all part of one building, so that this was only demolition of part of a building, there is, I think, another answer to the appellants.

Section 12 (2) is, so far as relevant, in these terms:

> "The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:-
>
> (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building and (in either case) are not works for making good war damage; …"

It was argued that you cannot look at subsection (2) , which was a clause of exclusion, to construe subsection (1) . This, however, states the principle too broadly. You cannot look at a clause of exclusion to extend the natural construction of the main section but you can, in my opinion, most certainly look at it to support the view which you may tentatively form as to the meaning of the main section. Subsection (2) only confirms the view which, assisted by the definition of "building" and "building operations" in section 221 , in my view subsection (1) naturally bears, namely, that a building operation in, on, over or under land includes an alteration to a building which would include mere demolition; the subsection, however, makes it clear that to fall within subsection (1) an alteration is limited to a building operation which materially affects the external appearance of the building. There is nothing to exclude an alteration which is no more than demolition per se.

As it is not in doubt that the removal of the walls and embankments affected materially the external appearance of the building (that was, indeed, the real ground of complaint by the inhabitants), that seems to be another ground upon which the decision of the Minister must be upheld.

My Lords, in these circumstances it does not seem to me that the question whether demolition per se or simpliciter is a development within section 12 (1) calls for determination by your Lordships. All that it is necessary to decide is that, if such demolition is covered, as in this case, by other provisions of that subsection, it is not saved from the application thereof merely by reason of the fact that it is only demolition per se or simpliciter.

The expression of opinion by the Minister upon the question of demolition in his Circular No. 67 dated February 15, 1949, has stood and has apparently been accepted by the profession for 20 years and there may be much common sense and practical utility in it. I do not criticise it but, in my view, it remains a matter of ministerial opinion and practice and its legal correctness does not arise for your Lordships' decision. For these reasons I would dismiss this appeal.

LORD WILBERFORCE

My Lords, I have had the benefit of reading in advance the opinion prepared by my noble and learned friend, Lord Pearson. I gratefully adopt his statement of the history and the facts of this case: I agree with his conclusions with regard to them and to the findings and decisions of the Minister. I desire only to add some observations ***763*** as to the scope of the Town and Country Planning Act, 1962 , and the concept of development.

"Development" is a key word in the planners' vocabulary but it is one whose meaning has evolved and is still evolving. It is impossible to ascribe to it any certain dictionary meaning, and difficult to analyse it accurately from the statutory definition.

In the Town and Country Planning Act, 1932 , we find this:

> Section 52. "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:- …
>
> 'Building operations' includes any road works preliminary, or incidental, to the erection of buildings; …
>
> 'Development,' in relation to any land, includes any building operations or rebuilding operations, and any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used:."

Leaving aside the inaccuracy of using an inclusive formula to express the meaning assigned, "development" here was used, in relation to operations, in a normal sense to refer to those which in their nature are constructive. It would have been difficult to argue under this Act that an operation involving mere demolition of a building, or part of a building, constituted development and I think that the view that it did not was assumed, if not decided, in the case of *Marks and Spencer Ltd. v. London County Council [1952] Ch. 549* , affirmed sub nom. *London County Council v. Marks and Spencer Ltd. [1953] A.C. 535* .

In the Town and Country Planning Act, 1947 , the conception of development was greatly expanded. The relevant section, 12 (2) , was in the same form as section 12 (1) of the Act of 1962. The main changes, as compared with the Act of 1932, were that it was drafted in a "means" not "includes" form and that the operations referred to became "building, *engineering, mining or other operations in, on, over, or under land* ." Then there were six stated exceptions of operations or uses which were not to be deemed to involve development, of which the most important for the purposes of this appeal is —

> "(a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building; …"

This definition was amplified in section 119 (corresponding to section 221 of the Act of 1962) by definitions of "building," "building or works," and "building operations" which I need not quote.

It is relevant, I think, to recall that the Act of 1947 in Part VII provided for the levying of development charges in respect broadly of any development for which planning permission was required. But there was an exemption from these charges (by Schedule III) of specified types of development, one of which was "the enlargement, improvement or other alteration" of certain buildings. No mention was made, in the exemptions, of any demolition, total or partial, of any building, yet had demolition been considered to be, or possibly to be, developments such a mention would surely have been included. The development charge provisions are not repeated in the 1962 Act, but it is still legitimate to look back to that of 1947 in construing the definition of "development."

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It is on the definitions now contained in sections 12 (1) and 221 of the Act of 1962 that the appellants seek an answer to the question whether demolition or, as the appellants call it, demolition per se, can constitute development.

Unfortunately I do not think that the question in this form can be answered because neither in the terminology of the Act, nor in its discernible policy as regards development, is it possible to segregate some identifiable operation, for which the description or label "demolition" is apt and to say of it that it does or does not amount to development under the Act. References, indeed, appear, in various contexts, as, for example, in the sections of the Act dealing with listed buildings, or in those which contain enforcement provisions, to demolition, removal, restoration or reinstatement, but these bear meanings which, while appropriate for their subject-matter, carry no consistent implications as regards the meaning of expressions in other contexts. The Act seems to be drafted empirically rather than logically.

One must start with section 12 . It is not easy to construe, and certain negative propositions are easier to state than positive.

1. I think it is clear that the exception stated in section 12 (2) (a) cannot be used to establish the meaning of "development" in section 12 (1) . Though I endorse the result of the judgments in the Court of Appeal, I cannot agree with passages in the judgments which extract from section 12 (2) (a) the words "materially affect the external appearance of the building," say that the works in question do this, and so conclude that they are development within the meaning of section 12 (1). Qualifying words in an exception cannot be introduced into the rule so as to enlarge the scope of the rule: so, if an operation is not one of the kinds included in section 12 (1) it cannot be made into one merely because a condition of exemption is not complied with. Relevantly, if demolition is not included in section 12 (1), there is nothing for the exemption in section 12 (2)(a) to bite on and the question whether the external appearance is affected has no relevance or application. What is development must be ascertained from section 12 (1) aided by section 221 .

2. I do not find it possible to identify a genus in the words "building, engineering, mining or other operations." It is hardly good enough, when the Minister's decision is being reviewed for error of law, to say that "other operations" must be construed ejusdem generis: that the genus need not be defined in detail, but that it includes only operations of a certain scale. I agree with the Court of Appeal and your Lordships in thinking both that this is not an adequate test (if it is a test at all) of the genus and that in any event it led the Divisional Court to the wrong result. No more satisfactory was the test suggested by the Minister who said that the genus was identified by the word "development" — a word which he claimed everyone understands. But since the task on which we are engaged is to ascertain what "development," as defined, means, it hardly seems possible to interpret the words by which "development" is defined by reference to the, ex hypothesi, unknown meaning which "development" bears. Such a process is one of levitation by intellectual bootstrap.

Finally there is the appellants' suggestion that the relevant operations must at least be of a constructive character, leading to an identifiable and positive result. I think that this is near the heart of the matter, and that there is an important element of truth in the argument. I would accept, and think it important to emphasise, that the planning legislation should be approached with a disposition not to bring within its ambit, unless ***765*** specific words so require, operations in relation to land which do not produce results of this kind, that is to say, results (I deal only with operations, not with use) of a positive, constructive, identifiable character. In my opinion, the appellants succeed in showing that neither the development of the legislation, nor the successive descriptions of "development," nor the policy of control and, while it lasted, of charge on development, nor common sense or common expectation, require or suggest that the mere removal of a structure, or a building, or of a part of a building should be subject to the code. And I think that they derive important support for this argument from the Minister's circular No. 67 of February 15, 1949, in which he stated that he was

> "advised that the demolition of a building does not of itself involve development, although, of course, it may form part of a building operation, or lead to the making of a material change in the use of the land upon which it stood."

The advice referred to may not have been quite correct (I return to this point) but in giving this information to planning authorities, the Minister was undoubtedly reflecting a common sense and accepted opinion as to the general nature of development. I accept of course that, as an interpretation of the Act of 1947, under which it was issued, the circular had no legal status: but it acquired vitality and strength when, through the years, it passed, as it certainly did, into planning practice and text books, was acted on, as it certainly was, in planning decisions, and when the Act of 1962 (and I may add the Town and Country Planning Act of 1968) maintained the same definition of "development" under which it was issued.

So far, for the appellants, so good: they establish, in my opinion, this general approach to the construction of "development" and I think that it assists them in the limitation of the words "other operations." But, as I said above, this can only be so unless specific words so require. The governing statutory words remain those of sections 12 and 221 , and where these fairly apply, they must prevail. They cannot be prevented from applying to a particular operation, which comes within them, by the mere fact that, in addition, the descriptive label "demolition" would fit that operation.

The Minister's circular to be fully accurate, should then have said not that it (the demolition of a building) may form part of a building operation, but that, what might be described as demolition may fall within one of the specific types of operation described in section 12 (1) and rank as development accordingly.

The Minister has held here that the removal of the embankments was an engineering operation, and that removal of the walls would be a building operation. Neither of these conclusions appears to me to have been inevitable: he might have held that both or either would be demolition and that neither the one fell under "engineering" nor the other under "building." But both were marginal decisions given in relation to a very special case, and I think were open to him to make as he did. The Act, in general, as the subject-matter, probably requires, is drafted with a wide mesh; its use of expressions, particularly those relating to building, demolition; alteration and the reverse of these operations, is not precise or consistent — as to engineering or mining there is no definition at all — and the sections conferring power of decision on the Minister, in particular section 43 , show that decisions on marginal questions as to development — what it is and what it is not — are intended to be left to him through or with his ***766** expert and professional staff. I am of opinion that the decisions he reached were within his permitted field and were not wrong in law. This leads to the conclusion that the appeal must be dismissed.

LORD PEARSON

My Lords, this appeal relates to a group of six buildings near Meriden, which is a village in the countryside between Birmingham and Coventry and about nine miles from each. These buildings were constructed in 1938 or 1939 as magazines, two for the storage of explosives and four for the storage of ammunition. Each consisted of a central block, surrounding blast walls about four feet away from the central block and sloping embankments extending outwards for about eight to ten feet from near the top of the blast walls to ground level. The two magazines for explosives were made of brick, and each of them was about 25 to 30 feet long, 12 feet wide and 11 feet high, and had a narrow entrance at each end. The four magazines for ammunition were made of concrete and each of them was about 70 feet long, 30 feet wide and 11 feet high rising to 13 feet at the roofs centres and had two narrow entrances at each end, and at the sides had windows with their tops about level with the tops of the blast walls. The embankments consisted partly of soil and partly of ash and brick rubble, and the sloping surfaces were covered with vegetation.

In 1962 the Minister on appeal decided that the magazines possessed an existing use on the appointed day within Class X of the Use Classes Order, 1950 . I understand that under section 12 (2) (f) of the Town and Country Planning Act, 1962 , the effect of the Minister's decision was that use of the magazines for storage of any kind was permitted.

The magazines, however, were purpose-built. They had been specially designed and constructed for use as magazines for storing explosives and ammunition. The blast walls, supported by the embankments, would tend to confine the effect of any explosion that might occur. The embankments with their green vegetation tended to camouflage the group of buildings — the explosives and ammunition depot — against possible enemy air attack. Also the green embankments largely concealed the otherwise unsightly buildings from the view of local residents and passers-by. The magazines were not suitable for use as warehouses for general storage. The entrances were very narrow, being only about four feet wide and seven feet high and preventing loading and unloading of large-sized goods. The presence of the embankments made access to the roofs of the central blocks very easy, and intruders could break the windows and steal goods from inside. The blast walls kept light from the windows. There was dampness in the narrow passages between the central blocks and the blast walls.

The appellants acquired the group of buildings in 1964. Early in 1966, without having obtained planning permission, they set out to remove the embankments, demolish the blast walls and enlarge the entrances to the central blocks. The effect would have been to convert the purpose-built magazines into warehouses for general storage. But when they had removed, or begun to remove, the embankments, there was local opposition on the ground that the ugly buildings were being exposed to view. On March 30, 1966, the Meriden Rural District Council, exercising planning control powers delegated to them by the Warwickshire County Council, served on the appellants an enforcement notice under section 45 of the Act of 1962, describing the removal of the embankments as unauthorised development and requiring it to be discontinued and requiring steps to be taken to replace the embankments. The appellants, on April 9, 1966, appealed to the Minister against the enforcement notice. The appeal was ***767** initially under paragraph (d) of section 46 (1) of the Act, and later was under paragraph (c) also. Paragraph (c), so far as material, is “that no planning permission was required in respect of that development.” Paragraph (d) is “that what is assumed in the enforcement notice to be development did not constitute or involve development.” The enforcement notice and the appeal to the Minister against it related only to the embankment. The blast walls were still standing.

In July, 1966, however, the appellants under section 43 of the Act of 1962 applied to the Meriden Rural District Council for a determination whether in the opinion of the council certain proposed works, including removal of the blast walls, would constitute development. In October, 1966, under the provisions of section 43 (2) and sections 23 and24 of the Act of 1962, there was an appeal by the appellants to the Minister on the basis that the council had not made a determination within the appropriate period.

