DETERMINING PLANNING APPLICATIONS

When is planning permission required?

Planning permission is required for the carrying out of any development of land (s57 TCPA 1990).

What is development?

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 (s55 TCPA 1990).

How can planning permission be granted?

In one of three ways:

1. by Development Order (currently the Town and Country Planning General Permitted Development Order 1995) without the need for any application to be made,
2. by a deemed grant of planning permission (on an appeal against refusal of planning permission or against an enforcement notice),
3. as a result of an express application to the local planning authority.

Who can determine?

The Local Planning Authority (LPA) will decide application on matters other than minerals, waste or Regulation 3 applications which will be determined by the County Council.
How are applications determined?

The Town and Country Planning Act 1990 states that applications shall be determined in accordance with the Development Plan unless material considerations indicate otherwise.

What is the Development Plan?

It comprises policies within the following adopted plans:-

<table>
<thead>
<tr>
<th>The Structure Plan</th>
<th>now replaced by Regional Spatial Strategies Local Development</th>
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<tbody>
<tr>
<td>The Borough Local Plan</td>
<td>Frameworks (Planning and Compulsory Purchase Act 2004)</td>
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<tr>
<td>The Minerals Local Plan</td>
<td>now replaced by Minerals and Waste</td>
</tr>
<tr>
<td>The Waste Local Plan</td>
<td>Local Development Frameworks</td>
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When is a consideration material?

Any consideration which relates to the use and development of land is capable of being a planning consideration. Whether it is material in any given case will depend on the circumstances.

Considerations held to be material by the courts include:-

- Protection of an ancient monument
- Risk of flooding to neighbouring landowners
- Disturbance or annoyance to neighbours from a casino
- Fear of the consequences of the development

Considerations held to be immaterial include:-

- Economic viability of development
- Absence of any proposal for provision of planning gain

Other material considerations include:-

- Planning Circulars
- Planning Policy Guidance Notes (PPGs) (being replaced by Planning Policy Statements, under the Planning & Compulsory Purchase Act.)
- Previous Appeal decisions
Timescales for determining planning applications

The Secretaries of State expect Local Planning Authorities to decide 80% of applications within the statutory eight-week period following receipt, although this can be extended if jointly agreed. This recognises that some 20% of the applications will be too complex or controversial to be decided within the period. With regard to minerals and waste applications, this period is doubled to 16 weeks if an Environmental Assessment is submitted. An Environmental Assessment is required for certain major developments and should present and assess information on the environmental effects of the proposed development. The applicant and the planning Authority can agree to extend the determination period.

Ability to Decline to Determine an Application
(Amended by the Planning and Compulsory Purchase Act)

The Authority may refuse to determine repeat planning application if within two years previously there have been two similar applications and there has been no significant material change since those refusals. There is no right of appeal to the Secretary of State against such a decision, the only remedy being Judicial Review.

Consultation

Various interested bodies must be consulted before the officer’s report can be prepared with a recommendation for a decision. These bodies include:

- The District Planning Authority,
- The Local Highway Authority,
- The Environment Agency,
- The Secretary of State for National Heritage,
- The Historic Buildings and Monuments Commission for England,
- DEFRA

and is dependent on the type of development applied for. The consultee is required to respond within 14 days although in practice this is often exceeded which in turn leads to delays in applications being considered.

Publicity

As far as applications to the County Council are concerned all, excluding those made by the Council itself, are required to be advertised as they are regarded as “major development”. The publication consists of posting a site notice in at least one place in or near the land for not less than 21 days or by serving notice on any owner or occupier of the land adjoining the subject land and publishing a notice in a newspaper circulating in the locality.
Called-In Applications

Section 77 of the T & CPA 1990

The Secretary of State may “call in” any application for planning permission for his/her own determination, rather than allow them to be determined by the Local Planning Authority. The Secretary of State will only exercise these powers if the planning issues involved in the planning application are of more than local importance. The Courts have identified certain guidelines for the instances where the call-in may apply. These include proposals for significant development in the Green Belt and major proposals involving the winning and working of minerals.

Appeals

- Section 78 of the T & CPA 1990 gives an applicant the right of appeal to the Secretary of State against a refusal or a conditional grant of planning permission. The right of appeal must be exercised within six months of the refusal or conditional grant. In addition, if the Authority have failed to give a decision within the statutory eight weeks then this amounts to a deemed refusal and an Appeal can be made. The Appeal may be dealt with by written representations of the parties, an informal hearing, or a Public Inquiry. Although the Appeal is to the Secretary of State, in the majority of cases the decision is delegated to an appointed Inspector who, after considering all matters put to him/her and visiting the subject site, will issue a decision letter summarising both sides’ case and containing reasons for his/her decision.

