Neutral Citation Number: [2010] EWHC 3127 (Admin)

Case No: CO/4717/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 December 2010

Before :

MR JUSTICE LINDBLOM

- -

Between :

Gazelle Properties Ltd	Claimant (1)
Sustainable Environmental Services Limited	Claimant (2)
- and -	
Bath & North East Somerset Council	Defendant

- -

Mr David Elvin Q.C. & Mr Alex Goodman (instructed by **Ashfords Solicitors**) for the **Claimants**
Mr Peter Towler & Mr Gary Grant (instructed by **Council Legal Department**) for the **Defendant**

Hearing dates: 23 & 24 November 2010

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice Lindblom :

Introduction

1. In this claim for judicial review the Claimants, Gazelle Properties Limited ("Gazelle") and Sustainable Environmental Services Limited ("SES") challenge the decision of the Defendant, the Bath and North East Somerset Council ("the Council"), by its Development Control Committee, on 18 February 2009, to delegate to its Divisional Director of Planning and Transport Development the taking of enforcement action in respect of land known as the former Fuller's Earthworks site, at Combe Hay, Bath, and the decision of that officer, on 23 February 2009, to issue enforcement notices against an alleged change of use and certain operational development on that land. Gazelle owns the site. SES had an option over all or part of it, and, although that option has expired, says that it remains keen to develop a waste processing facility on the land. Both contend that in several respects the Council erred in law in deciding to take enforcement action against the existing development, asserting that the Council's consideration of the expediency of such action was flawed, that the decision was irrational and unfair, and that factors material to it were ignored.

The issues in the claim

2. Seven issues for the court arise. They are:

> (1) whether the court has jurisdiction to hear the claim;
> (2) whether the decision to delegate to officers the taking of enforcement action is vitiated by the Council's committee's failure to recognize the materiality of negotiations and to take account of those negotiations as a material consideration;
> (3) whether the delegated decision is itself vitiated by the officers' failure to recognize the materiality of negotiations and to take account of those negotiations as a material consideration;
> (4) whether the committee's decision to delegate and the delegated decision itself were unfair and irrational;
> (5) whether the committee's decision was infected with procedural unfairness;
> (6) whether the Council's enforcement action is vitiated by a failure to ascertain the extent of the relevant planning unit; and
> (7) whether the Council's continuing decision to enforce is, in any event, vitiated by the Council's failure to reconsider the expediency of enforcement action in the light of the proposed allocation of the Fuller Earth Site in the emerging Joint Waste Core Strategy.

Procedural history

3. Originally there were two related claims in this case. The claim that is still live is the second. The first claim challenged an earlier decision of the Council's Development Control Committee (taken on 29 October 2008) to delegate to officers the taking of enforcement action on the same site. Permission for that claim to proceed was refused by Mr Mark Ockelton, sitting as a deputy judge of the High Court, on 4 September 2009.

4. By an application notice lodged on 4 November 2010 the Claimants sought to add a further ground of challenge and to rely on further evidence detailing events that have occurred since permission for the claim to proceed was granted. That application was opposed by the Council. At the start of the hearing and in view of the inherent flexibility in judicial review and in the absence of any apparent prejudice to the Council in that ground being added at this stage, I allowed the Claimants' application to do so.

Factual background

The site

5. The site to which the enforcement notices relate extends to about 3.38 hectares. It is within the Bath and Bristol Green Belt and close to the Cotswold Area of Outstanding Natural Beauty. It lies on high ground about 800 metres from the south-western edge of the city of Bath, on the south-eastern side of the Fosse Way, which, as the A 367 road, forms the main route into the city from that side. The city is a World Heritage Site. In the late 19th century, and for some time after that, the land, or a part of it, was used for the extraction of Fuller's Earth. Latterly it has been used for a variety of purposes. Today it contains two dwellings, an agricultural field and an area on which general industrial use has taken

place and which is at present used for the recycling of waste and other uses within Use Class B2 of the Town and Country Planning (Use Classes) Order 1987. It has a long planning history, which need not be recounted in detail here.

The dispute and its history

6. The substantial controversy in the case concerns the physical extent of the lawful industrial use. The Council has accepted that an area corresponding to "Area A" on a plan submitted with an application for a certificate of lawfulness, which extends to about 1.2 hectares, benefits from "historic" use in Class B2 and therefore could not or should not be subject to enforcement action. Gazelle considers that the area which should be regarded as enjoying that status is much larger, embracing the whole 3.38 hectares.

7. It is pointed out by Gazelle that on several occasions in the past a lawful Class B2 use has been accepted across the whole of the 3.38 hectares, and that these occasions include the decision of the Secretary of State on 1 August 2003 when refusing planning permission for a scheme of Class B1 development and live/work units and subsequently in the Council's evidence for the inquiry into objections to the then emerging local plan in 2005. In the August 2003 decision the Secretary of State agreed (in paragraphs 30 and 31 of his decision letter) with his Inspector's conclusions (in paragraph 435 of his report) that "the buildings and hardstandings on the site enjoy a B2 fallback, that is, they may be used for general industry without the need for further planning permission" and (in paragraph 443) that "the use of the site for B2/B8 purposes has not been abandoned …". Those conclusions seem consistent with the agreement between Gazelle and the Council recorded in paragraph 6.1 of the Statement of Common Ground submitted to the Inspector:

> "The applicant and the local planning authority are in agreement that the existing use of the site is industrial processing which falls within Class B2 (General Industrial) of The Town and Country Planning (Use Classes) Order 1987. …",

although it is to be noted that this view was evidently not shared by third party objectors. The Secretary of State differed from his Inspector on the likelihood of the fallback position being taken up on the entirety of the site (in paragraph 35 of his decision letter).

8. It is not necessary here to recount all of the events in the planning history of the site after the Secretary of State's decision in August 2003. It is to be noted, however, that the Council was advised in May 2004 by junior counsel (Mr Peter Towler) that "it would be wholly inappropriate for [it] to take enforcement action in respect of any B2 use of the site", and in May 2006 by leading counsel (Mr Timothy Straker Q.C.) that "[e]nforcement action against a B2 use on the land is inexpedient".

9. The Council's Development Control Committee B considered enforcement action in respect of numerous alleged breaches of planning control in November 2006. It was accepted in the officer's report that the Secretary of State's decision of 1 August 2003 had determined the established use of the site then under consideration as being Class B2 general industrial use (paragraph 1.1 of the report). It was noted that an application for a certificate of lawfulness had been submitted. The committee resolved that it should continue to receive regular reports on the site.

10. In March 2008 the Ombudsman for Local Administration, who had received a complaint from Gazelle's principal shareholder, Mr Ridings, about the Council's decision in 2004 to pursue enforcement action against the recycling of aggregates on the site, criticized the Council for threatening such action, found maladministration and recommended to the Council that it pay compensation to Mr Ridings. He also recommended (in paragraph 93 of his report) that the Council should

> "Determine the remaining planning enforcement issues at Mr [Ridings'] site without further delay and notify him of the outcome."

The Ombudsman commented on the Class B2 use on the site, stating in paragraphs 81 and 82 of his report:

> "81. … It seems to me that, when considering enforcement action, the Council might reasonably have deduced from paragraph 30 of [the Secretary of State's decision] that the B2 fallback position applied only to the buildings and hardstanding. That said, noting the ambiguity about the extent of the fallback position in the inquiry papers,

> Counsel had initially advised the Council against enforcement action and, in my view, it should have heeded that advice.
>
> 82. It was not until the Statement of Common Ground was brought to its attention by [Mr Ridings'] Solicitor in 2004 that the Council, on the further advice of Counsel, revised its view and accepted that the B2 fallback position extended to the whole of [Mr Ridings'] site. In the meantime, however, contrary to legal advice and without any direction from its Planning Committee, the Council wrote to [Mr Ridings] threatening the possibility of planning enforcement action if he did not cease industrial operations on some parts of his site. The Council's approach here was ill-considered and the threats of enforcement action were not justified. That was maladministration."

The correspondence

11. From the middle of 2007 until the second half of 2008 the Council and Gazelle's solicitors engaged in correspondence about the lawful use of the site and the possibility of finding an agreed way forward. Mr Towler referred to much of this correspondence in the course of his submissions. It seems fair to say that the tone of the correspondence is marked at times by a degree of frustration on either side. By the middle of 2008 little progress appears to have been made. In his letter to Mr Bosworth of Gazelle's solicitors dated 28 May 2008 Mr Trigwell expressed his disappointment that Gazelle considered a meeting between the parties to be unnecessary, and indicated his belief that the most appropriate thing for Gazelle to do would be to submit a planning application for the whole site. He said that in the determination of such an application "the B2 fall back position of Area A would, of course, be a material consideration" but that the Council would have to consider the application "in the light of the areas which it considers not to have a B2 fall back use, on its planning merits and including whether any very special circumstances have been put forward as to why an expansion of the B2 use, or such other use as [Gazelle] may apply for, would be acceptable on this prominent site within the Green Belt". Mr Bosworth's reply on behalf of Gazelle, dated 30 June 2008, referred to the Council's acceptance of the Ombudsman's report, to the advice the Council had had from Mr Towler and Mr Straker as to the expediency of taking enforcement action, and to the several occasions on which the Council had accepted that the lawful use of the site was Class B2 use. Having made some comments on the principles relating to the determination of the planning unit, and having observed that he could see no reason why the the planning unit should not in this instance be taken as the historic unit of occupation, Mr Bosworth contended that there was "no case for the Council to be considering enforcement action". His letter concludes as follows:

> "You also suggest that our client submits a planning application for the whole site. I must advise you that our client has no intention of doing this. However, I can advise you that they have entered into an agreement with a development partner, Sustainable Environmental Services Limited, with a view to that company securing a comprehensive development of the site for waste recycling purposes. I understand that Sustainable Environmental Services have already held discussions with some of your colleagues about their proposal, and I enclose a copy of a recent letter that they have provided to my client, which sets out where they currently are with a view to submitting a planning application for their proposal.
> … In the light of the plans that Sustainable Environmental Services have to develop the site, and the progress they are making with a comprehensive planning application, I would suggest that any meeting to discuss the points covered in your letter of 28 May is unnecessary."