Thus, there were two appeals by the appellants to the Minister, one raising in relation to the enforcement notice the question whether the actual removal of the embankment was development requiring planning permission, and the other raising under section 43 the question whether the proposed removal of the blast walls would be development requiring planning permission.

In December, 1966, a ministry inspector held an inquiry into the appeal relating to the enforcement notice and the removal of the embankments. The inspector's report, dated January 11, 1967, included a description of the appeal site and surroundings, the gist of the representations made at the inquiry, and his findings of fact, conclusions and recommendations. Representations on behalf of the appellants were made by Mr. S. J. Williams, a director of the appellants. The report shows that he agreed in cross-examination

> “that the blast walls and soil embankments were probably an integral part when built, the embankments making the blast walls stronger and deadening blast effect, and that the blast walls were probably an integral part of the construction of a building which contained ammunition.”

The inspector set out his finding of fact in paragraph 100 of his report and in paragraphs 101 and 102 his conclusions, including the following:

> “The legal implications of the above facts are matters for consideration by the Minister and his legal advisers, but it appears to me that:-
>
> (1) Surrounding embankments and blast walls are a necessary and integral part of buildings used for storing explosives and together they constitute a magazine. … Their appearance has been materially affected by the removal of the embankments, which work was an engineering operation constituting development. … On the planning merits of the case I am of the opinion that the exposure of the concrete blast walls and buildings forming these magazines, by the removal of the grass and vegetation covered embankments, has resulted in these ugly structures being much more prominent in the rural surroundings. The quality of the countryside here, and its effectiveness as a part of a proposed green belt, has accordingly deteriorated to an unacceptable extent. …”

The inspector's recommendation was that: “If it is decided that development requiring planning permission is involved, planning permission be not granted”

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In a letter of decision dated May 16, 1967, the Minister considered the representations made at the inquiry, and the inspector's findings of fact and conclusions and recommendations. In the course of the letter the Minister said:

> “The council maintained that the blast walls and the embankments were an integral part of each of the buildings. This latter view is accepted as the correct one in this case. … The removal of the embankments was an engineering operation clearly falling into section 12 (1) of the Act. This operation constituted material development for which planning permission was required. …”

The Minister upheld the enforcement notice, refused planning permission for the development to which it related (i.e., the actual removal of the embankments) and dismissed the appeal.

In the other appeal, that relating to the proposed removal of the blast walls, no inquiry was held but written representations were made to and considered by the Minister. In a second letter of decision dated May 16, 1967, the Minister dealt with this appeal. In the course of his letter he said:

> "With regard to the removal of the walls, the company argued that the blast walls were separate from the storage units and that as they in no way afforded any support to the buildings their removal could not be said to affect the external appearance of the buildings and further that demolition of itself does not involve development. In the opinion of the local planning authority the blast walls (and the earth banks which previously surrounded them) were all part of the original design of the buildings and their removal would therefore materially affect the external appearance of the buildings. It is noted that the buildings were erected shortly before the last war, some were used for the storage of ammunition and some for the storage of explosives. The blast walls and soil embankments were provided to prevent damage from explosion and to conceal the internal structure. The council's view that the blast walls form part of the buildings is accepted as a fact and it is considered that the removal of the blast walls would therefore constitute an alteration of the buildings, and that it would materially affect the external appearance of the buildings. In these circumstances the provisions of section 12 (2) (a) of the Act do not apply to the proposal which therefore constitutes development of the land for which planning permission is required. …"

The Minister determined accordingly and dismissed the appeal.

The appellants under sections 180 and 181 of the Act appealed to the High Court against both decisions of the Minister. The Queen's Bench Divisional Court allowed the appeal, deciding in favour of the appellants, but the Court of Appeal reversed that decision.

Under sections 180 and 181 of the Act an appeal to the High Court against a decision of the Minister can only be made on a point of law. There could be no such appeal against findings of primary facts. The Minister has, however, drawn inferences from the primary facts on the following important points which are in dispute:

> (1) He held that the blast walls and the embankments were integral parts of the magazines;
>
> (2) He held in effect that the removal of the blast walls would be a structural alteration of the magazines and would therefore constitute ***769*** building operations as defined in the Act and (not being within section 12 (2)(a)) would be development requiring planning permission; and
>
> (3) He held that the removal of the embankments was an engineering operation within the meaning of the Act and so was development requiring planning permission.

These inferences involve an element of construction of the Act and, therefore, of law, and so are in principle appealable. But an appeal cannot succeed unless it is shown that there is some error of law. In dealing with questions of mixed fact and law, such as those which arise in this appeal, it should be borne in mind that the Minister, advised by his department, is likely to have the benefit of expert knowledge and experience of building and engineering matters.

(1) I cannot see that there is any error of law in the Minister's view, agreeing with that of the local authority and the inspector, that the blast walls and the embankments were integral parts of the magazines. He did not take into account

any irrelevant factors or leave out of account any relevant factors, and it cannot be said that his view is manifestly wrong or unreasonable. The gap between the central block and the blast walls is quite small, but was duly taken into account. I think the character of the whole structure in each case as a purpose-built magazine is an important reason for treating it as a single unit (unum quid in the convenient Scottish phrase). If you take away the blast walls and embankments you deprive the structure of its character as a magazine and convert it into a warehouse for general storage.
(2) The second point requires consideration of section 12 (1) and (2) (a) and the definitions of "building" and "building operations" in section 221 . Section 12 (1) and (2) (a) are as follows:—

> "12. —
>
> (1) In this Act, except where the context otherwise requires, 'development', subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.
>
> (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:-
>
> (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building and (in either case) are not works for making good war damage."

The definitions of "building" and "building operations" in section 221 are as follows:

> "'building' includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building; …
> "'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder; …"

Now as the whole magazine in each case has been treated as a unum quid, that is to say as a single building or structure or erection, the removal of its blast walls would very clearly constitute a structural alteration of it. The exception provided by section 12 (2) (a) is not applicable because the removal of the blast walls would materially affect the external appearance ***770** of the building or structure or erection. Accordingly the Minister's decision under section 43 with regard to the blast walls should be upheld.
(3) Thirdly, there is the removal of the embankments. I would have been inclined to regard this also as a structural alteration of the magazine treated as a single building, structure or erection, and on that basis there would be a building operation within the definition and it would be development requiring planning permission. There is also the possibility that the removal of the embankments might come within "other operations normally undertaken by a person carrying on business as a builder," but without expert knowledge or expert evidence I do not feel able to form a view on this possibility. The Minister, however, did not decide on either of these grounds. He decided on the ground that the removal of the embankments was an "engineering operation." There is in the Act no definition of "engineering operation" except that the expression includes the formation or laying out of means of access to highways. In the *Divisional Court [1968] 1 All E.R. 62* Widgery J., with whom Lord Parker C.J. and Chapman J. concurred, said, at p. 65:

> "… this little job of shifting a few cubic yards of soil with a digger and a lorry, is not, in my judgment, an operation of a kind which could ever be dignified with the title of an engineering operation."

If I were able to agree with that description of the operation on the facts of this case I would agree that it was not an engineering operation. But the evidence shows, to my mind, that the removal of the embankments from the six magazines of the sizes previously described was not "a little job of shifting a few cubic yards of soil." It was rather a large job. There were large quantities of soil and ash and brick rubble to be moved. The appellants, naturally, would, and in fact did, employ contractors to perform the operation. The materials did not only have to be moved: they also had to be disposed of. The contractors were Bencif (Construction) Ltd., sports ground and tarmacadam contractors, and they stated in a letter that they had hired transport from various firms, and that the content of the embankments was made up of one-third top soil and sub-soil and two-thirds ash and brick rubble, and that the top soil was delivered to the new incinerator site at Castle Bromwich, the ash and brick rubble to various sites and the sub-soil to Barston. It was an operation of some magnitude. In my opinion, there was evidence on which the Minister could reasonably accept the view of the local authority and the inspector that the removal of the embankments constituted an engineering operation and, therefore, was development requiring planning permission.

The argument for the appellants was mainly based on the proposition that demolition, or demolition in or by itself, or demolition per se, does not constitute development. I think there is in this proposition some truth but only a limited amount of truth. On the one hand, there is in section 12 and in the relevant definitions in section 221 no mention of or reference to demolition or removal or any such operation. Therefore, an operation does not qualify as development by virtue of being a demolition or removal operation. It is not right to say "This is a demolition or removal operation: therefore, it is development." On the other hand, there are not in section 12 or in the relevant definitions in section 221 any words excluding operations from being development if they are demolition or removal operations. An operation is not disqualified for being development because it is a demolition or removal operation. It is not right to say "This is a demolition or removal operation: therefore, it cannot be development." Notwithstanding ***771*** that an operation is a demolition or removal operation, one still has to see whether it comes within the scope of development as defined in section 12 assisted by section 221. It may be within the definition of "building operations," e.g., because it constitutes a structural alteration of a building or because it is such an operation as to be normally undertaken by a person carrying on business as a builder. It may be an engineering operation. Whether it is or not any of those things depends on the facts of the particular case.

The argument for the appellants also sought to apply the ejusdem generis rule to the words in section 12 (1) "the carrying out of building, engineering, mining or other operations in, on, over or under land." It was contended that there must be one single genus comprising building, engineering and mining operations, and that the other operations must belong to this genus. It was further contended that the single genus was of positive, constructive operations and, therefore, could not include any negative, destructive operations and, therefore, could not include any operations of demolition or removal. I think there is a first step which can properly be taken along this line of argument: the "other operations in, on, over or under land" must be in some way restricted by the juxtaposition of these words with the words, "building, engineering, mining": if the "other operations" were any operations whatsoever in, on, under or over land, there would be no need to mention specifically building, engineering or mining: therefore, it is to be inferred that the draftsman or Parliament intended to deal primarily with building, engineering or mining operations but also intended secondarily to bring in some other operations similar to these specified operations or to some of them. This first step would be covered by the maxim noscitur a sociis. I doubt whether in construing this subsection — seeking the intention to be found in it — it is safe to say that there must be a single genus comprising building operations, engineering operations and mining operations and the other operations must be fitted into that genus. Another possible construction which can be suggested is that there are three genera and the other operations must be similar to building operations or to engineering operations or to mining operations. However this may be, I think the sufficient answer in this case is that if there is a single genus it cannot be of the kind suggested, because it has to include mining operations, which so far as they affect the land are not positive and constructive but negative and destructive operations. For instance, coal-mining demolishes and removes the seam of coal, leaving behind in the land a subterranean hole partly filled with waste and perhaps shored up but not having any utility and possibly causing disturbance and eventually subsidence of the upper strata. Secondly, there are operations which are both destructive and constructive. If a piece of ground is cleared of buildings and levelled for use as a sports ground or aerodrome, there is a destruction of the buildings and the mounds of earth but there is created the useful flat surface. In some circumstances it could be regarded as a positive and constructive operation.

In my opinion, the appellants' arguments cannot prevail. I would dismiss the appeal.

C. J. E.

Representation

Solicitors: Keen Marsland & Co. for Tompkins & Co., Birmingham; Solicitor, Ministry of Housing and Local Government; Sharpe, Pritchard & Co.

Appeal dismissed with costs.

Footnotes

1 Town and Country Planning Act, 1962, s. 12 : "(1) In this Act, except where the context otherwise requires, 'development' … means the carrying out of building, engineering, mining or other operations, in, on, over or under land, or the making of any material change in the use of any buildings or other land. (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land … (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which … do not materially affect the external appearance of the building …" S. 221 (1) : "… 'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder …"

R (on the application of Beronstone Ltd) v First Secretary of State and another [2006] EWHC 2391 (Admin)

C Newberry QC and J Pike for the Claimant

S Davies for the Defendant

Carr & Co; Treasury Solicitor

JUDGE MOLE:

[1] This is the appeal of Beronstone Ltd under s 289 of the Planning Act 1990 against the decision of an inspector appointed by the Secretary of State determining an appeal against an enforcement notice. The enforcement notice was issued on 18 February 2004 under s 172. It alleged a breach of planning control in that development had been carried out without planning permission. I shall go back to the terms of that enforcement notice in a moment or two. Let me sketch the facts to a degree first of all.

[2] The appeal site is a field off Lodge Lane to the south, I think, of Little Chalfont in Buckinghamshire. It is an area of grassland which the inspector records as being about 8.8 hectares, on about 5.2 hectares of which 554 wooden stakes have been driven into the ground. The inspector says that some of the stakes are placed between a metre and two metres apart, but, in the main, they are about four metres apart. They seek to define and mark out the boundaries and extent of about 40 plots of land together with a network of access ways. The tops of the marker stakes are painted differently to distinguish between those defining the access ways and those defining the plots. I do not think it is necessary to say more about the circumstances of the appeal site other than to say that the area of land I have described lying to the west of Lodge Lane extends to the west, almost to the rear of houses on another converging road to the west which joins Lodge Lane a little further to the south. At this stage I note that the land is within the Metropolitan Green Belt and within the Chiltern Area of Outstanding Natural Beauty, and in such areas the policy designation means that there is a general presumption against development.