- Section 288 of the T & CPA 1990 enables a person to apply to the High Court to question the validity of a decision made by the Secretary of State or an Inspector on his behalf. Such an application can only be made by an “aggrieved” person on the grounds that the Secretary of State was not acting within the powers of the T & CPA 1990 or that any of the relevant requirements have not been complied with in relation to that action and must be made to the High Court within six weeks from the date of the decision. Once granted a planning permission must be implemented within five years, now reduced to three years by the Planning and Compulsory Purchase Act 2004.
DEALING WITH OUR OWN PLANNING APPLICATIONS
AND STRATEGIC CONSULTATIONS

OUR OWN PLANNING APPLICATIONS

By virtue of Schedule 1 of the Town & Country Planning Act 1990 and the
Town & Country Planning (Prescription of County Matters) Regulations 1980
the County Council is the planning authority for minerals and waste disposal.
These are known as “County matters”.

The Town & Country Planning General Regulations 1992 requires the County
Council to determine applications for planning permission by the County
Council itself for non-County matters if it is the intention that the County
Council will develop the land or to jointly develop the land with any other
person. In such cases however the permission would inure only for the
benefit of the County Council and does not run with the land. In the case of
joint development, the permission inures for the benefit of the County Council
and that other person. However, once the permission has been implemented
the Circular advice is that the benefit can be passed on and that no fresh
permission is required to continue the use.

Central government advice on this matter is contained in Circular 19/92 which
makes clear that such planning applications should be handled in the same
way as any other application for planning permission and that largely the
procedures to be followed should be similar, e.g. publicity and consultation.
As to the issue of joint development with another person, Circular advice is
that the Authority’s interest has to be significant. The advice is that if the
Authority’s interest is not significant, then the application should be dealt with
by the responsible Development Control Authority which for non-County
matters would be the District/Borough Council. The Circular advises that
when judging whether the Authority’s interest is significant a useful test is the
level of financial commitment.

Internal “Disputes” Procedure

The County Council’s new arrangements are that in the event that the
Planning and Regulatory Committee wishes to refuse a planning application
made by the County Council it will refer the application back to the promoting
department informing them it is minded to refuse with reasons. The
promoting department will be expected to reconsider the application and
discuss the issue with the Head of Planning. If the promoting department
amends or re-submits the application this will go to the Planning and
Regulatory Committee for final determination.
STRATEGIC CONSULTATIONS

Schedule 1 of the Town & Country Planning Act 1990 and the General Development Procedure Order 1995 require the District Councils to formally consult the County Council when they receive planning applications which fall into any one of the three following categories:-

1. Proposed development which “would materially conflict with or prejudice the implementation” of any policy or general proposal contained in the Structure Plan,

2. proposed development of land “which would by reason of its scale or nature or the location of the land be of major importance for the implementation of the approved structure plan”, or

3. an application on sites where the County have notified the District as having either minerals or waste disposal potential or as being proposed for development by the County Council itself.

In this event consultation is required on any development of such identified land which would prejudice the proposed uses. The consultation period is only 14 days.
PLANNING CONDITIONS

The range of conditions on the grant of a planning permission has been restricted by the courts over the years. There is, though, a considerable area of overlap between what can be achieved by means of a condition and by means of a planning obligation.

Under Section 70(1) of the 1990 Act the LPA when dealing with a planning application may impose “such conditions as it thinks fit” when granting planning permission. However the House of Lords has held that for conditions to be lawful they must:

1. be imposed for a planning purpose,
2. fairly and reasonably relate to the development permitted, and
3. not be so unreasonable that no reasonable authority could have imposed them.

Section 72 of the 1990 Act provides that conditions may be imposed:

(1) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works of any such land, as judged to be expedient by the LPA for the purposes of or in connection with the development authorised by the permission (for the purposes of this section, “control” does not require ownership); and

(2) for requiring the removal of any buildings or works authorised by the Permission or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.

Conditions can be appealed forthwith under Section 78, or can be reviewed if the developer makes further planning applications regarding the land under Section 73 of the 1990 Act.

Validity of Conditions - General Criteria

In general, conditions should not be imposed unless they are necessary to achieve a planning objective and are likely to prove effective to that end. The LPA must weigh the extent to which a condition achieves a planning purpose against imposing an unjustifiable burden on the applicant. Circular 11/95 (reflecting and expanding upon a number of High Court decisions) advises that conditions should be:

(a) necessary,
(b) relevant to planning,
(c) relevant to the development to be permitted,
(d) enforceable,
(e) precise; and
(f) reasonable in all other respects.
Reasons for conditions

Article 22 of the General Development Procedure Order 1995 provides that when permission is granted subject to conditions or is refused, the Notice shall state clearly and precisely the full reasons for the refusal or for any condition imposed specifying all relevant policies. While failure to give such reasons does not make invalid either the condition or an Enforcement Notice alleging non-compliance with that condition this may make success at appeal greater.

Model conditions

Appendix A to Circular 11/95 contains a number of suggested models of acceptable conditions. They cover:

- outline permissions,
- time limits in relation to commencement,
- noise,
- accesses,
- service roads,
- parking,
- play areas,
- landscaping,
- storage,
- personal permissions,
- drainage,
- reinstatement after temporary permission,
- staging of development,
- caravans,
- seasonal sites,
- commercial or industrial building,
- limitation on occupancy,
- agricultural workers’ conditions restrictions on use,
- restriction on permitted development
- protection of archaeological sites.