12. The letter from SES to which Mr Bosworth was referring is dated 25 June 2008. It mentions the involvement of planning consultants in the preparation of an application. It also refers to SES having discussed the proposal with planning officers of the Council, and to "a very positive meeting" having been held with the Council's Estates Department. It goes on to state:

> "It is therefore anticipated that a comprehensive application will be developed in private session with the principals involved before being selectively discussed with key Councillors, Ward Members and principal objectors before being made fully public."

13. On 25 July 2008 Mr Trigwell responded to Mr Bosworth's letter of 30 June 2008, stating that the Council was "disappointed with the approach taken to its endeavours to negotiate a way forward" and

that the Council was now left "with no option other than to conclude that [Gazelle] has adopted an entrenched position against any regulation of the site". It was now necessary, said Mr Trigwell, for the Council to conduct a site visit, relying, if it had to, on its powers of section 196A of the 1990 Act. As to Gazelle's partnership with SES and the possible submission of an application for planning permission, Mr Trigwell said that the Council, as local planning authority, had not received such an application and although SES had approached the Council with draft proposals some months ago those proposals had lacked the necessary information to enable it to make any detailed comment upon them.

The site visit and the planning contravention notices

14. After officers of the Council had attended the site on 1 September 2008 at the appointed time and been denied access, a site visit eventually did take place, on 11 September 2008.

15. On 26 September 2008 Gazelle Properties was served with planning contravention notices by the Council's Development Manager, Ms Bartlett. The notice was not signed, and Gazelle declined to respond to the questions which it contained. The notices were subsequently signed and re-served; Gazelle answered the questions in them and sent them back, but this was not done until after the Council's committee met in October 2008.

16. On 21 October 2008 Gazelle was informed by the Council that officers were proposing to put before the Development Control Committee on 29 October 2008 a report which would recommend that delegated authority be granted to officers for the taking of enforcement action. The Council stated that, if the committee authorized such action and no new information emerged when the planning contravention notices were returned, all uses on the site would be required to cease, apart from any agricultural use, the "historic" Class B2 use of the works and surrounding hard-standing areas and the continued occupation of the two dwellings. Various operational development would also have to be demolished or removed.

17. On 24 October 2008 Gazelle's solicitors wrote to Ms Bartlett, inviting her to postpone the committee's consideration of the report, contending that the members should not be asked to make any decision until officers had had the opportunity to consider the response to a valid planning contravention notice, and pointing out that the Council had not yet come back to explain what it considered the relevant planning unit to be and why.

18. Ms Bartlett's response, in her letter dated 28 October 2008, did not deal with those requests.

The meeting of the Development Control Committee on 29 October 2008

19. On 29 October 2008, when the Council's committee convened, it received from its officers a report recommending the commencement of enforcement action. In paragraph 3.2 of the report the officers advised the members that it was

> "appropriate to consider what the correct "planning unit" is and within this, whether there is a single primary use with other ancillary uses or separate primary uses which are distinct from each other or perhaps being mixed a composite use [sic]. It will also be necessary to consider whether the planning unit has changed as well as whether the uses have materially changed."

In paragraph 3.3 the officers referred to the "leading case" on the concept of the planning unit, namely *Burdle v. The Secretary of State for the Environment* [1972] 3 All E.R. 240. There follows an analysis of the activities taking place in various parts of the site, and, in paragraphs 3.23 to 3.27, the officers' conclusions on "current use", which culminate in the following passage (in paragraph 3.27):

> "The degree of physical and functional separation between some areas makes the consideration of the current planning unit difficult. However, on balance bearing in mind the tests set out in the Burdle case, other case law and how these uses appear to operate, it could be argued that the site within the boundary shown on MAP01 is one planning unit and within this planning unit, there is a mix of primary uses … rather than one overriding use with the others being ancillary. Again, clarification may be forthcoming on the return of the PCNs."

Under the heading "Historic use including any lawful "fall-back" position", in paragraph 3.28 of their report, the officers noted that was necessary "to consider whether the uses taking place are materially

different from any lawful use of the site, thereby constituting development requiring planning permission". They went on to refer to the application which had previously been submitted – but withdrawn before it was determined – for a certificate of lawful existing use. Of the five areas into which the site had been broken for the purposes of considering that application, the report concentrates on areas "A", "D" and "E". The officers referred, in paragraph 3.33, to the Statement of Common Ground submitted to the 2002 inquiry, and said that it had been

> "… agreed that the whole of the application site at that time could lawfully be within B2 use, including part of the public highway. However, that was never a position confirmed within a formal legal determination i.e. a certificate of lawfulness. The planning inspector at the time of the call-in agreed that "the buildings and hard-standings on the site enjoy a B2 fallback" he was not definitive about which parts of the site this included. …"

In paragraph 3.38 the officers stated:

> "On the balance of probabilities, the area approximating to area 'A' is that which had a "mothballed" lawful fallback situation at the time the current occupiers took ownership in 1999. …"

In their "Conclusions regarding what use/uses require planning permission", in paragraph 3.40, the officers said this:

> "Given the conclusion above regarding the present mixed uses including B2 industrial use, sui generis storage builders/scaffold contractors yards, residential use (within the two dwellings), siting a hot-food trailer it is considered that there is a "material change" from any previous use. The responses to the PCNs may indicate that this is a new chapter in the planning history of a site."

The passage of the officers' report on "Unauthorised use" includes, in paragraph 3.55, the following comments:

> "… [The] industrial use of part of the site (the "main buildings" and surrounding hardstandings in the approximate area marked "A" on the CLEU plan) previously had a lawful fall-back position and although a new chapter in the history of the site may have occurred, this would be an important material consideration ..."

The minutes of the meeting record that the Council' Planning and Environmental Law Manager told the committee that further evidence had come to light which "undermined the previously assumed extent of the lawful B2 fall back position". The officers' recommendations, in section 5.0 of the report, included the following action:

> "5.1 Subject to responses to the PCNs not disclosing information that would lead Officers to a materially different conclusion, the commencement of enforcement action. The requirements … should be:
> …
> ii. Use of land at "the works" and adjoining hardstandings for purposes within use class B2 is allowed to continue (within area 'A')
> …
> 5.3 Authorise the Divisional Director for Planning and Transport Development in consultation with the Planning and Environmental Law Manager to exercise the powers and duties of the Authority … under Parts VII and VIII of the Town and Country Planning Act 1990 … in respect of the above site."

20. The committee resolved in accordance with the officers' recommendation.

Gazelle's solicitors' letter of 15 December 2008

21. On 15 December 2008 Gazelle's solicitors sent a Pre-Action Protocol letter to the Council's Head of Legal Services. That letter complained about several aspects of the Council's decision-making on 28 October 2008. Among the complaints raised was the contention that the report which had been provided to the committee for its meeting on that day failed to provide a full picture of the planning

history of the site, including the discussions that had taken place between Gazelle and the Council. The letter referred to Gazelle's solicitors' letter to Mr Trigwell of 30 June 2008 identifying

> "the occasions on which the Council had previously confirmed the B2 use of this part of the Land, namely:
>
> - In the Statement of Common Ground prepared for the public inquiry in 2002;
> - On 21 May 2004 Mr David Davis confirmed by letter that the Council had accepted that the 2002 Public Inquiry site has a B2 use throughout its entirety;
> - In May 2004 Counsel advised the Council that in his opinion "it would be wholly inappropriate for the Council to take enforcement action in respect of any B2 use at the site";
> - The Development Control Sub-Committee B on 2 June 2004 confirmed that the Council accepted that the site has a B2 use throughout;
> - In July 2004 the Council approved a pre-inquiry change to the revised Deposit draft local plan which stated that the 2002 Public Inquiry had established that the entire site had the benefit of B2 use;
> - The Development Control Sub-Committee B at its meeting on 25 August 2004 accepted that the site has B2 use throughout;
> - At the Public Inquiry that was held in 2005, into the revised Deposit Draft Local plan, the Council gave evidence that the site had a B2 use throughout.
> - In March 2006 Queen's Counsel advised the Council that in his view planning enforcement action was inexpedient over any B2 use at the Inquiry Site;
> - In an email sent on 17 October 2006 to our client, Mr Rowntree confirmed again, this time in the context of the Lawful Certificate Application, that the Council's agreement for the '2002 appeal boundary area' was not affected.
> - The Development Control Sub-Committee B at its meeting in November 2006 accepted that the Inquiry in 2002 had "determined" the established use at the Site as B2".

The letter went on to state:

> "In the planning process the previous history of a site, including previous decisions of the authority, is a material consideration. A decision maker should realise the importance of consistency and should give reasons if they decide to depart from a previous decision … In the current case, with the exception of the reference to the statement of common ground at paragraph 3.33 of the report, the Committee were not informed either of the numerous previous decisions that the Council had made regarding the use of the Land nor as to the correct approach to adopt in respect of those previous decisions. In the circumstances, the Committee's decision to delegate authority to take enforcement action was made without regard to a material consideration and was therefore made without knowledge of the available facts. Accordingly the decision cannot have been made lawfully."

The first claim for judicial review

22. On 7 January 2009 Gazelle launched a claim for judicial review of the Council's decision of 28 October 2008, asserting, among other things, that officers had failed properly to inform the members of the discussions which had been taking place between the parties, and to explain to the committee the site's planning history and the circumstances relating to the relevant planning unit. The Council's immediate reaction to those proceedings was to undertake to bring the matter back before the committee in February 2009.