[3] The council had been concerned at an earlier stage that in reliance upon permitted development rights some means of enclosure might be laid out. It is unnecessary to set out exactly how and why. It is simply right to record that, as a result, the council asked the Secretary of State for an art 4 Direction. The Secretary of State, in his letter of 1 September 2003, indicated that he was satisfied that there was a real and specific threat of development of that nature sufficient to withdraw the permitted development rights covered by the General Permitted Development Order. This had the effect of depriving the Appellant of any argument that the posts that were put on the land were a means of enclosure that was permitted by the General Development Order.

[4] The enforcement notice was issued on 18 February 2004. What it alleged was that there had been a breach of planning control which was defined in the enforcement notice before it was amended in this way:

“Without planning permission, the erection of approximately 0.7 metre high fence posts to form enclosures, sub-dividing the land into a number of small plots of land and demarking what appears to be a potential access track to the newly defined and enclosed plots on the land.”

The council, under its “Reasons for issuing this notice”, recorded the art 4 direction I have mentioned and said something about its reasons. At the end of para 24 (sic), after recording the history of some earlier claims and recording that they had been replaced by the newer, higher fence posts, it was said:

“2. . . . The recently erected fence posts sub-divide the land and thereby enclose the individual plots to the detriment of the visual amenity of the locality as set out below.”

They then recite the planning policy considerations and return to the effect of the posts on that in these words (para 3):

“The marking out of the sub-divided plots of land by individual posts is considered to be significantly detrimental to the open and rural character of the area and to the detriment of the visual amenity of the area, mindful in particular to the location within the Chilterns Area of Outstanding Natural Beauty.”

I do not quote further although there is more in that passage.

[5] What the enforcement notice required the Appellant to do was: “Remove from the land edged black all fence posts that have been erected on the land.” The time for compliance given was one month.

[6] An appeal was lodged against this notice and an inquiry was held on 14 April and 7 July 2005. At that appeal Mr Clive Newberry QC appeared on behalf of the Appellant. He made a number of submissions. He called Mr Bond to give planning evidence on behalf of the Appellant. Mr Newberry has assisted me with his submissions again today. Mr Langham appeared for the Chiltern District Council and called Mr Bowden. Both Mr Bond and Mr Bowden have provided statements in these proceedings, as has the inspector, Mr Bailey. I further note that there were a number of letters from interested parties and there was the evidence of Mr Naylor-Smith, who was the chairman of the Little Chalfont Village Society. The inspector's decision letter was dated 1 August 2005. It is going to

be necessary to return to it in rather greater detail. I am going to put it aside for a moment in order to turn back to set out the law that seems to me to be relevant.

[7] The appeal against the enforcement notice was made under s 174(1). That section specifies certain grounds of appeal as follows. Ground (a) is “(a) that, in respect of any breach of planning control . . . planning permission ought to be granted . . .” (I say in parenthesis that I am abridging these grounds):

“(b) that those matters [alleged] have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control.”

Grounds (d) and (e) do not concern this matter:

“(f) that the steps required by the notice to be taken . . . exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or . . . to remedy any injury to amenity which has been caused by any such breach.”

Section 174 then goes on to deal with the way in which an appeal has to be brought.

[8] The enforcement notice alleged that development had taken place. The first issue is whether or not what was done amounted to development. If it was development, then there is no doubt that it was not permitted. There is an issue however as to whether or not, under ground (a), the inspector should have permitted it.

[9] Dealing with the question of development, it is necessary to turn to s 55 of the Town and Country Planning Act. Section 55(1) states, amongst other things: “(1) . . . 'development', means the carrying out of building engineering, mining or other operations in, on, over or under land . . .” The inspector expressly considered building and engineering operations. He did not expressly consider mining operations because it was so evident that what happened on the land was not a mining operation.

[10] What he concluded, at paras 21 to 25 which I shall come to in greater detail in a moment, is that the driving of these particular stakes amounted to “other” development. He considered the permanence of the stakes as being a relevant factor. He was right to do so. He considered the scale of development. He referred to a note in the Encyclopaedia of Planning Law at para P55.26 that referred to “other” operations. That note, it is worth recording, reads as follows:

“In Coleshill and District Investments Co Ltd v Minister of Housing and Local Government [1969] 2 All ER 525, the House of Lords rejected a submission that 'other operations' should be construed according to the sui generis rule and thereby confined to the same class or genus of operations as building, mining and engineering operations. Beyond the very general notion of physical change it proved impossible to identify and class of genus to which those three types of operations belonged. In practical terms the area of physical operations not already falling under the other three headings are those of a scale too small to be able to qualify as, for example, an 'engineering operation' and in many cases will be operations for which deemed permission is conferred by the General Permitted Development Order 1995.”

This note then turns to other matters, and I read no more of it. The inspector thus considered the question of scale in the passages to which I will shortly turn.

[11] I have noted that ground (a) is an appeal on the basis that planning permission should be granted for the development that is the subject of the enforcement notice. Section 70 of the Act is the section that deals with the way in which local planning authorities can deal with applications, in particular it enacts that a local planning authority may grant planning permission either on condition or subject to such conditions as they think fit, or they may refuse permission.

[12] I turn to the section under which this appeal is brought which is s 289 of the Act. Section 289(1) provides that “Where the Secretary of State” (I interpose: that includes an inspector appointed by him) “gives a decision in proceedings of an appeal under Pt VII against an enforcement notice the Appellant may” according as rules of court may provide “appeal to the High Court against the decision on a point of law . . .” amongst other things. If the appeal succeeds the court has the power to quash the decision.

[13] The basis upon which the court acts on such an appeal is worth recording. The classic exposition of it, as apt as it was many years ago, is that of Forbes J in Seddon Properties v Secretary of State (1978) 42 P & CR 26n, 248 EG 950, [1978] JPL 835. The first principle, as is well known, is that the Secretary of State must not act perversely in the sense that he must not reach a conclusion that no reasonable person in the position of the Secretary of State or his inspector could reach, properly directing himself on relevant matters. There is a useful reminder in Newsmith Stainless v Secretary of State [2001] EWHC Admin 74, the judgment of Sullivan J, that a challenge under this head is not an opportunity for the review of the planning merits of an inspector's decision. (I note in parenthesis that this appeal is under s 289 but the principles seem to me to apply to exactly the same degree.) At para 6 Sullivan J said:

“An application under section 88 is not an opportunity for a review of the planning merits of an inspector's decision. An allegation that an inspector's conclusion on the planning merits is Wednesbury perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a re-run of the arguments on the planning merits.”

What Sullivan J expressly was referring to is a Wednesbury challenge (see Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680). The principle is the same, it seems to me, for other forms of challenge too. The court must be careful not to permit what is effectively a re-running of the arguments on the planning merits. Sullivan J continues:

“In any case where an expert tribunal is the fact-finding body and the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount, that difficulty is greatly increased in most planning cases because the inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example, is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport, etc? Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which have been categorised as unreasonable.

Moreover an inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing or contained in written representations, but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background, an applicant alleging the inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment faces a particularly daunting task.”

[14] I return briefly to the Seddon principles. The next head – and this is one on which the Appellant in this case particularly relies – is that the inspector must not take into account irrelevant matter and he must not fail to take into account relevant matter. The inspector must give reasons for his decision. Those reasons, while they are to be taken as addressing an informed audience, must deal with the most important of the points that have been raised. There is a helpful recent statement or re-statement in South Buckinghamshire v Porter (No 2) [2004] UKHL 33, [2004] 4 All ER 775, [2004] 1 WLR 1953. This was a decision of the House of Lords. Lord Brown summarised the principles to be applied to a “reasons” challenge in this way:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact is resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. Such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. The reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[15] Before I leave the law, I note the inspector's powers under s 176 which are one of the issues in this case. Section 176(1) reads:

"On appeal in Section 174 the Secretary of State may –

(a) correct any defect, error or misdescription in the enforcement notice, or

(b) vary the terms of the enforcement notice if he is satisfied that the correction or variation will not cause injustice to the Claimant or the local planning authority."

[16] I recall the words of Brooke LJ in Hammond v Secretary of State for the Environment and Maldon District Council [1997] JPL 724, at p 732, when he said, rejecting a submission that there should be a gloss upon some of the words of s 176:

". . . the law has now reached the stage where the pettifogging has stopped, where artificial and nice distinctions understood only by lawyers no longer prevail and the Act can be read so it means what it says, namely that the Secretary of State may correct any defect or error in an enforcement notice if he is satisfied that the correction can be made without injustice to either party to the planning appeal."

[17] Following from that and bearing in mind the correct approach to ground (f), I refer to Taylor & Sons (Farms) v Secretary of State for the Environment [2001] 2 EWCA Civ 1254, [2001] 35 EGCS 105, [2002] PLCR 154. That was a case in which farmers had put down a very substantial amount of hardstanding on a site and had been subjected to an enforcement notice. They raised the point that some degree of hardstanding would have been permitted development. Schiemann LJ, giving judgment of the court, dealt with that at para 38. He said:

"38. On the assumption that we are right in our view that the inspector was entitled to conclude that Mr Taylor was not entitled to bring so much material on to the site but that he was entitled . . . to bring some of that material on to the site, what should the inspector have done?

39. It is submitted by Miss Macpherson, on behalf of Mr Taylor, that the inspector should have declared how much hardstanding was reasonably necessary for the purposes of agriculture within the unit. If this did not exceed 465 square metres, she should have varied the notice so as to specify

the relevant area and so as to require removal only of the excess. If the amount reasonably necessary for the purposes of agriculture within the unit exceeded 465 square metres she should have varied the notice so as to require the removal only of that which exceeded the 465 square metres. It was accepted by Miss Macpherson that there was no material before the inspector on which she could have exercised an independent choice as to which area to choose, however, Miss Macpherson submitted that the inspector should have asked for further submissions or, at the very least, have considered whether or not to ask for further submissions."

The Secretary of State submitted that this imposed an impossible burden on the inspector and explained that argument. The judgment of the court was expressed by Schiemann LJ thus:

"41 In our judgment the broad approach of the Secretary of State is justified. Appellants should contemplate the possibility that their primary contentions may fail and that those of their opponents may succeed. The very reliance on ground (f) shows that this is the position. If there is a fallback position on which they wish to rely then they should make this clear to the Secretary of State in their submissions. It is not reasonable to come to court, as has happened here, and ask for the case to be remitted to the inspector so that she may ask for further submission – which could and should have been made in the first place if the landowner wished to advance them. It might well be that the inspector had the jurisdiction to explore the possibilities further with the parties. But the Appellant was professionally advised. The advisers had chosen not to make any submissions in detail under ground (f)."

That is sufficient to read from that case. That is a relevant passage because in this case the Appellants say that they put before the inspector what was effectively a fallback position and although the inspector purported to deal with that position, he did not do so adequately.

[18] I turn back to the inspector's decision, and I note that it has two parts because there was also an application for costs. There is a letter relating to the costs application of the same date. I have been referred to that, not because there is any particular appeal against the costs decision but because the inspector refers in his costs letter to things that were said and conclusions he has reached on the other matters.

[19] The inspector began with the appeal on ground (c). He considered the meaning of "development". He recorded that a degree of permanence was an important factor. He concluded that the essence of the appeal on this ground was whether or not what had occurred amounted to an "other operation" or was it so trifling as to be de minimis and not to amount to development at all? In that context, he considered two cases. I particularly note a case against Tandridge District Council concerning land at Rookery Hill (reported [1977] JPL 122). Twelve metal pegs supporting a thin nylon rope marking out the boundaries of three plots of land were held to be too insubstantial to amount to development. With that in mind, the inspector turned to the circumstances before him in these passages starting at para 21. He said:

“21. The Appellant argues the stakes do not possess the requisite degree of permanence. But on the contrary, marker stakes have remained in place since August 2003, notwithstanding that the original 0.3m-high stakes were replaced by the 0.7m-high stakes that remain presently. There is no evidence to indicate that the stakes were intended by the Appellant or the owners of the plots as a temporary expedient, such as would be the case if they were intended to be removed in the foreseeable future; or that they have been or would be taken away for substantial parts of the year, then subsequently restored for a further limited period; or that they were to be superseded and/or supplemented by the erection of some alternative or more substantial means of identifying the perimeters of the individual plots and the alignment of the accessways. Indeed, the Article 4 direction would prevent the erection in their place, or in addition, gates, fences, walls or other means of enclosure, unless planning permission was sought and obtained. On the balance of probabilities, the marker stakes are a permanent feature of this 5.2 ha portion of the appeal site.

22. It might be the case that the hammering into the ground of a single stake would not be of a scale that would amount to operational development. But this is not a case concerning a single stake; the notice is directed at about 554 of them, regularly spaced and spread across 5.2 ha of open grassland in a grid-like pattern arising from their function of defining the perimeters of the plots and alignment of the accessways.

23. The appeal site is generally level although falls away to the south-west. From my own observations, the photographs and written evidence, it is plain that the marker stakes can be seen from Lodge Lane that forms the eastern boundary. The visibility of the stakes to the eye decreases with distance from that public vantage point, but that would not materially detract from their presence on the land. Moreover it would also be the case that most are hidden in summer months, if the grasses and other vegetation remain untrimmed and reach a substantial height, but there is no certainty that this would continue to be the case.