The LPA may also require the applicant to carry out off-site works by means of what is called a Grampian condition requiring compliance prior to the commencement of the development.
Appendix B contains examples of conditions which in the Secretary of State’s view are unacceptable. These include:

- time limits in relation to completion,
- positively worded requirements in relation to the dedication of land for highway widening when the local highway authority is different from the local planning authority,
- ensuring compliance with other statutory provisions in force in the district (as these are unrelated to planning control)
- requiring that an ancillary road be built when required by the LPA.

**Minerals Planning**

In applying the principles of planning conditions to minerals development, Minerals Planning Guidance 2 dated July 1998 is relevant. This guidance advises that conditions should reflect a programme of working which accommodates both the operator’s needs and the need to minimise the effect on the environment both during and at the end of the development. For the purposes of Section 72 (above), the Minerals Regulations 1995 provide that the winning and working of minerals is a “use of land”. The limitations or obligations on a developer must be confined to those which are related to land use. Schedule 5 of the of the 1990 Act provides that planning permissions for minerals development, unlike other development, must be subject to a condition limiting the duration of the development and enables the imposition of aftercare conditions (advice on restoration and aftercare is given in MPG7).

**Development without compliance with conditions previously attached**

Section 73 of the Act provides for an application for permission to develop land without compliance with conditions previously attached to a previous permission. The LPA may:

1. grant planning permission subject to different conditions;
2. grant planning permission without conditions at all; or
3. refuse the application.

If the LPA refuse the application, the previous planning permission stands subject to the condition attached. In accordance with Section 78, the right of appeal lies to the Secretary of State. If development has already taken place without complying with the conditions the appropriate course would appear to be to use Section 73A to seek permission to retain buildings or works or continue the use of land, without complying with the condition.
Examples of conditions

- Conditions regarding access.

- Conditions of agricultural occupancy (often development is limited in the countryside to that which is essential to the efficient operation of local agriculture, horticulture, forestry, outdoor recreation or public utility services).

- Conditions of local occupancy (sometimes imposed restricting the occupation of commercial or industrial premises to local firms).

- Personal occupancy conditions (in exceptional circumstances permission may be granted for some purpose which would not normally be allowed on strong compassionate or other personal grounds).

- Conditions restricting movements within the Use Classes Order or development under the General Permitted Development Order.

- Conditions restricting hours of opening.

The Planning and Compulsory Purchase Act has prevented s73 applications being used to extend the life of a planning permission by varying the time limits within which development must be started or within which applications for the approval of reserved matters must be made.
.SECTION 106 PLANNING OBLIGATIONS

In granting planning permission, a local planning authority may wish to regulate the development or use of the land by imposing conditions or, where conditions would not be appropriate, requiring the developer to enter into a planning obligation.

Section 106 Planning Obligations

A planning obligation is a negotiating tool between the LPA and the Developer and offers flexibility which might not be available through the medium of a planning permission subject to conditions.

Section 106 provides that any person with a legal interest in land may enter into a planning obligation which may:

1. restrict the development or the use of the land in a specified way; or
2. require specified operations or activities to be carried out in, on, over or under the land; or
3. require the land to be used in a specified way; or
4. require money to be paid to the LPA on the specified date or dates, or periodically.

Points to note

1. A planning obligation may be created either by agreement by a unilateral undertaking (or a combination of both). Undertakings may also be couched in conditional terms (usually in the context of appeals).

2. A planning obligation may impose both restrictive and positive covenants which are both enforceable against successors in title of the Developer (registerable as local land charges). A person will generally only be bound by the obligation whilst he has an interest in the land. Covenants in planning obligations may be imposed either indefinitely or for a specified period but may be modified or discharged after five years.

3. Planning obligations are enforceable by injunction or the LPA can enter land, carry out the works and recover the costs.
Circular No. 1/97

The Circular is a statement of government policy relating to the proper use of planning obligations and, as such, are a material consideration when considering planning matters. Certain tests should be satisfied before planning obligations are sought, namely an obligation:-

1. should be necessary,
2. should be relevant to planning,
3. should be directly related to the proposed development if it is to influence a decision on a planning application,
4. should only be sought when it is necessary to make a proposal acceptable in land use planning terms,
5. may relate to matters other than those covered by a planning permission, provided that there is a direct relationship between the obligation and the permission,
6. should be fairly and reasonably related, in scale and kind, to the proposed development. Developers may reasonably be expected to pay for or contribute to the cost of infrastructure which would not have been necessary but for the development, and
7. should be reasonable in all other respects.

The Circular advises that:

- development which is acceptable in principle should not be refused because an applicant is unwilling or unable to offer benefits,
- LPAs should consider phasing of payments in relation to the phasing of development so as to avoid creating financial difficulties for the Developer,
- Planning obligations should never be used as a means of securing for the local community a share in the profits of development,
- LPAs should place more emphasis on the overall quality of the development proposal than on the number and nature (or value) of planning benefits they can obtain,
- Unacceptable development should never be permitted because of unnecessary or unrelated benefits offered by the Developer; and
- Planning obligations should not require the transfer of interest in land.
Planning Contributions

s.46 of the Planning and Compulsory Purchase Act 2004 provides that planning contributions may be made in relation to the development or use of land. Regulations still to be published will decide the formula for these contributions. It is intended that this will introduce more transparency for all parties and reduce the disparity in the way different local authorities approach the issue of seeking contributions from developers.