The meeting of the Development Control Committee on 18 February 2009

23. On 18 February 2009, when the committee met again, it received a report which indicated that officers were of the view that the members had been properly apprised of the relevant history. By this time the Council had received responses to the planning contravention notices. Section 6.0 of the officers' report dealt with the planning history. The corresponding part of the October 2008 report was referred to (in particular, paragraphs 2.6 and 3.28 and 3.29), and in paragraph 6.3 the officers stated:

> "Members will also have a copy of the Owner's Solicitors letter dated 15 December 2008 – Annex B. The Committee's attention is, in particular, drawn to Paragraph 6 as

> the accusation in the Pre-Action Protocol letter from Gazelle Properties Limited is that the Committee [were] not provided with a full picture of the planning history of the site. This accusation is repeated in the application for leave to make the Judicial Review claim. Officers are of the opinion that the Committee did have all the relevant information to make its decision on the 29 October 2008, but are bringing this to the Committee's attention for the AVOIDANCE OF DOUBT. I would also refer the Committee to Paragraph 6 of the Council's letter at Annex C. If Members require any further clarification regarding any of the matters set out in either of these letters, I would ask that they seek this from Officers before the Committee meeting. Any queries raised by Members will be reported in the Update Report to this Committee."

The officers stated in paragraph 8.4 of their report:

> "It is your officers' view, as set out in the October Committee Report, that the land outlined in bold on the Site Location Plan, Annex D, is now in a mixed use for the purposes set out above. Full consideration has been given to any "fall back" B2 use that may have existed up to the "call in" inquiry in 2002. There is, however, disagreement between the Council and the Owner of the land as to the significance of what was agreed within the SOCG …
>
> It is acknowledged that the Council had in the past accepted that the land which formed part of the application site at the 2002 'call in' public inquiry had a B2 fall back use and that it would have been inexpedient at that time to take enforcement action against such use. However, this was based on the information available to the Council at the time."

The officers went on to tell the members that in their opinion a material change of use had occurred:

> "The significance of these previous views is considered to be even less following the findings from the September 2008 site visit. These findings have been endorsed by the responses to the PCNs. It is considered that a material change of use of the land has now taken place as there are currently several uses taking place on the land and over a wider area than has historically been the case which, nevertheless, retain a link with the central part of the site. The material change of use to this current mixed use of the land has clearly occurred within the past 10 years and is therefore unauthorised. … The Owner of the land does not concur with your officers' view that planning permission is required for the present mix of uses on the land."

In paragraph 9.1 of the report the officers expressed their view that the information in the responses to the planning contravention notices indicates that the conclusions in the October 2008 committee report regarding the mixed use of the site were correct. The officers also concluded (in paragraph 10.1) that, given the harm the unauthorized development was causing, the envisaged enforcement action would, represent "a proportionate and necessary interference … in the wider public interest" with the rights of the owner and occupiers of the land under the Human Rights Convention. They then turned to consider the expediency of enforcement action, concluding as follows (in paragraphs 11.1 to 11.5):

> "11.1 It is considered expedient to commence enforcement action for the reasons set out in this Report having regard to the Development Plan and national planning policy (see paragraphs 3.49 – 3.52 of the October Committee Report). However, it is also considered reasonable to take account of the historical uses of the land when considering the extent of any enforcement action. To this effect, it is recommended that a B2 use is allowed to continue within Area A on the CLEU plan (Annex E) and that the residential use of 1 and 2 The Firs should not be fettered by the proposed enforcement notices. In this way, it is considered, that the action proposed is reasonable and proportionate to the harm caused by the breach of planning control.
>
> 11.2 It is recommended that within Area 'A' on the CLEU plan, Annex E that the B2 use will be allowed to continue but that elsewhere, non agricultural activity should be ceased (apart from the residential use of 1 and 2 The Firs)….
>
> 11.4 The structures including the concrete manufacture and batching plant, storage bays, ancillary metal buildings and the permanently sited office building are considered unacceptable …

> 11.5 The businesses on this site have become established and may encounter difficulties in re-locating. The users that will be allowed to remain within the core-area of the site will need to change their operations. The Council should therefore allow a reasonable period of time for compliance with the requirement to cease these unacceptable uses, the reduction in the area of industrial use and the removal/demolition of operational developments. "

Thus the officers' advice was that, in view of the historic use of the site, enforcement action should not be taken against "Area A". Their recommendation to the committee was:

> "That delegated authority be granted to the Divisional Director of Planning and Transport Development, in consultation with the Planning and Environmental Law Manager, to take any necessary action on behalf of the authority in respect of the alleged planning contraventions set out above by exercising the powers and duties (as applicable) under Parts VII and VIII of the Town and Country Planning Act 1990 (including any amendments to or re-enactments of the Act or Regulations or Orders made under the Act) in respect of the above land."

24. Through requests for information made on behalf of Gazelle it has emerged that at the committee meeting the members received an annex, Annex B, which was not made public. This annex contains ten documents, which relate to the planning history of the site. This material was made available to the members outside the meeting. The public had no opportunity to see it or comment on it before the members reached their decision.

25. As the minutes of the meeting record, the committee resolved, by a vote of seven in favour and two against, with three abstentions, to accept the officers' recommendation in their report, though it is to be noted that in the resolution the phrase "any necessary action" was used rather than "any necessary enforcement action". The resolution included a note which stated that the officers' delegated authority

> "*will, in addition to being the subject of subsequent report back to Members in the event of Enforcement Action being taken, not being taken or subsequently proving unnecessary as appropriate, be subject to:*
>
> *…*
>
> *(b) all action being subject to statutory requirements and any aspects of the Council' strategy and programme;*
>
> *…"*.

Mr White's representations

26. Mr White, the Managing Director of SES, was present at the committee meeting on 18 February 2009. SES had been set up as a special purpose vehicle to tender for the Council's waste contracts. Gazelle had entered into a formal agreement with SES, under which SES would be responsible for securing the requisite consents and commitments from the Council, whereupon SES would take a lease of the site and Gazelle would be entitled to share the profits from the waste contracts.

27. The background to Mr White's attendance at the committee meeting in February 2009 included correspondence and meetings, which may be understood from numerous documents that were produced to the court in evidence. It is not necessary to set out the whole of that story. The draft witness statement of Mr Matthew Smith, the Council's Divisional Director of Environmental Services, helpfully describes some of the salient events, and Mr White's witness statement adds detail of his own. It appears that in 2006 the Council had begun searching for suitable sites on which waste facilities could be located. Officers of the Council's Environmental Services team met Mr White on several occasions in 2006 and 2007 and discussed the concept of developing a waste recycling and treatment facility on the Fuller's Earth site. It is clear that a good deal of progress was made, to the point at which draft designs were being discussed in late 2007. In March 2008 Mr Smith indicated to Mr White that the Council would be willing to act with SES as joint applicant for planning permission for such a proposal. That position later changed. Mr Smith has explained how, and why:

> "After a discussion with Planning Services (it was considered that a joint planning application was not a recommended route, particularly given our intention to apply for permission at other, more favourable sites) and consideration of our position (i.e. we

> could not enter into a formal contract with them and had no further funding to support this project), I informed Mr White (via a phone call) that although the Waste Authority would support the application, we would not be in a position to be joint applicants. I am sure that Mr White understood this.
> …".

Mr Smith says that at a meeting in April 2008 it was made plain to Mr White that the Council would not be in a position to submit a joint planning application, and that

> "Mr White was also advised that he should submit his application so that he would be in a position to tender for any work which we might offer. He was briefed on the West of England Partnership's plans to procure waste treatment facilities (to which we were a party) and the type of processing such a plant would be required to undertake. … [SES] did not tender for the West of England contract."

28. Mr Smith concludes his draft witness statement with this:

> "Discussions involving myself or Waste Services officers did not progress further following a meeting of the Waste Board at which I expressed concern about any further involvement in the matter. This was because the Board agreed (in October 2008) to place a moratorium on development proposals, pending greater clarity about whether the Western Riverside scheme would progress as planned and we could not be placed in a position where we might compromise the commercial confidentiality of the Western Riverside developer to another developer (Penhalt). It was therefore agreed that the authority's Property Services would act as the contact point for any further discussion with Mr White and I informed Mr White of this change. This moratorium also placed "on hold" work on proposals to develop our preferred sites (at Pixash Lane Keynsham and Lower Bristol Road Bath)."

1. Mr White states in his witness statement of 13 May 2009 (in paragraph 9) that after September 2008, progress with the application for comprehensive development of the site slowed, but that

> "no-one from within the Council has withdrawn from supporting our proposals. SES remains fully committed to taking forward plans to develop the site comprehensively".

As I understand it, no application has yet been submitted to the Council.

30. Mr White had registered with the Council his desire to speak at the meeting of the committee on 18 February 2009. He wanted to ask the members to defer their consideration of the taking of enforcement action, because he considered that such action would unnecessarily destabilize the process of negotiation between SES and the Council. In his witness statement Mr White described what happened at the meeting:

> "12. I attended the meeting of the Development Control Committee on 18 February 2009. I had previously registered with the relevant Council officer, expressing my wish to speak at the Committee. I was therefore surprised to hear the Chairman of the Committee state, prior to the Committee's consideration of the officers report, that the contents of my letter should be ignored. The Chairman then advised me that any future development proposals that my company might have for the site were not relevant to the deliberations of the Committee and that I should direct my statement only to the enforcement report on the agenda. I attach as exhibit JW2 a copy of the speech that I had prepared to read out at the Development Control Committee Meeting. I attempted to read this out to the Committee but was prevented from doing so by the Chairman who intervened to stop me raising these issues. I had no choice but to curtail my representations.
>
> 13. I remained at the Meeting during the Committee's consideration of the Item and noted, in particular, that one of the Councillors indicated that the Council should set up a "Select Committee" style Committee to consider the future of the site. My understanding of the proposal that the councillor was suggesting to the Committee was that this should be made up of Councillors and officers that would look into the history of the site, hear and consider evidence from all interested parties and then come up with recommendations in respect of the site. However, in view of the clear

> advice that the Chairman had given to the Committee regarding the matters that they were entitled to consider, I was not surprised that his attempt to persuade the Committee to adopt such a stance was not accepted."