24. Newly-planted trees, which would not amount to 'development', would be commonly supported by stakes, perhaps not dissimilar in size to those to which the present case refers. But this would not be a like-for-like comparison. On the balance of probabilities, the character of land use arising from the planting of trees supported by stakes would be materially different from that of otherwise open agricultural land within which separate ownerships are delineated by free-standing marker stakes. This would justify different conclusions being reached, as a matter of fact and degree, about whether activities taking place were 'development'.

25. Furthermore it is argued that by placing stakes one-by-one, each in itself would not be an act of sufficient scale such as to amount to operational development; whether it is one stake, or 100 stakes, or 554 stakes, or whether they are provided all at one time, or spread over a period of time, it is said that no development would occur. However it is not the individual component parts of what has occurred at the appeal site that needs to be addressed, but the whole scheme. What has taken place is not the placing of any number of stakes one at a time, each spread over several days, weeks or months. What has occurred is the placing of a quantifiable number of stakes, to a defined pattern, by

two men employed on the task for two days. It is a single scheme and that would be the basis on which to assess whether what has been done would amount to 'development'.

26. Hence neither of these examples would provide compelling support to justify the Appellant's stance that no 'development' has occurred. On the contrary, the number of stakes, their extent over a substantial parcel of land, their visibility, the grid-like pattern that they form and the absence of any temporariness, are all factors that, taken together, indicate there has been a physical alteration to the land which has a degree of permanence to the land itself. That which has occurred at the appeal site would not be operations that, as a matter of fact and degree, are of a nature reasonably capable of being described as trifling, inconsequential or insubstantial. The insertion of these marker stakes is of sufficient substance, scale and permanence so as to amount to an 'other operation' within the meaning of s 55 of the 1990 Act (as amended)."

The inspector then turned to consider the matters to which the enforcement notice is directed, which I will deal with separately.

[20] I deal first with the Appellant's criticisms of those conclusions. The criticisms are based on the broad contention that the inspector failed to take into account a number of relevant matters and erred in law. The following points are made. First it is said that the inspector failed to record the evidence of Mr Bowden for the planning authority, or properly to take account of that evidence, to the effect that there was a threshold where a substantial number of stakes could be put in the ground and yet would not involve development lying somewhere between 12 stakes which, it is said Mr Bowden acknowledged, would not involve development and 554 stakes which, Mr Bowden maintained, did involve development.

[21] The inspector also failed sufficiently to deal with the point that the insertion of one stake would not be development and the insertion of a stake a day, even for 554 days, would, in consequence, not be development either. This led to a similar point that the inspector failed to identify the point or threshold at which the driving in of stakes would amount to development. He was required in law to do that. As the Appellant argued, what is development is a question of law and the inspector simply did not address that issue; that is the argument. Those are, I think, the two main points which were developed by Mr Newberry.

[22] There were subsidiary points referred to, for example, Mr Newberry, as a third point, referred to the inspector's conclusion that 554 stakes with attendant young trees, the stakes being there to support the trees, might not be development but that 554 stakes without their attendant saplings would be. I think his submission really amounted to a contention that that distinction was perhaps perverse and irrational. There were other points, and I may identify them, but I think those were the essential points that were made, the first two in particular.

[23] Dealing with point 1 first of all, the evidence of Mr Bowden, there is plainly some difference of recollection, though it does not seem to me to be a very significant one, as to what exactly Mr Bowden did or did not concede. It does not seem to me that that actually makes any difference. It seems to me that it is almost self-evident that there are extremes, on the one hand, where clearly no development can be involved; the insertion, for example, of one stake would be such an extreme, and Mr Bowden may have been right to concede that the insertion of 12 would also be at the bottom end of the scale. Equally I do not think there is any argument but that there comes a point when the number of stakes is going to be so great that it clearly amounts to "other development".

[24] The way the inspector dealt with that proposition seems to me to be perfectly clear. His approach was to concentrate on what had actually happened in this case. Here, he says there were 554 stakes hammered in over two days by two men, and that is what he looked at. That was not only, it seems to me, an approach that was perfectly open to him, it was the right approach in my view. He was correct not to waste his time on considering how different matters might have had to be in order for him to be led to a different conclusion. What he had to do was to make a judgment as to whether or not development by other operations had occurred. It would not be right to say that this is solely a point of law; although I do not think Mr Newberry did advance that. The degree to which law comes into such a judgment depends upon the case. In this particular case it seems to me the law comes into it little, if at all. Once the inspector had correctly advised himself as to the proper legal considerations – and there is no suggestion that he did not – his judgment is one of fact and degree based on the facts in front of him. It was a judgment, it seems to me, that was entirely open to him.

[25] As for point 2 – which is that he should, as part of this operation in deciding if there was development, have identified a threshold – I entirely reject that notion. He had no sort of obligation to try and define the point at which a conglomeration of stakes might become development. It would have been irrelevant and unhelpful to attempt what would have been an impossible task. It depends entirely upon the individual circumstances, for example, the degree of space around the stakes, the closeness of their clustering. The factors that it depends upon can be multiplied ad infinitum, and I will not do it. The only thing in those circumstances the inspector can do is to look at the facts in front of him and, in making his judgment on fact and degree, rely upon such crucial matters as what he thinks the stakes look like in the field, having been there and had a look at them.

[26] As to point 3 – which the inspector did expressly consider in para 24, the sapling point – his answer was completely logical in my view. He rejected the utility of the comparison: 554 new trees supported by 554 stakes, he said in effect, would be likely to be of a materially different character from 554 posts driven in markers in the field. That is a perfectly logical conclusion. It is based upon a planning judgment that he was perfectly entitled to reach and it was expressed with quite sufficient lucidity. In my judgment, the Appellant's criticisms of this aspect of the inspector's decision are of no weight.

[27] The inspector having decided that the insertion of the stakes amounted to development – and had done so in a way that was wholly open to him and which he explained with sufficient clarity – then turned to consider whether or not planning permission should be granted; this was ground (a).

[28] On ground (a) the inspector set out the relevant development plan and other policies. He identified the issues in para 39 as being, first, whether the scheme would amount to appropriate or inappropriate development in the Green Belt; secondly, whether the scheme would serve to conserve and enhance the natural beauty of the landscape; and, thirdly, whether there are other considerations sufficient clearly to outweigh any harm arising from the first and/or second of those main issues and thus would justify the development on the bases of very special or very exceptional circumstances. It is not suggested that that definition of the issues is in any way wrong.

[29] The inspector considered the development against the activities that the Appellant would or would not be lawfully able to carry out anyway (this is in paras 41 to 43 of his decision letter where references were made to the carrying out of various sorts of operations that Appellants and landowners might be entitled to undertake). He set out all the circumstances of the site and surrounding land. He recorded that there was no particular definition of “openness” in the Act. He said in para 45:

“In simple terms, it would mean an absence of development, but a judgement would need to be made in the particular circumstances of any individual case about the potential extent or impact of any scheme.”

[30] In para 46 (I mention this because there was another subsidiary point, although not one that Mr Newberry has put any particular emphasis on this morning) the inspector said:

“For the reasons set out in paragraph 25 above, the development that has taken place would result in a physical alteration to the land which has a degree of permanence. Such development would not be seen, even by an informed observer, as likely equating to a purpose serving the lawful agricultural use of the land, such as otherwise might arise by fencing. Indeed, the development would be likely to serve to inhibit agricultural use by preventing ploughing or by becoming a danger to grazing animals. Nor would its purpose be seen or conceived as serving a nil use of the land.

On the contrary, the stakes would be a form of development that would be seen as atypical in the countryside, unless, for example, as a precursor to some other development, such as the staking out of a roadway. A large area of land, staked out in the way that has occurred and without any apparent clear purpose relating to land use, would appear as a strange and inexplicable feature in the landscape.”

[31] After considering further arguments and comparisons advanced by the Appellant, the inspector concluded that the development would be inappropriate in the Green Belt. He then addressed the conservation and enhancement of the beauty of the landscape. In para 54, dealing with that, he said:

“The presence of so many stakes set out in a distinct pattern across this 5.2 ha site would fail to harmonise with the open agricultural and wooded countryside that make such important contributions to the character and appearance of the landscape. These reasons, together with those factors that have led me to conclude that the development in question would fail to maintain the openness of the green belt, indicate that the scheme would fail either to conserve or to enhance the natural beauty of the landscape hereabouts, contrary to Local Plan Policy . . . .”

[32] The third issue he had to deal with was whether there were “very special circumstances” that might justify development. He noted that the Appellant advanced no case on the basis of very special circumstances in the Green Belt, but nonetheless he had considered the matters advanced in support of development in the AONB as being relevant also to consideration of those circumstances. He said in para 57:

“57. Some form of indicator as to land ownership might be feasible, especially that which would not amount to 'development'. But posts of lower height, or of lesser number (limited only to plot corners), would remain visible and would not be appropriate as they would still have an impact on the openness of the appeal site, albeit of lesser degrees. The natural beauty of the landscape would not be conserved or enhanced.

58. Bearing in mind that the Appellant has sold land abutting the roadside boundary to individual owners of plots, it is not entirely clear that it would be open to the Appellant to plant a hedge on the side of the existing post-and-wire fence. But even if such planting could be achieved, a hedge would take some time to mature to provide an effective screen.

59. However, visibility from the highway is not the centre of objection; unacceptable development in the countryside would not be rendered acceptable by attempting to screen it from public vantage points by planting. In this case, a hedge on one boundary would do little, if anything, to overcome the harm arising from the impact of the scheme as a whole on the openness of this part of the countryside.”

He then said that those matters would not amount to very exceptional circumstances and that the appeal on ground (a) failed. I shall recall some of those more recent paragraphs when I turn to deal with the appeal on ground (f).

[33] The points that the Appellant makes on ground (a) are that it is said that it was evident, and confirmed to a degree by the evidence of Mr Bowden, that some posts of some height would not affect the Green Belt or the AONB and they would possibly be acceptable in planning terms. Therefore it was said what the inspector should have done was to grant planning permission for something and that should have been granted conditionally. It is said that the inspector did not take that properly into account or, if he did, he did not explain adequately or at all why he did not grant planning permission for some variation on the development.

[34] Furthermore, the second point is there was no evidence on which the inspector was entitled to conclude that there was likely to be any danger to grazing animals. I do not think there is much weight put on this point. Mr Bond said in his evidence that sheep could still be grazed.

[35] A point was made about the land being in a “nil” use, and that stakes were facilitating such a “nil” use. I have recorded that from the skeleton argument. It is not something that Mr Newberry has particularly emphasised this morning. Perhaps a more striking point is the fourth one I mention, that in considering a test of visual impact it must be borne in mind that some use of enclosure – fences, gates, including stakes no doubt – could be consistent with openness and thus acceptable in terms of policy in the countryside. It is said that this would not logically depend upon the use to which those stakes were put. The question, it is said, is whether or not the visual impact is acceptable or not. It seems to me that the biggest challenge is the first of the points I have identified which comes down to the inspector not properly considering a proposal for planning permission with a condition requiring some sort of landscaping scheme or some reduction in scale.

[36] In her comprehensive and helpful skeleton argument Miss Davies has addressed these points, as she has addressed the other points that I have mentioned. She points out some difference in the recollection between what Mr Bowden said and what others thought he had said. But I am quite prepared to proceed on the basis that the Appellant's contentions about what Mr Bowden said are actually right.

[37] The first point that Miss Davies makes is that the inspector is not bound to accept what Mr Bowden said. It is for him to form his own judgment in the light of his own knowledge and experience. The second point is that issue under ground (a) was and is whether or not planning permission should be granted in respect of the breach of planning control constituted by the matters in the enforcement notice. I accept both those submissions. While the inspector is certainly entitled to consider – in certain circumstances perhaps he should consider – whether or not a straightforward condition would make the development acceptable, it is really fanciful to suggest that he is under any obligation to set about the sort of exercise that the Appellant seems to suggest, which would amount to a transformation of the circumstances to which the enforcement notice is directed. That would effectively be saying to the inspector “give us planning permission for as much as you think we ought to have planning permission for”. That is not the sort of exercise an inspector can properly be asked to do or to which he should respond if he is asked. Certainly he cannot be criticised if he does not do it.

[38] The “grazing animals” argument is peripheral. Of course the inspector is not bound to accept Mr Bond's evidence which, in any event it seems to me, does not necessarily meet the point since sheep are not the only grazing animals. The inspector is entitled to rely upon his own judgement and his own knowledge in relation to other sorts of animals. There is some evidence in the letters of objection which I have read, though they hardly amount to any expert evidence. It would be right to say there is some evidence, I suppose. The inspector was entitled to take that into account. He did not take the point far, but he was entitled, in my judgment, to take it as far as he did.

[39] I do not think there is anything in the "nil use" point. The inspector assessed visual impact. In his judgment, rather than seeing the use as some sort of nil – which seems to have been equated with some sort of neutral or inoffensive use – he saw the use as being a form of development atypical in the countryside.