The Modification and Discharge of Planning Obligations

Anyone against whom an obligation (entered into after 25 October 1991) is enforceable may at any time after the expiry of the “relevant period” (currently 5 years from the date the obligation was entered into) apply to the LPA for the obligation to be modified or discharged.

Planning Obligation or Planning Condition?

If there is a choice between imposing conditions and entering into a planning obligation, the policy advice is that the imposition of a condition which satisfies the policy tests of DOE Circular 11/95 is preferable. This is because it provides an immediate right of appeal to the Secretary of State. Conditions imposed on a planning permission should not be restated in a planning obligation.

Examples of Obligations

Where development will create a need for extra facilities, e.g. new access roads, bus shelters, open spaces or measures to safeguard the environment it may be reasonable for Developers to meet or contribute towards the cost of providing such facilities. But LPAs should only require Developers to provide these facilities through planning obligations if it would be wrong on land use planning grounds to grant planning permission without them. In general it would be reasonable to seek, or take account of, a planning obligation if what is sought or offered:

1. is needed from a practical point of view to enable the development to go ahead and, in the case of a financial payment, will meet or contribute towards the cost of providing such necessary facilities in the near future; or

2. is necessary from a planning point of view and is so directly related to the proposed development and to the use of land after its completion that the development ought not to be permitted without it.
Therefore where a proposed development would, if implemented, create a need for particular facilities or would have a damaging impact on the environment or amenity and these matters cannot be satisfactorily resolved through the use of planning conditions, it will usually be reasonable for planning obligations to be sought or offered. The Circular provides further examples of appropriate planning obligations such as:

(i) to ensure an acceptable balance of the uses in a mixed-use development (although in many cases the layout may be adequately addressed through the use of planning conditions),

(ii) to secure the inclusion of an element of, e.g. affordable housing in a larger residential mixed-use development;

(iii) to offset the loss of or impact on a resource present on a site or nearby, e.g. the loss of a wetland habitat on a site by opening up a culverted stream or river;

(iv) to protect or reduce harm to protected sites or species acknowledged to be of importance (here it also may be more appropriate to address this matter through the use of planning conditions).

Commuted Sums

Regarding maintenance, as a general rule the Planning Authority should not attempt to impose commuted maintenance sums when considering the planning aspects of the development. Exceptions may be made for example where additional highway works are essential to the granting of planning permission and an agreement is entered into under Section 278 of the Highways Act 1980. The Circular advises that development plans should specify where a Local Planning Authority is likely to seek planning obligations in connection with a particular type of development or in relation to specific development sites.
CERTIFICATES OF LAWFULNESS OF EXISTING/PROPOSED USE OR DEVELOPMENT

Certificates of Lawfulness of Existing Use or Development

If anyone wishes to find out whether

- an existing use of buildings or other land or
- an operation which have been carried out in, over or under land

is lawful, i.e. not requiring planning permission, an application may be made for a Certificate of Lawfulness of Existing Use or Development (CLEUD) to the Local Planning Authority. (On waste or mineral matters the application would come to the County Council).

- For the purposes of the 1990 Act uses and operations are lawful at any time if no enforcement action may be taken in respect of them (because they do not involve development or require planning permission or because the time for enforcement action has expired or for any other reason) and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

Under the previous law an established use might be certified as such and achieve immunity from enforcement action yet still not be actually lawful. The concept of lawfulness is now the basis for the grant of these Certificates. Once a Certificate is granted the lawfulness of any use, operations or any other matter to which it relates is conclusively presumed.

The relevant time for determining whether the time for taking enforcement action has expired is the time of the application, i.e. going back ten years for change of use and four years for operational development.

The burden of proof is firmly with the applicant. The relevant test is the balance of probability. Circular 10/92 suggests that if authorities have no evidence of their own to contradict or undermine the applicant’s version of events there is no good reason to refuse the application provided the applicant’s evidence is sufficiently precise and unambiguous to justify the grant of a Certificate. The decision is based only on evidence. There is no place to consider the planning merits. There is a right of appeal to the Secretary of State.

With regard to third party challenge, the courts have held that third parties are entitled to challenge the grant of a Certificate by Judicial Review as there are no other avenues of challenge open to them under the legislation.
Offences

It is an offence to make false or misleading statements for the purpose of procuring a Certificate and the Authority may also revoke a Certificate where a false statement is made or information withheld. There is no right of appeal against revocation although revocation may be challenged by Judicial Review.

Certificates of Lawfulness of Proposed Use or Development

Any person wishing to ascertain whether any proposed use of buildings or other land or any proposed operations would be lawful may make an application for the purpose to the Local Planning Authority. If the Local Planning Authority are satisfied on the balance of probability that the use described in the application would be lawful if begun at the time of the application they are required to issue a Certificate to that effect.
ENFORCEMENT OPTIONS

The Authority’s enforcement powers are largely contained in Sections 171C to 196C of the Town & Country Planning Act 1990 with policy advice contained in PPG18 and Circular 10/97.