31. The statement which Mr White intended to read to the committee introduced himself as the Managing Director of SES and stated:

> "I hope you have all received my package of documents and have had the chance to peruse them
>
> From the information contained you will see that my company has been engaged in negotiation with officers of Bath and Notheast Somerset Council in order to deliver a solution concerning the land at The Former Fullers Earth Works, Combe Hay.
>
> I appear today to urge deferment of this proposed enforcement action to allow negotiations with your officers, which have reached an advanced stage, to continue in line with this Councils own enforcement policy.
>
> Enforcement would, in the context of these ongoing negotiations, be potentially destructive and achieve little but the frustration of all parties involved.
>
> Continuation of these advanced negotiations could achieve the delivery of a comprehensive solution to problems at the site whilst providing a sustainable, low carbon, integrated waste facility serving the people of BANES for decades to come.
>
> Proposals would provide for the recycling of organic wastes "in county" with the provision for renewable energy generation.
>
> The facility would include a much needed replacement Household Waste and Recycling Centre.
>
> To initiate enforcement action at this time would unnecessarily destabilize a process that your officers have clearly previously committed to, and would not accord with Banes published enforcement policy.
>
> Proposed action would deprive the City once more of a rare chance to provide the ratepayers of BANES with a much needed facility and solve the existing problems at the site.
> Your vote now is crucial.
>
> A vote for enforcement is a vote for positive change enabling (deferment could enable) the delivery of a long term environmentally sound solution and the opportunity to transform for ever an eyesore at an important gateway to The World Heritage Site of Bath.
>
> Let us not make the mistake made with previous comprehensive proposals for this site and grasp this opportunity for progress. A negotiated solution as proposed by this company is the only way forward."

32. The Council's enforcement policy to which Mr White alluded states, in the section headed "Principles":

> "The emphasis will be firmly on negotiating compliance or regularising breaches of planning control before considering formal enforcement action. The Council will take formal enforcement action only where it considers it **expedient to do so** …"

In the section headed "General Principles for Good Enforcement Procedures" it is stated, among other things, that

> "Unless immediate action is required, officers will endeavour to negotiate compliance or resolution and to provide the opportunity to discuss the circumstances of the case before formal action is taken."

The list of "planning enforcement criteria" includes

"Submission of planning application/listed building application"

and

"Not expedient to take enforcement action i.e.Permission is likely to be granted … ".

These considerations seem broadly consistent with relevant national policy in PPG18.

33. However, as the minutes of the meeting record, the Chairman of the committee, apparently in the light of advice he had received, was not content to allow Mr White to address the committee on proposals for development which SES might wish to bring forward in due course. The minutes record these remarks as having been made by the Chairman:

> "Before we begin dealing with Agenda Item 11 regarding the former Fullers Earthworks site, I need to mention that I have received – and I believe that all other members have received – a letter and associated documents from Mr Jon White who has also registered to speak on this item. Mr White's correspondence relates principally to possible development proposals that he may bring forward for this site rather than the Enforcement Report in the Agenda papers.
>
> I understand that Mr White has been informed that any future development proposals that his company may have for the site are not relevant to today's meeting and that he should direct his statement solely to the Enforcement Report on the Agenda.
>
> Similarly, the documents received by Members from Mr White are not material to the Committee's assessment of the Enforcement Report and I am advised that Members must disregard those documents entirely in their determination of the matter before them. I will intervene if needed in order to ensure that the discussion remains focused on the issues relevant to the Report."

34. At the meeting there was no discussion of possible future development proposals or of the points raised by Mr White in correspondence.

Mr Trigwell's delegated decision

35. On 23 February 2009 a delegated decision to issue enforcement notices was made. The Council's Divisional Director of Planning and Transport Development, Mr Trigwell, to whom the decision to take "any necessary action" had been delegated, prepared a document entitled "Enforcement/Prosecution Considerations". In that document Mr Trigwell recorded, among other things, the alleged breach of planning control as being "Change of use to mixed use site and operational development"; the effect on the public and the environment as being an "Unauthorised use of land to the detriment of the Green Belt and other policies in Local Plan"; the expediency of the proposed action being "As set out in Committee Report. Ongoing harm and Contrary to Policy"; the effect of enforcement as being "To regularise and condition the site in the public interest"; the attitude of the landowner as being "Unwilling to negotiate"; and the "Conclusion (taking into account all of the above reasons why I am taking enforcement action[])" being "An unregulated site, failure of negotiations to conclude issues, ongoing harm to Green Belt and other policy areas. In the public interest to proceed with enforcement action".

Gazelle's solicitors' letter of 24 February 2009

37. On 24 February 2009 Mr Bosworth wrote to the Council stating that Gazelle did not accept that the breaches of planning control alleged by the Council had occurred, but that SES had been negotiating with the Council with a view to resolving "the situation that exists at this site". Mr Bosworth also mentioned the fact that at the meeting of the committee on 18 February 2009 he had remarked that the advice the members had been given as to the relevance of what SES was attempting to say to the members was wrong. For this reason, said Mr Bosworth, he had advised Gazelle that the committee was misdirected in law, that the committee's decision to delegate the power to take enforcement action was "fundamentally flawed", and that he was minded to advise Gazelle to commence further proceedings for judicial review.

The enforcement notices

37. Two enforcement notices were issued by the Council on 25 February 2009.The first notice, which relates to the use of the site, alleges a change of use of the whole site from residential use, agricultural use and general industrial use to a mixed use comprising nine different activities. It requires the permanent cessation of the use of the site, save for "Area A", for several uses, including waste processing within Class B2, thus under-enforcing so as not to affect the area on which the Council considers general industrial use not to be unacceptable. The second notice, which relates to operational development, requires the demolition of the concrete batching plant on the site and the removal of the office building from it. The reasons given in notices for the taking of enforcement action referred to the planning harm and conflicts with policy upon which the Council relied.

Gazelle's section 174 appeals

38. On 20 April 2009 Gazelle appealed, under section 174 of the 1990 Act, against both notices, the appeal against the first notice being made on grounds (a), (b), (c), (d), (f) and (g), and the appeal against the second notice on grounds (a), (c) and (g).

The proposed allocation of the Fuller's Earth Site in the Joint Waste Core Strategy

39. Since the enforcement notices were issued the Council has continued to participate, with the three other unitary authorities which belong to the West of England Partnership, in the production of a spatial planning framework for waste for its sub-region. This framework is called the Joint Waste Core Strategy. Ms Kaoru Jacques, a planning officer employed by the Council in its Planning Policy Team, has described the process in her witness statement of 16 November 2010. Among other things, the core strategy will identify indicative capacities for "Residual Waste" to be treated in the sub-region and will allocate "Residual Waste Facility sites". The process is now well advanced. Several stages of consultation have been gone through. The draft core strategy was submitted to the Secretary of State in July 2010. Between 16 and 23 November 2010 an Inspector conducted an Examination in Public at which objections to the proposals in the document were heard. The Inspector will in due course issue his report, probably about eight weeks from now, setting out his conclusions and his recommendations, which will be binding. The core strategy is expected to be adopted in April 2011. Having been one of the 32 sites originally identified as possible locations for a strategic waste facility, the Fuller's Earth Site, which substantially overlaps the site which is the subject of the Council's enforcement action, did not progress to the Stage 3 assessment, which took place in early 2009, because it is in the Green Belt and close to the Area of Outstanding Natural Beauty. Thus the site was not included in the draft core strategy as a potential allocation for a residual waste facility at the time when the Council issued the enforcement notices. In July and August 2009 the Progress Update stage public consultation was carried out. The draft submission document was then prepared. It included the Fuller's Earth Site as a potential allocation for a residual waste facility. Thereafter the draft core strategy has proceeded with this allocation in place. Ms Jacques has explained in her evidence how proposals for development on the Fuller's Earth Site would be dealt with if it is retained as an allocation in the adopted core strategy, as the Council intends. In summary, she states (in paragraphs 53 and 54 of her witness statement):

> "53. The Fullers Earth site is proposed to be allocated as a residual waste facility with the safeguards and strict criteria that would require [sic] given the site's sensitive location.
>
> 54. The phasing of the Spatial Strategy suggests that Zone C is implemented to meet the medium term requirements ie 2016 – 2021. The Fullers Earth Site, even if allocated, might not therefore come forward for another 5 to 10 years which would leave the harmful impact caused by the unauthorised uses and development currently on a site in the Green Belt and in proximity to the AONB for some years to come."

40. In the material which it submitted in response to issues raised by the Inspector for consideration at the Examination in Public the Council, in answer to the questions "Is allocation of the Fuller's Earth Works site appropriate? Are any additional safeguards necessary?", stated:

> "The detailed site assessment report concluded that the Former Fullers Earth Works site is an appropriate site allocation for the development of a residual waste treatment facility because the site is well located to serve the needs of the south west of the Plan area.

> The site has a long and complex planning history, and is currently owned and managed by a waste recycling company, it is currently operational but B&NES has issued two enforcement notices for alleged breaches of planning control. The notices have been appealed, but the appeal has been held in abeyance due to a claim for Judicial Review in the High Court. The site is situated in Green Belt so … any proposals to develop the site would therefore need to demonstrate … very special circumstances. The site assessment process has identified very few opportunities for development of strategic waste facility in this area, which is a relevant consideration for development in Green Belt. …".

That summary seems consistent with what was said in the responses to representations received to the Pre-Submission Document earlier in 2010, and in particular with the response to the representation submitted on behalf of the Coombe Hay Parish Council, which had drawn attention to the "current (and very long running) planning, planning enforcement and environmental issues relating to Site BA12 and its surrounding area [which] MUST be resolved before Site BA12 is considered as a site for a potential Residual Waste Treatment Facility". The response stated:

> "The allocation of Site BA12 is for its future use as a residual waste treatment facility. Allocation of the site will give a better operational and planning outcome."