[40] As for the fourth point I identified, that is to say that effectively it is simply a question of visual impact to which use is not relevant, that seems to me to be simply wrong. An element of visual impact is incongruity; 55 posts in the countryside arranged in the form of a fence and in an appropriate position are likely to be in a fitting context, and would be likely perhaps to have very little visual impact simply because it is what you expect to see in the countryside as a natural part of it. Exactly the same number of posts grouped into a completely different structure are quite capable of looking highly incongruous, and because of their incongruity, having a high visual impact. I think the inspector's approach was unassailable.

[41] I think point 5 has been effectively dealt with although I shall say a little more about it when I turn to ground (f).

[42] The inspector remarked upon the possible difficulties of achieving landscaping but the way he dealt with it completely diffused any potential criticism because, while he referred to it not being entirely clear whether a hedge could be planted, he went on to consider as to whether or not, assuming that it could be, it would be acceptable and said that assuming it could be, it would be.

[43] I turn to ground (f), first of all, remarking that all parties have acknowledged that ground (a) and ground (f) are bound up together. On ground (a) what the Appellant says is that the inspector should have identified what it was that would have been sufficiently acceptable to be permitted in terms of policy. This then has a bearing on ground (f) because the argument is that the enforcement notice should have been amended, or rather the requirements of it should have been amended, in order to permit the Appellant to retain what was acceptable.

[44] I summarise the point; it has been addressed already. What the inspector said about this is set out in para 61 under the heading "The Appeal on Ground (f)". It would be impractical on an appeal under ground (f) to vary the requirements of the notice to request the submission of a hedge-planting scheme. The requirements must be clear to enable the recipient to know what he or she has to do to comply with the terms of the notice. In the absence of any detailed scheme of planting, including a timetable for implementation, the notice could not be varied with any degree of precision. The reduction in the height and number of posts from the planting of a roadside boundary hedge advanced in support of an appeal on this ground are all more appropriate to – and have been considered individually and cumulatively in respect of – the appeal on ground (a) and have been found not to outweigh the harm arising from development. I should say that the reference in that passage to the "reduction in the height and number of posts and the planting of a roadside boundary

hedge advanced in support of appeal on this ground" is a reference to the Appellant's case, as set out by Mr Bond, which is in his proof before me at para 5.63.

[45] What Mr Bond said was, under the heading of ground (f):

"5.62 If the inspector considers that the marker stakes constitute development and that they do not maintain the openness of the Green Belt or fail to conserve the natural beauty of the AONB, then a solution could be to replace them with a smaller number of lower marker stakes.

5.63 The following option arises: each plot is marked by eight in number uncoloured marker stakes, four in each corner and four halfway along the front/rear and flank sides (total 193) 0.45 metres in height and 6cms in diameter.

A landscaping condition requiring the planting of a native hedge along Lodge Lane to the east of the site."

That is what the inspector is clearly referring to in para 61. That is the extent to which another scheme was put in front of him.

[46] What he says about that is therefore important. He refers to the appeal on ground (a) and he says that those proposals have been found not to outweigh the harm arising from the development. That is the reason why he is not prepared to vary under ground (f) to permit that. Therefore what the inspector did was to consider the scheme that was put in front of him, to consider whether it was acceptable, to decide that it was not acceptable and therefore for that and the other reason relating to the lack of definition of a scheme of landscaping, to reject that as a proper solution under ground (f). It seems to me that that is an exercise that is beyond any justified criticism. He was entirely entitled to require the removal of all the stakes. He had decided that they constituted breach of planning control and visual amenity. Beyond considering the option he did consider, he is not obliged to require the removal of so many stakes or so much of the development as would leave it inoffensive and acceptable. He is entitled to say, so long as he properly considers an option properly put in front of him, that option offered is no good, what has been done is not acceptable; it is too much, so take it all away. That seems to me to be – given, as I acknowledge, the differences between Taylor and this case – to be in accordance with the approach that Taylor makes clear.

[47] That leaves only the question of the amendment of the enforcement notice. The inspector amended the enforcement notice, and Mr Newberry makes a determined challenge to that amendment. I should go back briefly to explain how he amended it. I set out the terms of the enforcement notice. I will not refer again to that because it is not necessary to do so. I will refer briefly to the inspector's reasoning, and that will deal with it sufficiently. It will be recollected what that description was. The inspector recorded that what the Appellant was arguing was that the

mischief that the local authority were trying to get at was not so much the placing of stakes but the formation of some means of enclosure. As a result, there was quite a degree of time spent, the inspector records, examining whether or not the placing of stakes would mean a fence or a means of enclosure was created. He recorded all that at para 30. He responded to this by saying:

“31. However if the stakes form a fence or means of enclosure, the development is unlawful because the permission ordinarily granted by the GPDO has been rescinded by the article 4 direction. If they do not, then I have found the operations would be operational development within the meaning of s 55 . . . In either case, no planning permission has been granted for such 'development', either expressly by the Council, or by the GPDO, or by any other statutory development order.

32. The words in the allegation that follow the word 'posts' are allied to the reasons for taking enforcement action. It might be the case that the 'posts' provide demarcation of the individual plots and accessways, but the notice is aimed at the stakes placed in the ground, not at the sub-division of the land into small plots . . .”

Pausing there, I read out the passages from the enforcement notice. While there is considerable discussion of enclosure, it seems to me that it is quite evident from at least two passages that the inspector is absolutely right, the notice is aimed at the stakes placed in the ground and not at the sub-division of the land into small plots. He continued:

“32. . . . Reading the notice as a whole, it is clear that the council views the 'fence posts' as a part of a wider scheme embracing the sub-division of ownership of the land (which is not, in itself, within the control of the council) and the potentiality of harm arising from such a scheme. Indeed the requirements of the notice seek only the removal of the 'fence posts'.

33. There is no doubt that what has been placed in the ground are 'posts', but even given the quantity that exist, as a matter of fact and degree, it is difficult to view them as comprising a 'fence', or part of one. They might be capable of becoming 'fence posts', but that would require them to be joined together in some way, whether by timber panels, rails, wires, or other means. Individually, in the council's terminology, they are 'posts'; the adjective 'fence' adds nothing to their qualities, other than a measure of confusion and it could be deleted from the allegation and requirements without materially affecting the meaning.

34. The Appellant has made no explicit appeal under s 172(2)(b) that what is alleged in the notice has not occurred, as a matter of fact. That must be right because on a fair reading of the notice as a whole, I do not believe the Appellant would be in any doubt about the matter to which the allegation in the notice is directed, that is, to what the council has described as the erection of 'fence posts', but which I believe would be more appropriately described as 'posts'. Support for that conclusion is found both on the front cover of Mr Bond's proof of evidence and on that of the submitted 'statement of common ground' where the appeal is described as relating to the 'insertion of marker

stakes to sub-divide plots of land'. That encapsulates precisely and aptly the matter to which the notice is directed.

35. To make the allegation clearer, I also intend to delete reference to all those matters that follow the word 'posts', save for reference to the demarcation of plots of land. I do not believe the Appellant would be in any worsened position as a consequence because, whether the breach is the erection of 'posts' or is the erection of 'posts forming a means of enclosure etc . . .', there would be a breach of planning control. The appeal on ground (c) will fail."

In my judgment, the inspector was absolutely right about that.

[48] Mr Newberry puts the point to me that the Appellant suffered injustice because they went to the inquiry facing what they thought was an enclosure argument. (I interpose, an enclosure argument that they felt reasonably confident they could knock down.) What happened was that the inspector amended the enforcement notice in a perfectly sensible way. The effect was to create a point that the Appellant could not knock down. But it was a point that was in accordance with, it seems plain to me, the words of the enforcement notice. It also seems plain to me – not only from the examples the inspector gives but also from other passages that I see in other parts of the documentation – that the Appellant knew precisely what it was that was at issue and dealt with it. There is nothing in this point. The inspector has a broad power of amendment, subject to the requirement that the amendment should not cause injustice. The inspector gave his mind to that, and the conclusion that he reached was entirely open to him.

[49] I have considered all the points that have been advanced and found that there is no substance in any of them. Frankly it seems to be a case where, understandably, what the Appellant really wants to do is to re-run the case on the planning merits. That is something that this court will not hear him do.

[50] For those reasons this appeal is dismissed.

MISS DAVIES: [51] There are two points. First – I do not know if you would have noted them in the footnote in my skeleton argument – when it comes to the making of an order the correct first Defendant is not now the First Secretary of State but it is the Secretary of State for Communities and Local Government.

JUDGE MOLE: [52] In a sense, it does not matter to me because I have lost track of the name changes and the fact there is a new name – I will write it down.

Appeal dismissed.

Neutral Citation Number: [2019] EWCA Civ 2250

Case No: C1/2019/0430

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
PLANNING COURT
THE HON MR JUSTICE OUSELEY
[2019] EWHC 176 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/19

Before :

LORD JUSTICE LEWISON

LORD JUSTICE HICKINBOTTOM
and
LADY JUSTICE ASPLIN

- -

Between :

NEW WORLD PAYPHONES LIMITED **Appellant**

- and -

(1) WESTMINSTER CITY COUNCIL
(2) THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT **Respondents**

- -
- -

Paul Stinchcombe QC (instructed by **Squire Patton Boggs (UK) LLP**) for the **Appellant**
Saira Kabir Sheikh QC (instructed by **Bi-Borough Legal Services**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Hearing date: 19 November 2019
Further written submissions: 25 November 2019

- -

Approved Judgment

Lord Justice Hickinbottom :

The Background

1. Telephone boxes are a feature of the London landscape. There are 1,800 in the City of Westminster alone.

2. However, with the rise of the mobile phone, many are now rarely used, in poor condition and suffering from anti-social behaviour and vandalism. The City of Westminster Council ("the Council") considers that, for some, their function has largely or wholly disappeared and consequently they should be removed in accordance with the conditions which formed part of the permitted development provisions under which they were installed.

3. It is therefore initially curious that, as reflected nationwide, applications to the Council to install new or replacement telephone kiosks have burgeoned over the last few years. Prior to a change in the scheme earlier this year to exclude telephone kiosks as a class of permitted development, each application was for prior approval of permitted development and was invariably accompanied by a parallel application to the Council for advertisement consent to allow illuminated advertising on the whole of the back panel of the new kiosk. That, the Council suggests, betrayed the true purpose of these proposed structures. The Council considers it is unlikely that the new kiosks would be used by the public to make telephone calls; and the applications were in substance an attempt unlawfully to use the provisions for classes of development permitted by order of the Secretary of State to circumvent normal planning permission controls that properly apply to such development.

4. It is in that context that this appeal raises important questions concerning the proper approach to the scope of development covered by a permitted development order.

5. It does so in the form of an appeal and cross-appeal from the Order of Ouseley J dated 5 February 2019 in which he allowed the Council's application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") quashing the decision of a Planning Inspector J Bell-Williamson MA MRTPI on behalf of the Secretary of State ("the Inspector") to grant approval to the Appellant developer ("NWP") to replace two existing telephone boxes in Marylebone Road with a single new kiosk incorporating a large back panel to display illuminated digital advertisements.

6. Before us, Paul Stinchcombe QC appeared for NWP and Saira Kabir Sheikh QC for the Council. At the outset, I thank them for their helpful submissions.

The Legal Background

7. Section 57(1) of the 1990 Act provides that planning permission is required for any "development" of land, defined in section 55 (so far as relevant to this appeal) as any building operations or material change in the use of any building or land.

8. The "use" of a building or land is therefore an important planning concept, as is the related concept of "purpose", i.e. the use for which the building or land is intended. By section 76(2) and (3) of the 1990 Act, where planning permission is granted for

the erection of a building, the grant of permission may specify the purposes for which the building may be used; and, if no purpose is specified, then the permission is construed as including permission to use the building for the purpose for which it is designed. "Purpose" in this context is not subjective – it does not depend upon what is in the mind of the developer – it is the use for which the (usually, proposed) development, looked at objectively, is intended. Development may of course have more than one purpose, and thus be "mixed use", e.g. if a development comprises both a farm (agricultural) and a farm shop (retail).

9. The installation of a telephone kiosk is undoubtedly development as a building operation, for which planning permission is required.

10. By section 58(1)(a), planning permission may be granted for classes of development by a development order made by the Secretary of State. The Town and Country Planning Act (General Permitted Development) (England) Order 2015 (SI 2015 No 596) ("the GPDO") is the principal development order made pursuant to that statutory power. By article 3(1) and (2) of the GPDO, subject to any relevant specified exception, limitation or condition, planning permission is granted for classes of development described as permitted development in Schedule 2 to the order.

11. At the relevant time, Part 16 Class A of Schedule 2 (headed "Electronic communications code operators: Permitted development"), so far as relevant to this appeal, permitted:

> "Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of—
>
> (a) the installation, alteration or replacement of any electronic communications apparatus…".

12. Paragraph A.2 provided, so far as relevant:

> "(2) Class A development is permitted subject to the condition that—
>
> (a) any electronic communications apparatus provided in accordance with that permission is removed from the land or building on which it is situated—
>
> (i) …
>
> (ii) … as soon as reasonably practicable after it is no longer required for electronic communications purposes; and
>
> (b) such land or building is restored to its condition before the development took place, or to any other condition as

may be agreed in writing between the local planning authority and the developer.