The Planning and Compensation Act 1991 inserted several useful provisions into the 1990 Act.

TIME LIMITS FOR ENFORCEMENT

**Section 171B**

For operational development, i.e. building, engineering, mining or other operations or change of use to a single dwelling house enforcement action must be taken within four years of when the operations were substantially complete. For all other breaches of planning control i.e. material change of use or non-compliance with planning conditions, enforcement action must be taken within ten years of the date of the breach. If no enforcement action is taken within these periods then such operational development/change of use becomes lawful. However following the Localism Act 2011 –

**Section 171A**

This section draws the LPA to apply to the Magistrates Court for a Planning Enforcement Order (“PEO”) up to 6 months after evidence of an apparent breach of Planning Control has come to the authority’s knowledge. This enables enforcement action to be taken within a year and 22 days after the Court’s decision to make an order.

INVESTIGATION POWERS

In written form

**Sections 171C and D**

Planning Contravention Notices

This enables the Authority to obtain information from the owner or occupier of land relating to the operations being carried out or the use of land together with details as to when such use began and by whom, information as to relevant planning permissions, and to inform us as to the recipient’s interest in the land together with any other person’s interest in the land. This is a useful provision as failure to respond to the notice within 21 days is a criminal offence unless the recipient had a reasonable excuse not to. It is also an offence for a recipient to knowingly give false or misleading statements. This second offence carries the
maximum fine available to the Magistrates. However, such notices can only be issued when it appears that there may have been a breach of planning control.

Section 330

This is a more general power of the Authority to require information from the occupier of premises in order that we may make any order or serve any notice under the 1990 Act. It is not restricted to enforcement matters. This power can be used to ascertain details of people having an interest in the land and the uses to which the land is being put and when such uses began. Similarly, failure to comply with such a notice is a criminal offence, although the sentencing provisions are greater. The information required should be supplied within 21 days.

Section 16

Local Government (Miscellaneous Provisions) Act 1976

This is very similar to a Section 330 Notice which requires the information within 14 days instead of 21.

By site inspection

Sections 196A, B and C

These sections give any person authorised by the Planning Authority the immediate right of access to non dwelling house site or building to investigate for any enforcement function under the Act. If admission to a dwelling house is required then 24 hours notice must be given. These powers can only be used if there are reasonable grounds for entering the site/building in question. If necessary, a warrant from a JP can be obtained to search premises. A person commits a criminal offence if he wilfully obstructs any person acting under these powers.

ENFORCEMENT NOTICES

Section 172

These can be served when there has been a breach of planning control, (i.e. the carrying out of development without the required planning permission or failure to comply with any condition or limitation imposed on the planning permission) where it is deemed expedient to issue a notice having regard to the Development Plan and any other material consideration. It should be noted that the power to issue enforcement notices is entirely discretionary. However the decision whether or not to
issue must be reasonable in that it cannot be based on irrational factors or taken without proper consideration of the relevant facts and planning issues or based on non planning considerations. In short, this means the Authority would have to consider the relevant provisions of the Development Plan and other material considerations and weigh these against the harm to amenity caused by the activity. Copies of the enforcement notice should be served on the owners/occupiers and any others having an interest in the land. The notice must be served within 28 days of its issue but cannot come into effect until 28 days after service. There is much policy advice relating to the issue of enforcement notices although they should not be used to simply regularise development which is unauthorised but which is otherwise acceptable on planning merits.

**Section 173**

This section sets out the details that must be included within an enforcement notice, i.e. to identify the matters which constitute the breach of planning control and the steps required by the recipient or the activities which the recipient is required to cease so that the breach of planning control may be remedied. A notice may require the removal of buildings or works, or the carrying out of any building or other operations. The enforcement notice shall specify the period in which the steps are to have taken place.

The taking of enforcement action is not straightforward. “No area of Town & Country Planning has given rise to such persistent litigation, such technicality and such conflicting statements of principle, than the issue of what an enforcement notice should contain”. (The Encyclopaedia of Planning Law and Practice). An example of the difficulty is the concept of “under enforcement”, i.e. if an enforcement notice could have required the removal of a building or an activity to cease but fails to do so, then by virtue of the section planning permission is to be treated as having been granted once all the requirements of the notice have been complied with. Enforcement notices can be withdrawn or any requirement can be waived or relaxed without prejudice to the ability to serve further enforcement notices.

**Section 174**  Appeals to the Secretary of State

There are seven grounds of appeal:

(a) that planning permission ought to be granted,
(b) that the matters alleged in the notice have not occurred,
(c) that the matters alleged, if they did occur, are not a breach of planning control,
(d) that at the date when the notice was issued no enforcement action could be taken,
(e) that copies of the enforcement notice were not served as required by the Section,
(f) that the steps required or the activities required to cease exceed what is necessary to remedy any breach of planning control,
(g) that any period specified in the notice is short of what should reasonably be allowed.

The Appeal must be lodged with the Planning Inspectorate in Bristol before the enforcement notice comes into effect, i.e. within the 28 day period. Whilst an Appeal is pending, the effect of the enforcement notice is suspended.