No change to the draft core strategy was proposed.

41. In her second witness statement, dated 16 November 2010, the Council's Development Manager, Ms Lisa Bartlett, observes that there are representations for and against the allocation of the Fuller's Earth Site and that the allocation is not a foregone conclusion. She states (in paragraph 19 of her witness statement):

> "There are a number of interested third parties such as the local residents, including those that come under the banner of 'The Victims of Fullers Earth', the Combe Hay Parish Council and the Bath Preservation Trust. Were the Council to take no action they would be entitled to hold the Council accountable for allowing the continuing harm caused by the development to continue unchecked in the hope that the site is:-
>
> (1) allocated as a residual waste facility;
> (2) a successful planning application is submitted for a residual waste facility; and
> (3) the approved planning application is implemented and the site is developed as a residual waste facility some time in the future."

Ms Bartlett goes on (in paragraph 23) to say:

> "I can further advise that the Divisional Director for Planning and Transport, David Trigwell, using his delegated authority, has confirmed that he does not consider it appropriate to refer the matter back to the Development Control Committee at the moment, notwithstanding the potential allocation in the JWCS, due to the continuing harm caused by the unauthorised uses and operational development taking place on the Site. Clearly the outcome of these proceedings and, in due course, the Inspector's report, will be reported to the Committee who will then have an opportunity to consider what future action the Council should take in these circumstances."

Delay

42. The Council has maintained its resistance to the claim on the grounds of the delay in the bringing of proceedings, contending that this is a matter to which the court should have regard in exercising its discretion as to the granting of relief. It is true, and unfortunate, that the claim has not come to a hearing until more than 14 months after permission for it to proceed was given by Mr Ockelton, some 18 months after the application for permission was lodged, and some 21 months after the Council's resolution to delegate to its officers the taking of any necessary steps for the enforcement of planning control on the site. I have not been able to discern where the responsibility for this delay rests. The Council complains, probably correctly, that had the enforcement appeals taken their course rather than having been held in abeyance while the present proceedings run their course, the substantive issues in the appeals would by now have been resolved. But it appears that neither side has at any stage sought to have the hearing of the claim expedited. This is the context in which the issue of delay

has to be considered. Has any identifiable delay caused any real prejudice to the Council? Mr Elvin stated, rightly in my judgment, that no such prejudice has been identified. The Council has not pointed to any particular period within the span of approximately three months from the date of the Council's decision to the launching of proceedings which is said to have caused some specific detriment to good administration, or any hardship or prejudice. A detailed and uncontested account of what was done in the preparation of the claim has been provided by Mr Bosworth in his second witness statement (dated 2 September 2009). I see no reason to doubt the accuracy of that account, and I accept it. In my view, there was no undue delay in the bringing of the claim such as to warrant the withholding of relief under section 31(6) of the Senior Courts Act. Nor do I consider that, in the circumstances of this claim and its history, it would be right to give any material weight to delay as a factor in the exercise of my discretion to withhold such relief as might otherwise be appropriate.

The relevant statutory framework

43. Control over the development of land is effected by section 57(1) of the Town and Country Planning Act 1990 ("the 1990 Act") which provides:

> "Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land".

44. "Development" is defined by section 55(1) of the 1990 Act 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 other land."

45. Section 171A of the 1990 Act provides:

"(1) For the purposes of this Act –

(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted,

constitutes a breach of planning control.

(2) For the proposes of this Act –

(a) the issue of an enforcement notice (defined in section 172); or

(b) the service of a breach of condition notice (defined in section 187A),

constitutes taking enforcement action."

46. The power to issue an enforcement notice is contained within section 172 of the 1990 Act, which provides:

> "(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them -
>
> (a) that there has been a breach of planning control; and
>
> (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

47. An enforcement notice, once issued, may be varied or withdrawn under section 173A of the 1990 Act, which so far as is material provides:

> "(1) The local planning authority may -
>
> (a) withdraw an enforcement notice issued by them; or
>
> (b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9).

> (2) the powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.
>
> ...".

48. Section 174 of the 1990 Act provides for appeals to be brought against enforcement notices, on specified grounds:

> "(1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a coy of it has been served on him.
>
> (2) An appeal may be brought on any of the following grounds -
>
> (a) that, in respect of any breach of planning control which may be construed by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
>
> (b) that those matters have not occurred;
>
> (c) that those matters (if they occurred) do not constitute a breach of planning control;
>
> (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
>
> (e) that copies of the enforcement notice were not served as required by section 172;
>
> (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
>
> (g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."

49. Section 285 of the 1990 Act provides that

> "the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought." "

Issue (i): Jurisdiction

The law

50. In *Davy v Spelthorne Borough Council* [1984] AC262, the House of Lords considered the provision in the Town and Country Planning Act 1971 which was the predecessor to section 285, and in similar terms. Lord Fraser of Tullybelton stated (at p.272 D-G):

> "But, in my opinion, the respondent's claim for damages is not barred by section 243(1)(a). That paragraph provides that the validity of an enforcement notice shall not be questioned in any proceedings whatsoever "on any of the grounds on which such an appeal may be brought." The words "such an appeal" are a reference back to an appeal under Part V of the Act of 1971 [analogous to Part VII of the 1990 Act], and they mean in effect the grounds specified in section 88(2) [of the 1971 Act, analogous to s.174(2) of the 1990 Act]. But section 243(1)(a) [of the 1971 Act, i.e. s.285(a)(a) of the 1990 Act] does not prohibit questioning the validity of the notice on other grounds. If, for example, the respondent had alleged that the enforcement

> notice had been vitiated by fraud, because one of the appellants' officers had been bribed to issue it, or had been served without the appellants' authority, he would indeed have been questioning its validity, but not on any of the grounds on which an appeal may be brought under Part V. So here, the respondent's complaint that he acquiesced in the enforcement notice because of negligent advice from the appellants is not one of the grounds specified in section 88(2), and it would not have entitled him to appeal to the Secretary of State under Part V of the Act of 1971 [i.e. Part VII of the 1990 Act]. Accordingly, even on the assumption that the validity of the enforcement notice is being questioned in the present proceedings (an assumption which in my opinion is open to serious doubt), it is certainly not being questioned on any of the grounds referred to in section 243(1)(a) [of the 1971 Act, i.e. s.285(1)(a) of the 1990 Act] and the proceedings are not barred by that subsection. …".

Amplifying that principle in *R v Wicks* [1998] A.C. 92 Lord Hoffmann stated (at p.120):

> "… there remain residual grounds of challenge lying outside the grounds of appeal in section 174(2) of the Act of 1990, such as mala fides, bias or other procedural impropriety in the decision to issue the notice. I shall call these "the residual grounds". … If section 285(1) says that the notice cannot be questioned on certain grounds, it follows that it *can* be questioned on any other grounds. One has to ask why they were not included in the appeal procedure. The reason, as it seems to me, is obvious. Questions of whether the planning authority was motivated by mala fides or bias or whether the decision to issue the notice was based upon irrelevant or improper grounds are quite unsuitable for decision by a planning inspector …",

and (at p.122):

> "I do not think that in practice hardship will be caused by requiring the residual grounds to be raised in judicial review proceedings. The statutory grounds of appeal are so wide that they include every aspect of the merits of the decision to serve an enforcement notice. The residual grounds will in practice be needed only for the rare case in which enforcement is objectively justifiable but the decision that service of the notice is "expedient" (section 172(1)(b) is vitiated by some impropriety". "

51. In *R v Caradon DC, ex parte Knott*, a challenge was made to a local planning authority's decision to take enforcement action. The first ground of the challenge was that the authority acted outside the powers granted to it under section 172(1) of the 1990 Act because the taking of enforcement action was not expedient, as that section requires or, in the alternative, that the decision that it was expedient was, in the circumstances, unreasonable. Revocation and discontinuance orders in respect of the enforced against development were already in place and beyond challenge, and, as it appeared to the authority at the time when it issued the enforcement notice, the notice would achieve no more than those two orders would achieve. Sullivan J., as he then was, said this (at p. 171):

> "Under section 172(1), it must appear "expedient" to issue an enforcement notice, not for any purpose, but for a proper planning purpose. It would not be lawful for a local planning authority to serve an enforcement notice upon a landowner, for the sole purpose of reducing the compensation payable to that landowner if his land was going to be acquired by the local planning authority, for example, under a compulsory purchase order. Issuing an enforcement notice must have some planning purpose. The reduction of a potential liability to pay compensation is not, on its own, such a purpose."

52. In the recent decision of the Court of Appeal in *The Health & Safety Executive v. Wolverhampton City Council* [2010] EWCA Civ 892 the court considered the meaning of the concept of expediency in the taking of decisions under section 97 and other provisions of the 1990 Act. Section 97 provides the power for the local planning authority, if it appears to it to be "expedient" to do so, to revoke or modify a planning permission. Sullivan L.J., with whose judgment Longmore L.J. agreed, stated (in paragraph 38):

> "I readily accept that it was for Wolverhampton as the local planning authority to decide what was the best way forward, but a decision to rule out taking action under section 97 as one of the options had to be a rational one applying conventional *Wednesbury* principles. Thus, Wolverhampton had first to correctly direct itself as to

> the ambit of its powers under section 97, and then reach a decision not to exercise those powers having regard to relevant, and not irrelevant, considerations. …".