(3) … Class A development—

…

(c) on unprotected land where that development consists of—

…

(iii) the construction, installation, alteration or replacement of—

(aa) a public call box;…

is permitted subject… to the conditions set out in paragraph A.3 (prior approval).

13. The relevant condition is found in paragraph A.3(4):

> "Before beginning the development described in paragraph A.2(3), the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting and appearance of the development."

Further requirements of the application are found in paragraph A.3(5). Paragraph A.3(8) essentially prohibits beginning the development without confirmation from the local planning authority that prior approval is not required or has been granted; although where, within a specified number of days (now, 56 days) of an application under paragraphs A.3(4) and (5), the authority fails to respond substantively to that application, then development is effectively deemed to be permitted and it can begin.

14. Paragraph A.4 defines "electronic communications code operator" as "a person in whose case the electronic communications code is applied by a direction under section 106(3)(a) of the Communications Act 2003 ['the 2003 Act']". Paragraph A.4 also says that "electronic communications network" shall have the same meaning as in the 2003 Act; and it is defined in section 32 of that Act to include "a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description". It is uncontroversial that, under these definitions, NWP is an electronic communications code operator operating a national electronic communications network.

15. Again by virtue of paragraph A.4, "electronic communications apparatus" also has the same meaning as in the 2003 Act, which, in paragraph 5 of the Electronic Communications Code (which is incorporated into the Act as Schedule 3A), defines the term as follows:

> "(1) In this code "electronic communications apparatus" means—

(a) apparatus designed or adapted for use in connection with the provision of an electronic communications network,

(b) apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network,

(c) lines, and

(d) other structures or things designed or adapted for use in connection with the provision of an electronic communications network.

(2) ….

(3) In this code—

…

'structure' includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus."

16. It is – in my view, rightly – common ground before us that, for these purposes, a telephone kiosk is a "building"; and, therefore, it falls within the definition of "structure" and thus "electronic communications apparatus" if, and only if, its "sole purpose... is to enclose other electronic communications apparatus".

17. To an extent, the inclusion of communications infrastructure within Part 16 of the GPDO reflects the support given in the public interest to that infrastructure by the National Planning Policy Framework ("NPPF"). The NPPF at the relevant time (the 2012 version) said, in particular (emphasis added):

"42. Advanced, high quality communications infrastructure is essential for sustainable economic growth. The development of high speed broadband technology and other communications networks also plays a vital role in enhancing the provision of local community facilities and services.

…

46. Local planning authorities must determine applications on planning grounds. They should not seek to prevent competition between different operators, [or] *question the need for the telecommunications system...*".

18. Where a proposed development falls within one of the GPDO classes, as a result of these provisions, the principle of development is not in issue – although that is not in itself necessarily determinative of the application because, to fall within the scope of

permitted development within the GPDO, development has also to comply with any specified "exception, limitation or condition" which applies to the particular class (see, e.g., Infocus Public Networks Limited v Secretary of State for Communities and Local Government and the London Borough of Hammersmith and Fulham [2013] EWHC 4622 (Admin) ("Infocus No 2") at [15]-[16]). Thus, for Part 16 Class A, the prior approval of the planning authority is still required for the siting and appearance of the development. Consequently, on the basis that the proposed development otherwise falls within the permitted development definition for that class, in considering an application for prior approval under Part 16 Class A, the focus of the decision-maker is exclusively on whether, on balance and as a matter of planning judgment, the siting and appearance of the development are acceptable in planning terms. Other conditions etc apply to other defined classes of permitted development.

19. Where development does not satisfy the class definition and conditions so as to fall within a class of permitted development, then the GPDO does not apply; although, of course, the developer can still apply for express planning permission in the usual way. However, in considering such an application, the consideration of the local planning authority will not be restricted to consideration of whether the class conditions (e.g., so far as Part 16 Class A is concerned, siting and appearance) are satisfied. The application will need to satisfy all of the planning requirements for an express grant, and will be the subject of the full rigour of the planning application regime to that end.

20. Section 220 in Chapter 3 of the 1990 Act gives the Secretary of State power to make provision "for restricting or regulating the display of advertisements". For these purposes, "advertisement" is defined in section 336(1) as:

> "any word, letter, model, sign, placard, board, notice, awning, blind, device or representation, whether illuminated or not, in the nature of, and employed wholly or partly for the purposes of, advertisement, announcement or direction, and (without prejudice to the previous provisions of this definition) includes any hoarding or similar structure used or designed, or adapted for use and anything else principally used, or designed or adapted principally for use, for the display of advertisements".

21. The relevant regulations are the Town and Country Planning (Control of Advertisement) (England) Regulations 2007 (SI 2007 No 783) ("the Advertisement Regulations"). By regulation 4, no advertisement can be displayed unless consent for its display has been granted either (i) by way of deemed consent under Part 2 or (ii) following an application, by way of express consent from the local planning authority under Part 3.

22. So far as deemed consent is concerned, by regulation 6, subject to identified limitations and conditions, consent is granted for the display of an advertisement of any class specified in Part 1 of Schedule 3. Class 16 is:

> "An advertisement displayed on the glazed surface of a telephone kiosk…";

which is subject to a number of limitations including, so far as relevant to this appeal:

> "(2) Illumination is not permitted."
>
> "(4) … [N]o advertisement may be displayed on more than one face of the kiosk."

23. The relationship between the prior approval regime and the advertising consent regime was considered in Infocus Public Networks Limited v Secretary of State for Communities and Local Government and the Mayor and Commonality of the Citizens of London [2010] EWHC 3309 (Admin) ("Infocus No 1"), another case concerning permission for a telephone kiosk with an advertising display, in which (at [66]) Foskett J described the procedure for obtaining advertising consent as "a self-contained code for the regulation of advertising material generally and, in this particular context, of advertising attached to the surface of a telephone kiosk".

24. In addition to the provisions of the Advertising Regulations, section 222 of the 1990 Act, under the heading "Planning permission not needed for advertisements complying with regulations", provides that, where the display of advertisements in accordance with the Advertising Regulations involves development of land, planning permission for that development shall be deemed granted without any application for express grant. Given the definition of "advertisement" (see paragraph 20 above), this means that where it is proposed to erect (e.g.) an awning or hoarding displaying an advertisement, then if consent for that advertisement is obtained under the Advertisement Regulations, then any required planning permission for that awning or hoarding will be deemed to have been granted.

25. I have set out the relevant provisions as at the time of the Inspector's decision. However, since then, both sets of regulations have materially changed. From 25 May 2019, regulations 16 and 17 of the Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments) (England) Regulations 2019 (SI 2019 No 907) amended the GPDO and the Advertisement Regulations so as to remove the permitted development right and any deemed advertising consent for telephone kiosks. Therefore, any proposed new telephone kiosk in the future will be subject to the full regime for express grant or consent.

26. However, this appeal is still of real significance because, aside from the issue of the lawfulness of the particular decision under the old regime in this case, the issues of law arising in this appeal remain potentially relevant to both the status of telephone kiosks already installed and to the interpretation of permitted development rights in other, extant classes.

The Factual Background

27. NWP owns two telephone kiosks on the pavement outside 25-27 Marylebone Road, which it wishes to replace with one new kiosk, larger than each of the individual kiosks it would replace but not quite as large as both together. The "multi-functional capability" of the new kiosk is described in paragraph 2.3 of NWP's Written Representations to the Inspector, as follows:

> "• New telephone equipment with the ability to accept credit/debit card, contactless and/or cash payment;

> • 24 inch LCD display providing an interactive wayfinding capability;
>
> • Equipment for provision of public Wi-Fi access points and/or equipment for provision of public small-cell access nodes;
>
> • Location-based information (NFC, Bluetooth 4.0 LE); and
>
> • On the reverse side, a 1650mm (h) x 928mm (w) LCD display for digital advertising purposes, recessed behind toughened glass."

28. With regard to the last bullet-point, it was said that the telephone kiosk would "incorporate an internally illuminated digital advertisement panel on the reverse side thereof" (paragraph 1.2); and that the replacement telephone kiosk and "integrated advertisement display" were "inextricably linked" (paragraph 1.3). Paragraph 2.5 gave a further description of the proposed LCD panel:

> "As noted, the reverse side of the replacement telephone kiosk would incorporate a 1650mm high by 928mm wide 1.5 sq m integrated LCD digital display panel. This is slightly less tall, narrower and 0.5 sq m (or 25%) smaller in terms of display area compared to a standard 6-sheet advertising display, of the type commonly found in bus shelters. The digital panel would display static advertising images in sequence, changing no more frequently than every 10 seconds, the change via a smooth fade…".

29. NWP considered that the development fell within Part 16 Class A of Schedule 2 to the GPDO, so that it was permitted development subject to prior approval from the local planning authority for its siting and appearance. On 4 July 2017, NWP applied to the Council for that approval. Given that it wished to use the display panel for illuminated advertisements, which were not permitted under the Advertisement Regulations, on 26 July 2017 it also applied to the Council for an express grant of advertising consent under those regulations.

30. On 6 September 2017, the Council refused both applications, giving the following reasons in respect of each:

> "a. Prior approval
>
> Because of its appearance, size and siting within the street scene, the telephone kiosk would be harmful to visual amenity and add street clutter to this part of the City. This would not meet S25 and S28 of Westminster's City Plan (November 2016) and DES 1 and DES 7 of our Unitary Development Plan that we adopted in January 2007 and the Westminster Way Supplementary Planning Document (adopted 2011).
>
> b. Advertisement consent

> Because of its location, capable display of (dynamic) moving images, size and method of illumination, the digital advertisement panel attached to a telephone kiosk, would harm the appearance (amenity) of the area. This would not meet S25 and S28 of Westminster's City Plan (November 2016), DES 1, DES 8, DES 9 of our Unitary Development Plan that we adopted in January 2007."

31. Under section 78 of the 1990 Act and regulation 17 of the Advertisement Regulations respectively, NWP appealed to the Secretary of State in respect of both refusals. The Secretary of State appointed the Inspector to determine the appeals, which proceeded by way of written representations.

32. In paragraph 35 of its Written Representations to the Inspector, the Council said:

> "Planning permission is not required for the installation of a new telephone kiosk. They are permitted development but prior approval is required from the local planning authority…. The only issues that can be considered are design and siting of the kiosk."

33. However, the Council considered that there was generally no need for new telephone kiosks, and no need for this particular kiosk; and, following its refusal of these applications, it sought legal advice as to whether applications for prior approval could be refused on the basis of the lack of need. Having received that advice, on 31 January 2018 the Council formally determined that the application for prior approval in this case should be refused on the additional basis that there was no need for further kiosks for the purposes of an operator's electronic communications network. It also decided that, where such a need was not raised as a reason for refusal but there was an extant appeal, the issue should be raised at the appeal. Thus, it was raised before the Inspector.

The Inspector's Decision

34. In fact, in Appendix 2 to its Written Representations to the Inspector, the Council raised not one but two grounds of refusal over and above those relating to siting and appearance. First, as presaged, it submitted that an additional reason for the refusal was the lack of need for the new telephone kiosk (paragraph 11). Second, as a yet further ground for refusal, it said (at paragraph 12):

> "The application for prior approval does not fall within the ambit of Part 16 of the [GPDO], as it is not considered to be for the purpose of the electronic operator's communication network and is not required for these purposes".

35. In a decision letter dated 27 June 2018, the Inspector dismissed the appeal in respect of the refusal of consent under the Advertisement Regulations (and there has been no challenge to that part of his decision); but allowed the appeal in respect of the GPDO, and he granted prior approval in respect of the new kiosk.

36. With regard to prior approval, at paragraph 7, he identified the main issue as:

> "… whether or not approval should be given in respect of the siting and appearance of the proposed kiosk, with particular regard to the effect on the character and appearance of the area."

37. In paragraphs 5 and 6, he explained why:

> "5. … The Council makes reference to Policies S25 and S28 of Westminster's City Plan and Policies DES 1 and DES 7 of its Unitary Development Plan. However, the principle of development is established by the GPDO and the prior approval provisions include no requirement that regard be had to the development plan. The provisions of the GPDO require the local planning authority to assess the proposed development solely on the basis of its siting and appearance, taking into account any representations received….
>
> 6. The [NPPF]… deals with supporting high quality communications infrastructure, including applications for prior approval, and requires that local planning authorities must determine applications on planning grounds. The Council has expressed concern relating to the need for a proposed kiosk. However, the principle of development is established by the GPDO and the [NPPF] confirms that considerations such as need for the payphone kiosk, a telecommunications system, should not be questioned."

38. The Inspector expressly rejected any requirement to consider the purpose of the development. He stated (at paragraph 14):

> "The Council has also expressed concern that the purpose of the proposed kiosk is primarily to facilitate the display of a large advertisement. However, the construction of a kiosk and the display of advertisements are distinct and separate matters requiring different applications where necessary."

39. He considered siting and appearance, for example finding (at paragraph 13) that the kiosks would be "sufficiently well-separated" so as not to appear as "visual clutter", and concluding (at paragraph 16):

> "… that the siting and appearance of the proposed kiosk would not have an unacceptable effect on the character and appearance of the area and, therefore, the appeal should succeed."