**Section 178**

If the requirements of an enforcement notice are not complied with the Authority may enter the land and carry out the steps and seek to recover from the owner of the land any expenses reasonably incurred in so doing. It would be a criminal offence for anybody to wilfully obstruct an officer of the Authority from carrying out the works.

**Section 179**

This creates a criminal offence for non-compliance with an enforcement notice although it is a defence if the recipient can show that he did everything he could be expected to do to secure compliance. The maximum fine Magistrates can impose for an offence under this section is £20,000. It should be noted that the usual Magistrates’ maximum is £5,000. There is the ability for such offences to be heard in the Crown Court where there is no maximum fine although this is not an imprisonable offence. A useful provision however is that when the Court is determining the amount of the fine it shall have particular regard to any financial benefit which will or has accrued to the Defendant. The Proceeds of Crime Act 2002 also allows the LPA to seek an order to seize the Defendant’s assets where they are the proceeds of a “criminal lifestyle”.

**Section 180**

If planning permission is subsequently granted then this will override an enforcement notice previously served to the extent that it is inconsistent with the permission.
STOP NOTICES

Section 183

The Authority may serve a stop notice if it is considered that an activity should cease for the period for compliance with an enforcement notice. In practice, a stop notice is served at the same time as an enforcement notice and may also be served on any person who is carrying out the activity that is to stop. Circular 10/97 advises that a cost/benefit assessment shall be carried out (i.e. to assess and weigh the cost to the recipient in complying with the notice against the risk to the amenity of the neighbourhood) before serving a stop notice and to ensure its requirements do not prohibit anything more than is essential to safeguard amenity or public safety in the neighbourhood or prevent serious or irreversible harm to the environment in the surrounding area.

Section 184

This provides that unless we consider that there are special reasons for specifying an earlier date, a stop notice cannot come into effect for three days but must come into effect within 28 days from when it was served.

Section 186  Compensation

This may be payable if

(1) the enforcement notice on which the stop notice depends is quashed on grounds (b) to (g),

(2) the enforcement notice is varied, so that the activity prohibited by the stop notice ceases to be enforced against,

(3) the enforcement notice is withdrawn, other than by the grant of planning permission, or

(4) the stop notice itself is withdrawn.

The calculation of compensation would include any sum payable in respect of a breach of contract caused by the taking of action necessary to comply with the prohibition.

Section 187

This creates a criminal offence for a person to breach a stop notice of which he is aware. The maximum fine is the same as for breach of an enforcement notice.
TEMPORARY STOP NOTICES

The Planning and Compulsory Purchase Act 2004 provides that local authorities may serve temporary stop notices lasting for a maximum of 28 days. Unlike a Stop Notice, a Temporary Stop Notice does not need to be preceded or accompanied by an Enforcement Notice. They cannot be used to stop activity which has been carried out for four years previous to the issue of the notice.

BREACH OF CONDITION NOTICES

Section 187A

This is intended to be a simple and efficient method of enforcement against breaches of planning conditions whereby a notice can be served specifying what ought to be done in order to bring about compliance. If the steps specified are not taken within the period allowed by the notice, being not less than 28 days, the person responsible is guilty of a criminal offence. Having said that, it is considered that this apparent simple approach disguises “a potential maze of complexity”. If the Notice is not completed the LPA may bring a prosecution in the Magistrates Court. The Magistrates would be able to consider the validity of the condition itself because there is no right of appeal to the Secretary of State. For these reasons it is thought that one should only use such a notice in the clearest cases. There are two defences that can be raised in the criminal proceeding:

1. that the defendant took all reasonable measures to comply with the condition or
2. that he no longer has control of the land.

A maximum fine under this section is not as great as that for non-compliance with an enforcement notice or a stop notice.

INJUNCTIONS

Section 187B

Application may be made to either the High Court or County Court if it is considered necessary or expedient for an actual or apprehended breach of planning control to be restrained. Application for an injunction may be made without first having exhausted the other enforcement remedies. It should be noted that an injunction is a discretionary remedy so the Court is not obliged to make an order. The Court of Appeal has held that this section should be given a broad interpretation and that parliament have granted a clear power to the Court to grant injunctions to enforce planning control over apprehended as well as real breaches of planning control. It has also been decided that the Court may grant a mandatory injunction as well as restraining injunctions. In another case the Court of Appeal has even gone so far as to say that the possibility of planning permission being granted in the future was not a
legitimate reason for refusing an injunction to restrain a breach of the law. Failure to comply with a Court injunction can lead to committal for contempt and if the breach is wilful or deliberate imprisonment is a possibility. The advantage of seeking an injunction is that it can be a very swift response to a breach of planning control and can, in certain circumstances, be obtained within a few hours.
THE ROLE OF THE LOCAL GOVERNMENT OMBUDSMAN

- The Local Government Act 1974 established two commissions for local administration, one for England and one for Wales, consisting of Local Commissioners (colloquially known as Local Government Ombudsmen) to receive and investigate complaints against local government.
- Their jurisdiction is to investigate complaints by members of the public who claim to have “suffered injustice in consequence of maladministration”.
- Maladministration has been defined as covering “bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so-on”. It has been said that the greatest part of that catalogue is the “and so-on”.
- There are two important limits to the jurisdiction of the Local Government Ombudsman.