Sullivan L.J. went on to consider the decisions of Richards J. (as he then was) in *Alnwick District Council v. Secretary of State for the Environment, Transport and the Regions* (2000) 79 P. & C.R. and of Ouseley J. in *R. (Usk Valley Conservation Group) v. Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin), preferring the latter in its conclusions on the relevance of the liability to pay compensation to an authority's decision under section 97 (see paragraphs 39 to 62). Sullivan L.J. referred (in paragraph 42) to the conclusions expressed by Ouseley J. in *Usk* (in paragraphs 198 to 202 of his judgment) on the implications of the need for the authority to consider expediency in the making of such a decision:

> "198. An *expedient* decision would, to my mind, necessarily require attention to be paid to the advantages and disadvantages of taking one or other or none of the available steps under s102. These advantages and disadvantages should not be confined to those which the subject of the notice would face; they should be measured against the advantages and disadvantages to the public interest at large, including the costs and effectiveness of the various possibilities. The question of whether the cost to the public is worth the gain to the public is, I would have thought, the obvious way of testing expediency. At least it is difficult to see that expediency could be tested without consideration of that factor.
> …
> 201. … S102, like s97 and s172, deals with expediency decisions: what if anything should be done about a state of affairs that has arisen. They are processes which an authority can initiate to deal with that state of affairs, if it is *expedient* to do so. There is no obligation to take enforcement action in respect of every breach of planning control, nor to take revocation or discontinuance proceedings in respect of unlawful uses or permissions which the authority wishes had not been granted. The notion of "*expediency*" in the context of a decision as to what to do, if anything, about a state of affairs which has arisen, brings with it the issue of whether the gain is worth the cost, which I regard as an obvious part of any decision on expediency. The cost and time of taking enforcement proceedings balanced against the prospects of success and the gain from success would be obviously relevant to the decision on enforcement proceedings.
>
> 202. Although Richards J. in *Alnwick* may be right to say that what is expedient must be judged in a planning context, that context is provided by the statutory provision itself. The inclusion of the notion of "*expediency*" contrasts s102, s97 and s172 enforcement, with s70, the grant of permission whether prospective or retrospective. This shows quite clearly that these provisions, two of which are expropriatory, must be approached quite differently from the grant of a s70 permission. … "*Expediency*" is not part of the s70 decision-making process which, by contrast, is initiated by the applicant and not the authority, and requires the authority to reach a decision one way or the other having regard to the development plan and other material considerations. A proper and substantial meaning has to be given to that contrast and to the notion of "*expediency*". No interpretation of s102 which fails to draw a very clear distinction between decisions under s70 and decisions under s102, or s97 and s172 for that matter, can be correct."

Sullivan L.J. observed (in paragraph 47) that

> " the mere fact that the word "expedient" is to be found in sections 97(1) and 102(1) but not in section 70(2), is not, of itself, a sufficient reason for concluding that a local planning authority may lawfully have regard to its liability to pay compensation when deciding whether to make an order under section 97 or 102. The question is one of substance, not semantics, and the need for decisions under sections 97(1), 102(1) and 172(b) to appear to the local planning authority to be "expedient" is, in part at least, a reflection of the different character of the decisions that have to be taken under those enactments."

He went on (in paragraph 59) to endorse the submission of counsel that if a local planning authority was entitled to have regard to its liability to pay compensation under sections 107 and 115 when deciding whether it was expedient to make an order under section 97 or 102, the weight to be given to that factor would (subject to *Wednesbury* irrationality) be a matter for the local planning authority.

Longmore L.J, agreeing with Sullivan L.J., noted (in paragraph 65 of his judgment) the absence of the word "expedient" from the statutory language relating to the grant or refusal of planning permission. Pill L.J., disagreeing with Sullvan L.J. and Longmore L.J. as to the breadth of the concept of expediency, stressed (in paragraph 91) the statutory context, and the question for the decision-maker, therefore, will be whether the decision contemplated is

> "expedient having regard to the development plan and to any other material considerations? The word permits latitude in an evaluation but the evaluation must be based on matters lawfully taken into account, in my view considerations relating to the character, use or development of the land".

Submissions

53. For Gazelle and SES, Mr David Elvin QC submitted that, in the light of the principle acknowledged in the House of Lords decisions in *Davy v. Spelthorne* and *Wicks*, and following the approach adopted by the court in *ex parte Knott*, it is plain that the court does have jurisdiction, on a claim for judicial review, to entertain and determine issues, such as those which arise in the present case, which go to a local planning authority's consideration of the expediency of taking enforcement action. Though the Council relies on the provision in section 285 of the 1990 Act that the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever "on any of the grounds on which such an appeal may be brought", it is those words themselves which demonstrate the difficulty with the argument it seeks to advance. The present claim for judicial review, submitted Mr Elvin, clearly raises matters which could not be the subject of an appeal under section 174 of the 1990 Act.

54. For the Council Mr Towler submitted that the exclusive provisions cannot be avoided by bringing proceedings for a declaration in anticipation of a notice being issued and served, if the substance of the proceedings, once the notice has been served, is a challenge to its validity falling within section 174(2). He referred to *Square Meals Frozen Foods v Dunstable* [1974] 1 WLR 59, in which the Court of Appeal held that the proceedings were barred by the predecessor provision to section 285(1) of the 1990 Act and should in any event be stayed because the statutory appeals procedure was a comprehensive and also more convenient procedure for dealing with all the matters raised in the case. In *R. (on the application of Sivasubramaniam) v. Wandsworth County Court* [2003] 1 WLR 475 Lord Phillips M.R. (giving the judgment of the court) stated (in paragraph 47) that there was:

> "an abundance of authority for the proposition that judicial review is customarily refused as an exercise of judicial discretion where an alternative remedy is available. Where Parliament has provided a statutory appeal procedure it will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory than the procedure of judicial review."

In that case the Court of Appeal referred to a number of authorities to that effect (including *R v Birmingham City Council, ex parte Ferrero* [1993] 1 All ER 530 per Taylor L.J. at p. 537c) and also recognized that special considerations applied in the case of immigration appeals (see paragraphs 51 and 52). Mr Towler submitted, in effect, that the authorities cited by Mr Elvin to found the proposition that the court has jurisdiction to hear the present claim in truth provide no support for it. The cases of *R v Camden L.B.C., ex parte Comyn Ching and R. v. Wiltshire County Council, ex parte Nettlecombe* are, said Mr Towler, clearly distinguishable on their facts. In the *Camden* case the CPO had not taken effect and therefore the privative provisions did not apply. In the *Wiltshire* case, which concerned the regime in section 66 of, and Schedule 15 to, the Wildlife and Countryside Act 1981, the respondent authority's counsel conceded that there was no factual basis to support the Council's resolution to designate a route as a Byway Open to All Traffic. *Davy v Spelthorne DC* concerned a claim for negligence relating to advice by a planning officer in connection with an issued enforcement notice, which clearly fell outside the statutory grounds of appeal. The case of *Wicks* involved a criminal prosecution in the Magistrates' Court for a failure to comply with an enforcement notice in which the defendant sought to rely on matters which might have been challenged under the statutory grounds of appeal as part of his defence to that criminal charge. In *ex parte Knott* revocation and discontinuance orders were already in existence and the court concluded that there was, in those circumstances, no need to issue enforcement notices as well.

Discussion

55. I accept Mr Elvin's submissions on jurisdiction. Section 285 leaves for the court, on a claim for judicial review, grounds of challenge to the decision of a local planning authority to take enforcement action which are not within the compass of a statutory appeal as provided in section 174. Such grounds were described by Lord Hoffmann in *Wicks* as "residual". Nowhere in the relevant authorities are they precisely or comprehensively defined. But, as Lord Hoffmann emphasized, the deliberate inclusion by Parliament of the words "on any of the grounds on which such an appeal may be brought" in the preclusive provision in section 285(1) is recognition of the fact that there is a category of challenge to an enforcement notice which is not within the ambit of section 174. The specific grounds in section 174 are for decision-makers on appeals, not for the courts. This much is effectively acknowledged in the statutory code itself. Where the line is to be drawn between the statutory grounds and the residual category is for the court to determine. And the court has been cautious in drawing that line no further than the traditional boundaries of judicial review, as is shown by the Court of Appeal's decision in the *Wolverhampton* case.

56. As Mr Elvin submitted, two conclusions which are pertinent here emerge from that case and Ouseley J.'s decision in *Usk*: first, that the concept of "expediency" in contexts which include the exercise of enforcement powers by a local planning authority goes wider than the concept of material planning considerations such as are engaged in the determination of an application for planning permission, extending, in the enforcement context, to the balance of advantage and disadvantage to the public interest and, in particular, the question of whether the potential gain in going ahead with enforcement action against an identified breach of planning control is worth the cost and time likely to be spent in doing so; and, secondly, that an authority's exercise of its discretion when making an "expediency" decision is susceptible to review by the court on conventional public law grounds.

57. The "residual" category of grounds is not so narrowly confined as being limited only to cases of bad faith or bias. It may safely be said to include the exceptional case where, as Lord Hoffmann put it in *Wicks*, "the decision to issue the notice was based upon irrelevant or improper grounds". One illustration of the kind of case that falls on this side of the line is to be seen in *ex parte Knott*. Another, in my judgment, would be the case where a local planning authority's consideration of the question of expediency – an exercise embracing the factors mentioned by Ouseley J. in *Usk* – was vitiated by irrationality or unfairness. Moreover, if matters relevant to the question of expediency and beyond the reach of the statutory grounds of appeal are ignored, or, as a corollary, if matters not relevant to that question are taken into account, the court's jurisdiction is not excluded by section 285. In my view therefore Mr Towler was right to acknowledge, without conceding their merit, that there are some matters raised in the present claim which are susceptible to judicial review. Those matters are clearly to be distinguished from the appraisal of planning merit required by an appeal on ground (a) in section 174(2) (which is equivalent to the task facing an authority dealing with an application under section 70), from the fact finding exercise entailed in considering an appeal on ground (b), (c), (d) or (e), and from the judgments called for by an appeal on ground (f) or (g). So to conclude is, I believe, wholly consistent with the principles to which I have referred in *Wicks* and *Davy v. Spelthorne*, and it is not at odds with the jurisprudence which informed the cases on which Mr Towler relied.