40. With regard to conditions, he said (at paragraph 23):

> "… [T]he grant of prior approval for the payphone kiosk is subject to the standard conditions set out in the GPDO, including an implementation timescale, removal of the structure/apparatus when it is no longer required for electronic

> telecommunications purposes and accordance with the details submitted with the application…".

The Section 288 Application

41. On 7 August 2018, Westminster issued proceedings under section 288 of the 1990 Act to challenge the Inspector's prior approval decision, raising in substance two grounds of challenge, namely:

   i) The Inspector erred in not accepting that the proposed development did not fall within Part 16 Class A of Schedule 2 of the GPDO because it was not for the purpose of the provision of an electronic communications network.

   ii) The Inspector erred by refusing to address the need for the development.

42. In a judgment dated 5 February 2019, Ouseley J allowed the appeal on the first ground, and quashed the Inspector's decision. Referring to the judgment of Lindblom LJ in Keenan v Woking Borough Council and Secretary of State for Communities and Local Government [2017] EWCA Civ 438, he stressed the requirement for any development to fall "fully" or "squarely" within the applicable class of the GPDO in order for permission to be granted by it (see [37]). As Ouseley J put it:

> "38. The concept of the principle of development being established [by the GPDO itself]… means that the development which is being considered must all fall within the class in question, otherwise its 'principle' cannot be taken to have been established.
>
> 39. A development therefore falls outside the scope of Class A Part 16 of it is not 'for the purpose' of the operator's network. That means, at least in the specific context of a GPDO permission, that a proposed development falls outside it, if part of it falls outside it. It cannot be said that the whole falls within the GPDO. The benefits of the GPDO, a quicker process, the limited range of material considerations, and the restricted range of conditions would be used for a development, part of which they were not intended for, and which had not been judged to merit permission on that basis. A development which is partly 'for the purpose' of the operator's network, and partly for some other purpose, is not a development 'for the purpose' of the operator's network, precisely because it is for something else as well. The single dual purpose development must be judged as a whole."

43. Having rejected a test based on "dominant purpose", in favour of one essentially based on "single purpose", he continued (at [42]):

> "I do not consider that the evidence here could permit of any conclusion other than that the kiosk served a dual purpose. Part of its purpose was for the operator's network, as a telephone kiosk. Part of it was to be the electrified advertising panel.

> The panel was for the purpose of displaying advertisements. It was not ancillary or incidental to the kiosk, nor legally insignificant. It does not matter whether it would have been lit if no advertisements were displayed. No relative significance has to be attributed to either part of the dual purpose; it is sufficient if the two purposes exist without the advertising use being ancillary or incidental or of no legal significance. There was no suggestion from the [decision letter] or the parties that the Inspector had or could have considered the advertising panel, for which separate consent had to be obtained, to be legally insignificant or merely incidental to the telecommunications use."

44. However, having allowed the appeal on that ground, in respect of need, he accepted that the GPDO, with its limited range of material considerations, precluded any argument about whether electronic communications networks (and the facilities required for their use, including telephone kiosks) are "needed" in the public interest; and he therefore refused the Council's appeal on the second ground.

The Grounds of Appeal: The Appellant's Submissions

45. The issue in the appeal by NWP is whether the proposed development, in the form of a telephone kiosk with an integrated illuminated advertisement display panel, fell within the scope of development permitted by Part 16 Class A of Schedule 2 to the GPDO. The judge concluded that it did not. Ms Sheikh contends that he was correct, essentially for the reasons he gave.

46. Mr Stinchcombe submits that the judge erred in concluding that the proposed development fell outside the scope of development permitted by Part 16 Class A because it was "dual purpose", on the following basis.

    i) Proposals to place a telephone kiosk on the footway and to incorporate advertising into that kiosk respectively engage two entirely discrete regimes: the prior approval regime (under which permission can be obtained as permitted development) and the self-contained regime controlling advertisement (under which consent is required which can in some circumstances be deemed, but if the proposed advertisement is illuminated then consent must be by way of express grant on the basis of an application) (Infocus No 1).

    ii) In its application under the GPDO, NWP applied for only prior approval for the development under the Class 16 Part A, under which only siting and appearance fall to be considered (Infocus No 1 and Infocus No 2).

    iii) Since the Inspector concluded that the siting and appearance of the proposed kiosk were acceptable in planning terms, he was bound to grant approval. He certainly did not err in doing so.

47. Mr Stinchcombe relied upon eight strands of argument in support of these propositions and his submission that Ouseley J was wrong to overturn the Inspector's decision.

i) NWP's subjective purpose in pursuing the development is irrelevant. Under the prior approval regime, an application can only seek approval on the restricted basis that the siting and appearance of the proposed development are acceptable in planning terms. That is all that NWP applied for here. The scope of the Inspector's task was restricted by the application that was made and which, on appeal, he was re-considering. The kiosk will serve a communications purpose, even if that is not its only or main purpose. The proposed advertising was not the subject of the prior approval application, but rather of the application for consent under the discrete, entirely self-contained Advertisement Regulations regime. Indeed, when considering the prior approval application, the Inspector was well aware that he was going to uphold the refusal of the advertising consent, and so was aware that any kiosk installed as permitted development would and could only be used exclusively for communications purposes.

ii) In oral argument confirming paragraph 42 of his skeleton argument, Mr Stinchcombe accepted the proposition at [47] of Ouseley J's judgment that, if a kiosk is not designed from the outset potentially to accommodate an illuminated panel and an application is subsequently made to alter the kiosk for that sole purpose, the GPDO would not apply and express planning consent would be required. Ouseley J considered that this supported the construction he favoured; because there was no good reason why the application of the GPDO should depend on a difference in the way in which an identical kiosk came to be proposed, i.e. the sequencing of the applications. However, Mr Stinchcombe submitted that it did not support that construction, because, under the proposed development to include the advertising panel:

a) the kiosk would continue to serve a communications purpose;

b) it would be inevitable that any application for planning permission for the alteration of the kiosk to accommodate the advertising panel would be granted, because it has to be assumed that the design of the kiosk in planning terms – the only material consideration – would already have been accepted; and

c) in any event, an advertisement could only be displayed if it obtained deemed or express advertising consent in which case only if independently considered by the local planning authority to be acceptable.

In any event, he submitted, there is no reason to remove permitted development rights for a telephone kiosk which provides communications services solely because an advertisement might, subsequently and acceptably, be added.

iii) Mr Stinchcombe submitted that Ouseley J's "dual purpose" approach to the interpretation of the GPDO is impossible to reconcile with the facility to display non-illuminated advertisement on a telephone kiosk with the benefit of deemed consent under the Advertisement Regulations. At the relevant time, subject only to prior approval for siting and appearance, an electronic communications code operator such a NWP could install a kiosk which would serve communications purposes and host a non-illuminated advertisement. Parliament has thus already approved the “dual purpose” approach; and, if that is true for non-illuminated advertisements, it must be true for illuminated advertisements.

iv) Ouseley J said that a “dominant purpose” approach inevitably and wrongly engages the planning decision-maker in an investigation of the motive of the operator; but, Mr Stinchcombe submitted, so does the “sole purpose” approach the judge himself adopted, because, although using a different threshold, the decision-maker would be required to ascertain whether advertising use was part of a “dual purpose” or whether it was merely “incidental or ancillary” to communications as a “single purpose”. For the same reason as Ouseley J rejected “dominant purpose”, he should also have rejected the “single purpose” approach.

v) Mr Stinchcombe submitted that Ouseley J’s approach potentially has widespread implications for many other parts of the GPDO. For example, Schedule 2 Part 9 Class C grants highway authorities deemed consent for development “required for the purposes of the carrying on of any tramway or road transport undertaking consisting of… the erection… of passenger shelters”; Part 12 Class A grants local authorities deemed consent for the erection of “passenger shelters, public shelters… required in connection with the operation of any public service administered by them”; and Part 19 Class A grants deemed consent for development by or on behalf of the Crown for the erection of “passenger shelters, shelters… required in connection with the operational purposes of the Crown”. Many of these shelters have advertisements on them which to an extent, in the public interest, defray the cost of the shelters. If such development could not fall within the GPDO because it had a dual purpose, then none of this development would fall within the provisions of permitted development and it would have to be the subject of an application for express grant. That is not a consequence which Parliament or the draftsman of the GPDO could have intended.

vi) Even where such public facilities are funded by advertising, the fundamental identity, public service and purposes of such facilities remain unchanged. A telephone kiosk with an advertising revenue stream is still a telephone kiosk.

vii) The Council’s concern, that the real purpose behind the application for prior approval was not to provide communications services but advertising, is unfounded. If that were the case, this kiosk will not now be installed, because it has no advertising consent. On the other hand, if that were not the case, then the kiosk will be installed without advertising and will be used exclusively for communications purposes. In either event, there is no mischief here.

viii) However, if there were a mischief, then it is not a matter for the courts to address: it is a result of the scope of the GPDO, and it is a matter for Parliament or the executive to address it by amending the GPDO (as, of course, the Secretary of State has now done in respect of telephone kiosks and advertising on such kiosks).

The Grounds of Appeal: Discussion and Conclusion

48. With regard to the relevant principles, forcefully as these submissions were made, I am unable to accept them, largely for the reasons set out in Ms Sheikh's submissions.

i) The GPDO describes classes of "permitted development" for which planning permission is granted without the requirement for a planning application to be made under Part 3 of the 1990 Act. To fall within a class, development not only has to comply with the class description, but also has to satisfy a series of conditions and limitations unique to that particular class. If it does not do so, then it is not permitted under the GPDO; and planning permission can only be obtained on the basis of a full application.

ii) To take the advantage of being permitted development, the proposed development must fall entirely within the scope of the GPDO. Mixed use development cannot take advantage of that benefit – because, if it were to be able to do so, the GPDO could and would be used for permitting development for something outside its scope, i.e. the part of the development that does not fall with a permitted development class.

iii) In support of that proposition, Ms Sheikh relied upon Keenan upon which Ouseley J also relied (see paragraph 42 above). In Keenan, the local planning authority failed to respond within time (in that case, 28 days) to an application for prior approval for the "siting and means of construction" for a hardcore track in a unit of land which, it was said, fell within Part 6 (or Part 7) Class A in Schedule 2 to the GPDO as being a private way reasonably necessary for the purposes of agriculture (or forestry) in that unit. It was submitted that, in those circumstances, there was deemed prior approval, and the development could begin (see paragraph 13 above). However, Lindblom LJ (with whom Lewison LJ agreed) held that the track did not become permitted development by default, because "the development proposed had to fall squarely within the description of 'permitted development', in the relevant class" (see [35]). It did not do so because the unit of land was not being used for the purpose of agriculture or forestry at that time. The condition requiring a developer to apply for a determination as to whether its "prior approval" would be required to the siting and means of construction of the private way "[did not] confer upon the authority a power to grant planning permission for development outside the defined class of permitted development" (see [36]). I accept that the reason why the development in that case fell outside the scope of the GPDO was very different from why the development in this case is said to do so: but, in my view, the principle equally applies. In particular, contrary to Mr Stinchcombe's (in my view, somewhat circular) submission, an application for prior approval on the basis that the development satisfies the restricted criteria relevant to such approval (i.e. in this case, siting and appearance) cannot in any way extend the scope of the GPDO.

iv) Part 16 Class A in Schedule 2 to the GPDO includes, as permitted development, "the installation, alteration or replacement of any electronic communications apparatus", which expressly includes "the construction, installation, alteration or replacement of… a public call box" (see paragraphs 11-12 above). The proposed development in this case patently includes such "electronic communications apparatus" including the telephone kiosk itself.

However, it also includes "an integrated advertisement display panel" (see paragraphs 27-28 above). Ouseley J found (see paragraph 43 above), as is clearly the case, that this panel is not merely incidental or ancillary to the electronic communications apparatus: indeed, that part of the development has an entirely different purpose, namely advertising. The development could therefore be described, as Ouseley J put it, as "dual purpose": the use or purpose of the panel, as a structure, was advertising whilst the use or purpose of the telephone kiosk including its equipment was electronic communications. Absent the panel, the development would have fallen within Part 16 Class A and would have been permitted development; but, with that panel, only part of the proposed development fell within that class; and the permitted development route could not be used to avoid the rigours of the full planning application process for that other part. In my view, to allow it to have done so would have been a clear abuse of the permitted development scheme.

v) Therefore, the true construction of the GPDO means that, as a general proposition, to be "permitted development", the whole of any development must fall within the scope of a class in Schedule 2 of the GPDO, by falling within the relevant definition and satisfying any express restrictions as to "exceptions, conditions and limitations"; and therefore a mixed use or dual purpose development, where one use or purpose is outside the scope of the class, cannot generally be permitted development.

vi) Mr Stinchcombe relied upon the "concession" of the Council in paragraph 35 of its Written Representations to the Inspector (quoted at paragraph 32 above), that "the only issues that can be considered [in an application for prior approval for Part 16 Class A permitted development] are design and siting of the kiosk"; but that concession was clearly made only on the basis that the development otherwise met the Part 16 Class A definition for permitted development. Similarly, his reliance on Infocus No 1 and Infocus No 2 was, in my view, misplaced: the observations made in those cases about the principle of development not being in issue (see paragraph 17 above) were made in the context of cases in which it was not in issue that, but for prior approval, the development satisfied the definition of permitted development in Part 16 Class A. In the case before the Inspector, Ouseley J and now us, whether the development falls within the definition of the class was and is very much in issue.

vii) In my view, the Advertisement Regulations are also something of a red herring. Subject to the effect of section 222 of the 1990 Act, those Regulations concern the display of advertisements, not planning permission for buildings etc upon which advertisements might be displayed.

viii) At [45] of his judgment, Ouseley J said that:

> "On a cruder description, part of the purpose of the kiosk was as a hoarding for the display of illuminated advertising…".