**He is prohibited from questioning the merits of any decision taken without maladministration in the exercise of a discretion vested in the authority.** A member of the public cannot therefore complain to the Ombudsman merely because he considers the body concerned should have reached a different decision to the one it did reach. **Maladministration must always be present therefore before the Ombudsman can issue an adverse report.**

The Ombudsman is prohibited from investigating cases where the aggrieved person has or had a remedy in law. However, the Ombudsman can investigate a complaint if satisfied that in the particular circumstances it is not unreasonable to expect the complainant not to pursue his legal remedies.

- Access by members of the public to the Local Government Ombudsman is direct.
- In past years almost a quarter of complaints received by the Commission for Local Administration in England related to planning matters.
- Examples of remedies recommended by the Local Government Ombudsman for complainants over the past few years are as follows:
  (a) Inconsistent application of policy and operating hours; takeaway consistently traded until 3am every morning - £2,500 for causing nuisance to local residents.
  (b) Flawed Section 106 Agreement; incapable of enforcement; excessive delays between resolution to grant and the grant of planning permission - £750 for frustration caused to neighbour.
(c) Inadequate committee report - lack of site visit notes - proximity of new dwelling to existing neighbouring house not considered - £500 for dissatisfaction, time and trouble.

(d) Failure by Officer to consult Council’s expert arboricultural consultant - 150 year old oak tree felled - later evidence indicated it would have lasted another hundred years. Recommended that Council identify suitable site in village for two new oak trees.

(e) Obtrusive machinery classed at permitted development although not all criteria satisfied. Failure to give accurate description to Members; £2,500 and further £500 for time and trouble and loss of amenity paid to three households with further payments of £1,000 per annum to each household until plant removed or made nuisance free or compensation for diminution in value of their properties.

(f) Failure to ensure provision of new children’s playground in area where previous playground lost to development; failure to advertise intention to dispose of former playground - Council asked to contribute £10,000 towards the cost of suitable replacement play equipment.

- The Local Government Ombudsman will make a recommendation with regard to the remedy that the Authority should provide but the Authority concerned may decline to provide it.
JUDICIAL REVIEW

- Third parties have no right of appeal against the grant of planning permission. Any third party wishing to challenge the grant of planning permission as unlawful (in the sense that planning permission was granted outside the powers of the planning authority under the planning regime) or that the grant of planning permission was manifestly unreasonable or irrational (in the sense that no reasonable planning authority could have granted planning permission under the circumstances) may use the procedure known as “Judicial Review”.

- This is a two-stage process; an applicant must first make an application to the High Court for permission to apply for judicial review. This is without notice to the other side so that the applicant is able to obtain with no liability for costs (other than his own) a decision on whether he has an arguable case.

- If the applicant can show that he has sufficient standing (explained below) and has acted promptly, permission to apply will normally be granted.

- The second stage of the procedure is begun by originating motion, notice of which is served on all parties affected, along with witness statements in support of the application for permission. The court will hear the arguments in full on both sides and decides on the merits whether or not to grant the Order applied for.

- An applicant must have “a sufficient interest in the matter to which the application relates”.

- In a judicial review of Cotswold District Council by the Parish Council the High Court held that although the Parish Council was situated some distance from the development site it had sufficient standing as it was bona fide concerned about the increased through traffic which would go through the Parish if the redevelopment of a site went ahead. In another case of judicial review of North Somerset District Council the High Court held that the applicants for judicial review had no standing when they lived three miles away from the development site, had no rights over the land, did not themselves object to the application for planning permission, had no commercial interest and had no statutory rights to be consulted on the application.

- There is a need for expedition in addition to having the necessary standing. It is a requirement that an application for leave “shall be made promptly and in any event within three months of when the grounds of the application first arose”. (i.e three months from the issue of a planning permission, not the resolution to grant) The court may grant an extension of time but even where it does consider there is good reason it may still refuse leave if the granting of relief would be likely to cause substantial hardship or prejudice to the developer or be detrimental to good administration.
• It must be emphasised, however, that the court may refuse to grant leave even where the application is made within three months, if the applicant has not applied **promptly**.

• The remedy

• An application for Judicial Review may be used to secure an order requiring action, stopping action or quashing a decision. It may also be used to secure an injunction or a declaration (a finding by the Court) and the court may decide to grant some other remedy than that applied for if it considers it more appropriate to do so. Judicial review is not an appeal against a decision of a Public Authority but a review of the manner in which the decision is made and deals with the legality or validity of the decision, not the merits of the decision. For that reason the court cannot substitute its decision for that being challenged.
PLANNING AND THE HUMAN RIGHTS ACT 1998

The European Convention on Human Rights was adopted in 1950 but was not incorporated by statute into English law. Any person complaining of a violation of his Convention rights had to make an application to the European Court of Human Rights.

The Human Rights Act 1998 became law in October 2000 and incorporates the rights enshrined in the Convention. British people can now assert and enforce their rights under the Convention through all the ordinary United Kingdom Courts and Tribunals rather than rely on a belated remedy from the European Court of Human Rights.