58. Further support for that conclusion, albeit on a somewhat different rationale, can be seen in the decision of Dyson J., as he then was, in the *Wiltshire* case (at p.713):

> "In my judgment, the court does have jurisdiction to entertain the application in the instant case. No good reason has been advanced against the existence of the jurisdiction. The existence of the statutory regime alone, in circumstances where it is accepted that the ouster clause does not bite, is not enough. It might be said that the fact that the ouster clause deals with certain situations gives rise to the inference that Parliament did not intend to exclude the availability of judicial review in other situations. I prefer, however, to rest my decision on wider considerations. There has to be a good reason to deny jurisdiction. Prima facie, a party is entitled to have recourse to the court. It seems to me that the existence of the statutory remedy of public inquiry by an Inspector and statutory appeal thereafter is relevant to the question of whether I should refuse relief in the exercise of my discretion. I do not consider that it goes to jurisdiction. I find it difficult to detect any material distinction between the present case and *ex parte Comyn Ching*. [Counsel] did not identify any such distinction. His argument involves the proposition that, where a Council is threatening to commit a plain error of law … an aggrieved party cannot seek the

> intervention of the Court. Instead, he or she is obliged to embark on the often time consuming and costly procedure of a public inquiry, in which objectors can make representations, possibly involving detailed factual investigations, with the risk that the Inspector may repeat the Council's error of law. [Counsel] did not seek to justify this, save by reference to the existence of the statutory regime."

(cf. the judgment of Lord Denning M.R. in *Square Meals Frozen Foods Ltd.*, at p.65 F-H).

Conclusion

59. For the reasons I have given, I am satisfied that, in principle, an attack on the Council's decision on the expediency of taking enforcement action may legitimately be pursued by means of a claim for judicial review. It will, however, be necessary, for each of the issues with which I now go on to deal, to consider whether the challenge on that particular issue truly belongs to the "residual" grounds outside the scope of section 174(2) of the 1990 Act.

Issue (2): whether the decision of the Council's committee was vitiated by a failure to have regard to negotiations

Submissions

60. Mr Elvin submitted that a decision to take enforcement action is discretionary, and, as a statutory pre-requisite to the exercise of that discretion in favour of enforcement, it must appear to the local planning authority that it is "expedient" to take that course (section 172(1)). In the present case it was incumbent on the Council's committee to ask itself whether the objectives of enforcement might nevertheless be achieved without resort to enforcement action. The Council's own policy for the enforcement of planning control, reflecting national policy in PPG18, indicates that the Council will endeavour to negotiate compliance or a resolution of the dispute rather then taking enforcement action. The committee did not consider, for example, whether, in view of the progress that had been made in negotiations, it would be expedient to delegate the taking of enforcement action to officers or whether it might better defer such action to enable the SES initiative which Mr White had wanted to explain to members to be further explored. The officers' advice to the members appears to have been, in effect, that negotiations were immaterial and that they were not entitled to give any weight to the negotiations at all, because they were not material. At least one member on the committee, Councillor Wilcox, had asked whether a "select committee" approach to considering the future of the site could be adopted. The Council's position was that by the time the committee met in February 2009 there had been sufficient time for Gazelle or SES to submit an application for planning permission. But this was not what the Council had decided, and it was not what the committee's Chairman had said.

61. Mr Towler countered those submissions with the contention that, as a matter of fact, Gazelle had refused to negotiate and that SES was not in "advanced negotiations" with the Council. Preliminary discussions had taken place, but there had been no meetings of any substance since October 2008. Nor had an application for planning permission been submitted. And, in any case, the use of the site envisaged by Gazelle and SES was, in principle, contrary to policy. Mr Towler submitted that the committee's refusal to allow Mr White to read the statement he wished to read at the meeting was correct. The Council had been endeavouring for some time to negotiate with Gazelle. In June 2007, because Gazelle had at that stage indicated that it wished to negotiate, officers of the Council had agreed not to take a report to committee recommending that authority be given for the taking of enforcement action. After that there had been no meaningful negotiations. Invitations to meet the Council's officers were rejected. SES, for its part, had never submitted an application for planning permission. This was the context in which the decision was taken to prevent Mr White from reading his statement. That statement was not accurate, in two respects. In the first place, it wrongly asserted that negotiations were at an advanced stage. And, secondly, it was incorrect to state that officers were committed to SES's proposal. Mr Towler added that if local planning authorities had to refrain from considering enforcement action whenever speculative proposals were put forward, the effective enforcement of planning control would be undermined. But in the present case the possibility of an application being made by SES was not material to the committee's consideration of the unauthorized development that had taken place on the site, nor would it have relieved the need for the Council to consider the harm resulting from breaches of planning control on this prominent site in the Green Belt. The notion of a "select committee" approach to enforcement was not recognized in the Council's Constitution. Deferring their decision was an option open to the members, as they well knew, but they did not want to do that.

Discussion

62. I accept the submissions made by Mr Elvin on this issue.

63. One must begin, I believe, with an understanding of the statutory context for the decision the Council's committee went about making at its meeting in February 2009. The context is provided by section 172(1) of the 1990 Act, which required the committee to ask itself, first, whether there had been a breach of planning control (section 172(1)(a)) and, secondly, if the answer to that first question was "yes", whether it would or would not be expedient, having regard to the provisions of the development plan and to any other material considerations, to issue an enforcement notice (section 172(1)(b)). It is important to keep in mind that those two questions are separate. They imply the distinction between discerning a breach and deciding pragmatically what, if anything, ought to be done about it. This distinction was, as I see it, at the heart of the observations made by Ouseley J. in paragraphs 198 to 202 of his judgment in *Usk*, with which I would respectfully agree. Both questions required the committee to consider the relevant circumstances as they were at the time when they met. But the second question, if it arose, also required them to ask themselves whether the public interest demanded that enforcement action be proceeded with at that stage, and this made it necessary for them to take a reasonable and realistic view of the likely consequences of their going ahead with such action. This was an essential element of the expediency decision.

64. Did the members approach that decision lawfully when they excluded from it information and comment available to them about the discussions which had taken place between the Council and Gazelle and SES, including the negotiations which SES had had with the Council's Environmental Services department, and about the intentions of Gazelle and SES for the development of a waste recycling facility on the site? I do not believe that they did.

65. Even if one were to take the view that the considerations which bear on the expediency of issuing an enforcement notice must be considerations relating to the character, use and development of land, and must go no wider than that, it would be my view that the matters the members were told to disregard at the committee meeting on 18 February 2009 were matters truly germane to that question. They clearly embraced not only factors of relevance to the planning history of the site but also factors relevant to its planning future. And they were clearly capable of affecting the view to which the members had to come as to the good sense or otherwise of taking formal steps to remove the existing use or uses of the land. Whether, in land use planning terms, it would be advantageous to compel the present industrial activity on the site to cease when another form of industrial development might possibly commend itself to the Council surely had the potential to influence the decision with which the members were faced. They were not determining such a proposal, or pre-empting any future decision. But the prospect of such a scheme coming forward, against the background which Mr White wanted to describe and within the timescale he envisaged, was, in my judgment, a consideration material to expediency. There is, and could be, no suggestion that what Mr White wanted to say to the committee was motivated by bad faith, or was simply a last minute ruse to deflect the enforcement of planning control. His remarks, had they been listened to, might not have proved decisive, or even significant. But that is not for the court to judge. The court is concerned only with establishing materiality. And in my view the representations Mr White wanted to make to the members were a material consideration.

66. It may be, as Mr Elvin submitted, that the Council had confused or had failed to distinguish between, on the one hand, negotiations directed at securing compliance with planning control and, on the other, negotiations aimed at regularizing the use and development of the site, including the possibility of one form of industry being replaced with another as a result of the submission and approval of a proposal. These two purposes are not the same. In correspondence the Council's officers do seem to have concentrated on discussions about compliance rather than on any meaningful dialogue about the future of the site. But, in any event, the assertions made on behalf of the Council in the pre-application correspondence – and indeed the submissions made by Mr Towler – about the stage negotiations had reached late in 2008, and the unlikelihood of further progress being made, simply go to reinforce the point that those negotiations were relevant to the members' consideration of expediency. It might be the case that the parties were never going to reach agreement. It might be right that Mr White's optimism was misplaced, as the Council contends. There is clearly some contest about that. Mr Elvin suggested that a fair reading of Mr Smith's draft witness statement is that the withdrawal of the Council's Environmental Services' department from the submission of a joint application with SES was just a hiatus, and not an end to progress. This too might be so. But these were matters for the members to consider and give such weight as they saw fit.

67. The officers' advice to the committee was not that the negotiations about the future of the site had turned out to be abortive, nor that they had no more than a faint chance of coming to anything. The fact is that there seems to have been no advice at all on this topic, one way or the other.

68. The difficulty for Mr Towler's submissions on this issue lies in the crucial difference between materiality and weight. It is one thing to say that a consideration is not material, and quite another to say that it is material but should command little or no weight (see *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 W.L.R. 759, per Lord Hoffmann at p. 780). Mr Towler could not argue that the negotiations over the future of the site and the intentions of SES were material but given no weight, because there is no doubt that, at the committee meeting, both the officers and the members appear to have convinced themselves that these matters were immaterial. Mr Towler was not able to refute the clear evidence in the minutes that the members simply prevented themselves from judging what weight the negotiations and the intentions of SES should have. The members ought to have been allowed to make up their own minds on the weight, if any, to be given to the negotiations and, in particular, to Mr White's representations so that they could put that factor in the balance with the others which militated for or against the taking of enforcement action. Without that factor they could not properly strike the balance they had to strike. That they failed to do this was, in my judgment, a basic and fatal error. And I am no doubt that it is the kind of error which attracts relief in a claim for judicial review, rather than one which ought to be left, or could be, to an inspector hearing a statutory enforcement appeal.