Whilst a "hoarding" may fall within the scope of section 222 (see paragraph 20 above), in both his skeleton argument (at paragraph 47) and in his oral submissions, Mr Stinchcombe accepted that, if a telephone kiosk had been constructed as permitted development without an electronic advertising display panel as proposed in this case, and then it was later proposed to add such a panel, that would require express planning permission. But, even if the proposed back panel can properly be described as a "hoarding" or otherwise falls within the definition of "advertisement", that does not affect the mixed use nature of the development proposed here as a whole. As I understood him, Mr Stinchcombe submitted that planning permission was not required for the panel as part of the proposed development, because of the deeming effect of section 222; but, certainly at this stage, in my view that is not correct. Section 222 cannot be used to piggy-back a much more substantial development than envisaged by the definition of "advertisement" (i.e. in this case, the telephone kiosk); and, until that telephone kiosk has planning permission, section 222 cannot be engaged to make (deemed) planning permission for a hoarding dependent upon advertising consent. On the same principle as that which underlies Keenan, neither the Advertisement Regulations nor section 222 can extend any class of permitted development under the GPDO. Consequently, Section 222 does not assist Mr Stinchcombe's cause in this appeal.

49. Before applying those principles to this case, I should deal specifically with the strands of argument relied upon by Mr Stinchcombe which I have already identified. I do so in the same order.

i) It is, rightly, common ground that NWP's subjective purpose in pursuing the development is irrelevant: what is relevant is the use or purpose of the proposed physical structure that comprises the development. In any event, as I have explained, the form of the application cannot determine whether any proposal falls within a permitted development class. In Keenan (at [36]), Lindblom LJ said that an application to a local planning authority for a determination as to whether its "prior approval" would be required does not impose on the authority a duty to decide whether the proposed development is in fact permitted development under the GPDO. But the thrust of that paragraph of Lindblom LJ's judgment was that, by requiring a developer to seek prior approval limited to restricted planning issues, that did not confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. On an application to an authority for a determination as to whether its "prior approval" is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development.

ii) I agree that the form or sequence of applications should have no effect on whether development falls within the GPDO; but I do not consider that the interpretation I favour (essentially that adopted by Ouseley J) draws any distinction. If the development includes a structure for the purposes of displaying advertisements, then, subject to section 222, that will require an express grant of planning permission, whether it is included in an application for a development with mixed use or, subsequent to a telephone kiosk being installed as permitted development, in a discrete application for planning permission for the display panel. In this case, section 222 had no possible part to play, because (a) planning permission was sought through the GPDO not through the deeming provision of section 222, (b) even if the relevant electronic display panel could properly be described as a "hoarding", the deeming provision in section 222 could not be used to obtain planning permission for the structure onto which the hoarding was attached; and (iii) in any event, advertising consent was refused so that there was no room for the deeming provision to bite.

iii) Mr Stinchcombe submitted that Ouseley J's "dual purpose" approach to the interpretation of the GPDO is impossible to reconcile with the facility to display non-illuminated advertisement on a telephone kiosk with the benefit of deemed consent under the Advertisement Regulations. However, again I do not agree. Subject to section 222, the Advertisement Regulations only concern the consent to the display of advertisement, not planning permission for the structure upon which the advertisement is displayed. That applies equally to a structure designed for illuminated display and a structure designed for the non-illuminated display of advertisements. Part 1 Class 16 of Schedule 3 to the Advertising Regulations merely allowed the display of a non-illuminated advertisement on the glazed surface of a telephone kiosk, not the construction of a particular structure for the display of such an advertisement.

iv) I do not consider Mr Stinchcombe's criticism of Ouseley J's consideration of "purpose" is warranted. The judge held that "dominant purpose" had no part to play, but it was necessary for the planning decision-maker to consider whether the development was one of "dual purpose" because the GPDO only permitted development that fell within a particular GPDO class and was, to that extent, single purpose. That did not import subjective purpose, but merely requires the planning decision-maker to make an assessment of the purpose of the development. That is a usual planning function.

v) and vi) With regard to Mr Stinchcombe's submission that Ouseley J's approach potentially has widespread adverse implications for many other parts of the GPDO, notably for development in those classes which cover public shelters of one sort or another, I am unconvinced. Part 1 of Schedule 3 to the Advertising Regulations (which sets out the display of advertisements for which there is deemed planning consent: see paragraph 22 above) does not include advertisements (of whatever type) on such shelters (again, of whatever type), so that an application for express consent must always be made. Whether a particular shelter has a mixed use will ultimately be a question of fact and, in the absence of evidence or full argument on shelters, it would be unwise to offer any view; and I decline to do so. However, I do not consider that the position of shelters demonstrates that the construction I favour leads to impractical consequences or is wrong.

vii) and viii) Any concern that the Council has about "the real purpose behind the application for prior approval", i.e. NWP's subjective intention, is not to the point. As a local planning authority, the Council does, however, have a legitimate concern if applications potentially abuse the GPDO scheme as ultimately sanctioned by Parliament through the executive government.

50. I finally turn to the application of the principles to the facts of this case. I can do so briefly.

i) As I have already indicated, the issue in this appeal is whether the proposed development fell within the scope of development permitted by Part 16 Part A.

ii) Whilst there may be cases in which an exercise of planning judgment is required to assess whether proposed development does or does not fall entirely within a class of permitted development, in my view, this is not such a case: it is not possible properly to conclude that it does.

iii) I have already described the development in terms of a telephone kiosk that would "incorporate an internally illuminated digital advertisement panel on the reverse side thereof" (see paragraphs 27 and 28 above); in other words, the proposed development comprised a structure, part of which (namely a public call box which, by virtue of paragraph A.2 of Part 16 Class A (quoted at paragraph 12 above), is included within the definition of electronic communications apparatus) had the planning use or purpose of being part of an electronic communications network; and a part of which (namely the electronic display panel) had the planning use or purpose of the display of advertisements.

iv) Whilst a public call box was permitted development within Part 16 Class A of Schedule 2 to the GPDO, the electronic display panel was not within any permitted class. The GPDO could not be used to obtain planning permission for a mixed planning use or "dual purpose", because to allow it to be so used would allow permission to be obtained for development that was outside the scope of that permitted by executive (and, ultimately, by Parliament) under the GPDO, which would be an abuse of the GPDO.

v) Whilst, in my view, that was so on general principles, in this case, the general proposition is reinforced by the particular provisions which apply to telephone kiosks, because, as I have described and as Mr Stinchcombe accepts, for the purposes of the definition of "electronic communications apparatus", a telephone kiosk is a "structure" and a "building"; and for these purposes, by virtue of paragraph 5(3) of Schedule 3A to the 2003 Act (the Electronic Communications Code):

> "'structure' includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus."

It is uncontroversial that the proposed telephone kiosk in this case did not have merely the single purpose to enclose electronic communications apparatus, but also an advertising purpose. It therefore very clearly fell outside the scope of the GPDO.

51. For those reasons, in my view, Ouseley J was right to conclude that the proposed development fell outside the scope of the GPDO, and was right to quash the prior approval on that ground.

The Cross Appeal

52. Ouseley J rejected the Council's appeal on the basis that the Inspector was wrong not to take into account the (lack of) need for telephone kiosks. The Council cross-appeal, on the basis that that conclusion was wrong and/or inadequately reasoned.

53. Before us, Ms Sheikh did not press these grounds; and, in my view, she was right not to do so. The express criteria for development to fall within any particular class in Schedule 2 are detailed and comprehensive. Whilst "need" is a well-recognised planning requirement in other circumstances, it plays no part in the requirements for Part 16 Class A. It is part of the principle of planning consent that is assumed. Ouseley J was right to find as much (at [49] of his judgment).

54. For the same reason, he was also right to reject Ms Sheikh's submission that the condition imposed upon the grant of prior approval, that the telephone kiosk will be removed when no longer required, necessarily imports words into the test for prior approval that the kiosk must be "required for the purpose of" the operator's network, and that that imports a "need" test (see [50] of his judgment). That means, at least theoretically, that if development satisfied all of the criteria for Part 16 Class A and there was in fact no need for the particular kiosk proposed, the electronic network operator could install it, only in due course to be required to remove it as redundant. But, if ever that were more than a theoretical issue, the answer to it lay with the executive which could recognise the factual lack of need by removing the class of development from the GPDO (as Part 16 Class A was removed in May 2019).

Conclusion

55. For those reasons, I would dismiss both the appeal and the cross-appeal, leaving the order of Ouseley J quashing the Inspector's determination and the Council's decision to refuse the prior approval application in place.

Lady Justice Asplin :

56. I agree.

Lord Justice Lewison :

57. I also agree.

Coppen (Trustees of Thames Ditton Lawn Tennis Club) v Bruce-Smith

Also known as: Coppin v Bruce-Smith, Trustees of Thames Ditton Lawn Tennis Club v Bruce-Smith

No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
27 March 1998

Where Reported
[1998] 3 WLUK 553
(1999) 77 P. & C.R. 239
[1998] J.P.L. 1077
[1998] E.G. 55 (C.S.)
(1998) 76 P. & C.R. D7
[1998] C.L.Y. 3609
Judgment

Subject
Landlord and tenant

Keywords
Brownfield sites; Demolition; Intention; New tenancy applications; Planning permission; Sports and leisure facilities

Judge
Robert Walker LJ;
Sir John Balcombe

Counsel
For the appellants: Michael Barnes QC, Paul Randolph.
For the respondent: Lionel Read QC, Martin Rodgers.

Solicitor
For the appellants: Russell Jones & Walker.
For the respondent: Withers.

Case Digest

Summary
A landlord who had refused to grant a tennis club a new tenancy so that he could demolish the courts in the hope of obtaining planning permission for future development failed to establish a settled intention to demolish or reconstruct as required by the Landlord and Tenant Act 1954 s.30(1)(f). The work could amount to "demolition" if there were no competing and more apt description, but it was much more apt to characterise it as "engineering ... or other operations" within the Town and Country Planning Act 1990 s.55(1).

Abstract
The trustees of a tennis club, who had applied to the respondent landlord for a new tenancy, appealed against a decision that he had been entitled to oppose the application because he could show a clear intention to demolish the premises at the end of the current tenancy.

After the tennis club had applied for the new tenancy, the landlord agreed to grant a long lease of the land to developers for housing, subject to obtaining planning permission and vacant possession. Planning permission was refused on the ground of the loss of recreational open space without equivalent replacement. The landlord appealed, but decided to demolish all structures on the land without awaiting the outcome of the appeal in the hope and expectation that he would obtain planning permission in future. At a hearing of a preliminary issue, the judge held that the landlord could show a firm and settled intention to demolish or reconstruct the premises pursuant to the Landlord and Tenant Act 1954 s.30(1)(f). He found that the landlord's strategy was to turn the site into a brownfield site so that it would cease to be a recreational facility and make planning permission easier to obtain in future. He found that the landlord would not need planning permission for any of his proposed demolition work.

Held
Appeal allowed.

The judge's conclusion was clearly wrong. He had considered the intended works to be works of demolition rather than "engineering ... or other operations" which fell outside the exception in the Town and Country Planning Act 1990 s.55(2)(g). He had also been wrong to decide that the tennis courts were "buildings" rather than "any gate, fence, wall or other means of enclosure" within the Town and Country Planning (Demolition -Descriptions of Development) Directions 1995, which was apt language in which to describe the wire mesh fencing surrounding the tennis courts, *Gregson v Cyril Lord Ltd [1963] 1 W.L.R. 41, [1962] 10 WLUK 104*, *Cambridge City Council v Secretary of State for the Environment 90 L.G.R. 275, [1992] 2 WLUK 31* and *Heron Service Stations v Coupe [1973] 1 W.L.R. 502, [1973] 4 WLUK 15* followed, and *Romulus Trading Co Ltd v Trustees of Henry Smith's Charity (No.1) (1990) 60 P. & C.R. 62, [1989] 11 WLUK 399* not applied. The breaking up and digging out of the tennis court could amount to "demolition" if there were no competing and more apt description. In the instant case, it was much more apt to characterise the work as "engineering ... or other works" within s.55(1) of the 1990 Act and "other operations normally undertaken by a person carrying on business as a builder" within s.55(1A). That was not to give "demolition" a restrictive meaning, but to acknowledge that it was unnecessary and inappropriate to give it a wider meaning. The landlord had no reasonable prospect of being able to perform the proposed works because even if the land were turned into a derelict brownfield site, there would still be the loss of recreational facilities.The landlord could not therefore demonstrate a firm and settled intention to demolish the premises within the meaning of s.30(1)(f).