Clause 6 of the new Bill provides that it is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights. Local authorities are public authorities and will therefore be subject to the Convention. A person who claims that a public authority has acted or proposes to act in an unlawful way may bring proceedings in the appropriate Court or Tribunal or rely on the Convention right or rights in any legal proceedings but only if that person would be a “victim” of the act. In order to prove that they are a “victim” the applicant must establish that they are actually and directly affected by the act or omission about which they wish to complain. This is narrower than the term “sufficient standing” in English law and may well exclude amenity groups.

The main relevant provisions of the Convention.

In practice three provisions are likely to be the most relevant in the fields of planning and environmental law. These are Article 6, Article 8 and First Protocol, Article 1.

Article 6 (1) concerns the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This Article applies not only to criminal but also to civil rights. As the right to property is a civil right any decision granting or refusing planning permission and decisions in relation to enforcement proceedings may involve the application of Article 6.

In an appeal following an inquiry into the redevelopment of Alconbury Airfield in Cambridge the Court of Appeal held that the jurisdiction of the Secretary of State to determine the planning appeal was incompatible with the right to a fair hearing before an independent and impartial tribunal, i.e. he could not be both policy maker and decision maker. The House of Lords has reversed this decision stating that the availability of judicial review constituted sufficient review of the legality of the decisions and the procedures followed.

In enforcement notice cases however the House of Lords opined that further safeguards might be essential given that the appellate tribunal could only carry out a limited review of fact. It is likely that this is an area of law which
Article 8 is headed Right to Respect for Private and Family Life. The right to respect for the amenities of one’s home includes the right to be free from excessive pollution. The Spanish case of Lopez Ostra has raised the possibility of the threat of the Human Rights Act to force public authorities to use their powers under the Environmental Protection Act 1990 to prevent or stop nuisance causing activities or to pay compensation if they fail to use such powers.

Article 8(2) permits interference by a public authority with the exercise of the rights protected by the Article where such interference is in accordance with the law and necessary in a democratic society. Similarly, First Protocol, Article 1 which provides that every natural person is entitled to the peaceful enjoyment of his possessions and has been applied so as to protect an individual’s right to property, allows interference with that right where the State considers it necessary in accordance with the general public interest. The State therefore has considerable leeway and a court may conclude that a fair balance has been struck between the interest of the State and the individual. Where other legal remedies are available the courts may be slow to act on applications under the Human Rights legislation.

Consequences for Planning Authorities
Local planning authorities now need to show that they have taken account of relevant Convention provisions in the determination of individual applications and in the formulation of Development Plans. Committee reports now cite the relevant section of the 1998 Act rights to show that they have been taken into account. Although discretionary, the decision whether or not to take enforcement action will have to be considered carefully.
THE NOLAN COMMITTEE AND ITS REPORT ON THE STANDARDS OF CONDUCT IN LOCAL GOVERNMENT

Lord Nolan and his Committee published the Third Report on the Standards of Conduct in Local Government in July 1997 and made a number of recommendations to bring about a radical change in the ethical framework within which local government operates. They proposed that there should be a clear code of conduct for Councillors developed by each individual Council within a framework approved by Parliament. Each local authority was to adopt a local code of conduct which would incorporate the general principles and an approved model code.

Chapter 6 of the Report was devoted to the planning system. The Committee had received more letters from members of the public about planning during their work on local government than on any other subject. “Planning is clearly a subject that excites strong passions and for good reason. The planning system frequently creates winners and losers; it involves the rights of others over one’s property; the financial consequences of a decision may be enormous”.

The Committee considered in detail four areas:

- The roles of Councillors and Officers in the planning process,
- best practice and planning procedures,
- planning gain (planning obligations),
- the independent scrutiny of planning decisions.

The Report suggested a Code of Best Practice in Planning Procedures to provide that:

- Members and Officers should avoid indicating the likely decision on an application or otherwise committing the authority during contact with applicants and objectors,
- there should be opportunities for applicants and objectors and other interested parties such as Parish Councils to make presentations to Planning Committees,
- all applications considered by Planning Committee should be the subject of full written Reports from Officers incorporating firm recommendations,
- the reasons given by Planning Committees for refusing or granting an application should be fully minuted, especially where these are contrary to officer advice or the Local Plan,
• Councillors and Planning Officers should all make declarations at Planning Committee of significant contact with applicants and objectors in addition to the usual disclosure of pecuniary and non-pecuniary interests,

• no Member should be appointed to a Planning Committee without having agreed to undertake a period of training in planning procedures.

The Surrey Code of Best Practice in Planning Procedures was adopted in 1998 and updated in 2012. It forms part of our Constitution.

The Report also covered the area of planning gain and urged that government should consider whether present legislation on planning obligations is sufficiently tightly worded to prevent planning permissions from being bought and sold. The Committee was also of the view that local authorities should adopt rules on openness that allow planning agreements to be subject to discussion by Members of the authority and the public. They should not restrict access to supporting documents except where justified by the requirements of commercial confidentiality, which should be interpreted narrowly.