Conclusion

69. For the reasons I have given this ground of the challenge succeeds.

Issue (3): whether the delegated decision was vitiated by a failure to have regard to negotiations

Submissions

70. Mr Elvin submitted that the scope of the officers' delegated authority was defined by the delegation. To paraphrase the resolution: the Divisional Director of Planning and Transport Development, Mr Trigwell, in consultation with the Planning and Environmental Law Manager, was given authority, by virtue of that delegation, to take any necessary action on behalf of the Council to deal as he saw fit with the contraventions of planning control the members had identified. On the face of the document which Mr Trigwell completed, his decision and the members' were incompatible. The members had purposely given no attention to whether negotiations had failed, or to the intentions of Gazelle and SES, whereas Mr Trigwell patently did have regard to negotiations, though it was not clear from his document quite what it was that he did consider. Matters that were irrelevant at the time of the committee meeting could scarcely have become relevant a few days later, and vice versa. It was not open to the officer under delegated authority unilaterally to issue enforcement notices, partly at least on the basis of factors which the committee had ruled out of account. This ran counter to the principle apparent in the decision of the Court of Appeal in *Kides.* And it was no answer to point out, as had the Council in its detailed grounds, that the alleged failure of negotiations was but one of several factors in the officer's decision. Even if everything else in Mr Trigwell's document was as it ought to be, this one factor was enough to make the officer's decision bad.

71. Mr Towler submitted that there could be no dispute about the committee's power to delegate the decision on the taking of any necessary enforcement action to its officers. The submissions made for Gazelle and SES betray a misunderstanding of what it was that the committee actually resolved. The resolution was to grant "delegated authority" to Mr Trigwell to "take any necessary action" on behalf of the Council "in respect of the alleged planning contraventions set out above by exercising the powers and duties (as applicable) under Parts VII and VIII of the 1990 Act …". Parts VII and VIII of the 1990 Act contain a range of enforcement powers. In authorizing the officer to take "any necessary action" the resolution left to him the decision as to what the appropriate action would be at the time of his decision. He had a discretion as to what he should do. The only limit on that discretion was that it must be exercised in respect of the planning contraventions identified in the minutes, which in turn refer to the reports given in writing and orally by officers to the committee. Neither the resolution itself nor legal principle required the officer when subsequently making his decision to restrict his consideration to the matters which were before the committee. The position here was not analogous to that in *Kides*. The fact that there had been no meaningful negotiations was material to the officer's decision. That decision, said Mr Towler, was consistent with the relevant advice in paragraph 5(5) of PPG18, and was informed by all relevant matters, including the history of the site.

Discussion

72. On this issue too I accept Mr Elvin's argument.

73. There is, in my judgment, an obvious tension between Mr Towler's submissions here and those he made in resisting the contention that the committee was entitled to ignore what Mr White had wanted to say about the negotiations and the intentions of SES. What Mr Towler had to say on this issue was, in effect, that Mr Trigwell, when acting on the authority delegated to him, was not only entitled to have regard to the progress – or lack of it – in negotiations between the Council and Gazelle but bound to take that factor into account because it was – as it was put in paragraph 49 of Mr Towler's skeleton argument – "material".

74. In my judgment, the Council cannot have it both ways on the relevance of the negotiations to its decision to take enforcement action. If the negotiations were material to the delegated decision of Mr Trigwell, they were material to the members' decision from which the delegation sprang. Because they went to expediency, as I have held they did, they were in my view clearly relevant at the committee stage, when that issue was addressed, and did not become so only after the members had made their decision. Moreover, if they were material, they were, in my judgment, relevant in both of their aspects – compliance and regularization – and not just the former. In other words, it was necessary to consider not merely the question of whether, if enforcement action were not taken, the alleged breach of planning control was going to be removed or controlled to the satisfaction of the Council within a period of its choosing, but also whether there was a prospect of a satisfactory solution being found for the site through the initiative of a development proposal.

75. Mr Trigwell has not produced any evidence to explain precisely what he meant in the succinct remarks about negotiations which he made in completing his document entitled "Enforcement/Prosecution Considerations". If those remarks are taken at face value they seem to give rise to three conclusions. In the first place, the fact of "negotiations" itself and the perceived "failure of negotiations to conclude issues" were regarded, at least by Mr Trigwell when acting on his delegated authority, as material to the decision whether or not to issue enforcement notices. Secondly, the proposition that the "attitude" of the "landowner/offender" was one of unwillingness to negotiate seems to leave out of account the thinking and behaviour of SES, which, on a fair view, could be seen as the opposite of unwilling. And thirdly, following my conclusion on the previous issue, although the attitude and aspirations of SES were material considerations, they were apparently not regarded as such by the officer. It follows that Mr Trigwell's decision to issue the enforcement notices was, at least to this extent, infected by the same error as I have found in the members' approach.

76. I do not think that the officer's failure to have regard to the intentions of SES is overridden by the Government's advice in paragraph 5(5) of PPG 18 that where a local planning authority fails in an initial attempt to persuade the owner or occupier of the site to remedy the harmful effects of unauthorized development, "negotiations should not be allowed to hamper or delay whatever formal enforcement action may be required to make the development acceptable on planning grounds, or to compel it to stop". That advice does not say that negotiations are generally immaterial to the question of whether enforcement action is required or not, and in my view it should not be read in that way. It needs to be set in the broader context of the advice in PPG 18, the tenor of which is to support a case-specific consideration of whether the taking of enforcement action is essential.

77. As with the previous ground, so too with this: the error is an error of law, and there is no reason why the court should not intervene to grant appropriate relief.

Conclusion

78. I conclude that the claim must succeed on this ground.

Issue (4): whether the committee's decision to delegate and the delegated decision were unfair and irrational

Submissions

79. Mr Elvin's submissions on this issue mirrored what he had said on the previous two. He submitted that to both the members' decision to delegate and the officers' decision upon that delegation the basic principles of fairness applied. As Woolf J. (as he then was) held in *R. v. Monmouth District Council, ex parte Jones* [1985] 53 P. & C.R. 108 (at p.115) a local planning authority is "under an obligation to consider [an] application for planning permission fairly". When it is considering the expediency of taking enforcement action, or when it is delegating the decision to do so, the obligation is the same. It is underpinned by Article 6 of the Human Rights Convention. In the present case, both the members' decision, deliberately taken in reliance on advice that the preceding negotiations and the intentions of SES for a waste plant on the site were immaterial, and the officer's delegated decision, consciously taken on the basis that Gazelle was "unwilling to negotiate" and that negotiations had in fact "failed", were, in the first place, irrational. The first decision was irrational because no reasonable local planning authority could have regarded the negotiations and the intentions of SES as other than relevant and important in the Council's consideration of expediency. The second decision was irrational both because it was inconsistent in its approach with the first and because it was patently wrong as a matter of fact, or, at best, partial in the sense that it ignored the intentions of SES. And, secondly, both of these decisions were also unfair because both of them were taken after Mr White had been prevented from sharing with the members his comments on the proposals SES wanted to pursue, and the support they had received in discussions with the officers of the Council as waste authority. Had the officer acknowledged the willingness of SES to take forward its proposal for the site in co-operation with Gazelle as the owner of the land, he could not reasonably have characterized the attitude of the "landowner" as being hostile to negotiation. The perversity of this process of decision-making was only compounded by the Council's subsequent decision to allocate effectively the same piece of land for the kind of use that SES was urging in February 2009.

80. Mr Towler submitted that there was no unfairness or irrationality in the committee's decision to delegate the taking of enforcement action, nor in the delegated decision itself. This decision must be seen in the right context. That context included, as the background to the committee's consideration of alleged breaches of planning control on the site, the long history of such breaches, the lack of any tangible outcome to negotiations, and the absence of an application for planning permission for a real proposal which might have undone the harm that was being caused to the Green Belt. Viewed in that context the officer's decision should be seen as being a rational determination which he was entitled to make.

Discussion

81. Again, I accept Mr Elvin's submissions.

82. This issue is closely connected with the previous two, and my conclusions on it are similar.

83. In my view, it cannot sensibly be denied that in preventing Mr White from speaking at its meeting on 18 February 2009 the Council's committee acted unfairly. Mr White had something relevant to say about the matters in hand. He was entitled to have that taken into account by the members. There was no reasonable basis for the committee refusing to do that. Fairness in the making of a planning decision extends in both directions: to applicant and to objector (see *R.v. Monmouth District Council, ex parte Jones* [1985] 53 P.& C.R. 108, per Woolf J. (as he the was) at p.115). The unfairness in Mr White not being heard affected not only SES, but also Gazelle, as landowner, facing the possibility of enforcement action being launched against the current use of its site. The interests of both were prejudiced. It is enough that there was something which might have affected the outcome. As was held in *Hibernian Property Co. Ltd. v. Secretary of State for the Environment and another* (1974) 27 P.& C.R. 197, a case in which objectors to a compulsory purchase order had not had the opportunity of commenting on information taken by the inspector from other objectors in the course of her site inspection, the court is concerned here with the loss of a chance to influence the outcome. In that case Browne J. stated (at p. 211):

> "… the question is not whether the information obtained by the inspector did in fact prejudice the applicants by contributing to the decision of the Secretary of State to confirm the compulsory purchase order but whether there is a risk that it may have done so."

That is not a high test. Applying it in this case, I find it impossible to say that there is no risk that what Mr White wanted to say to the members might have made a difference to their decision.

84. The other point in Mr Elvin's submissions is also made out. For the committee consciously to rule out any consideration of what Mr White had to say was, I consider, neither reasonable nor rational. I would have reached this view even in the absence of the Council's enforcement policy – underpinned as it was by national policy in PPG 18 – which sees relevance of the prospect of a negotiating a satisfactory outcome or means of regularizing the use or development of a site. The existence of that policy does, however, strengthen the conclusion that for the members to deny themselves any discussion of those matters and how much, if any weight, to give them, was irrational.

85. As on the previous two issues, I do not doubt that this part of the claim falls well within the province of judicial review.

Conclusion

86. This ground of the challenge therefore succeeds.

Issue (5): whether the committee's decision was procedurally unfair

Submissions

87. Mr Elvin's submissions on this issue were based on the complaint, which was made in the first claim, that the decision to delegate enforcement action made by the Council's committee in October 2008 was flawed by the committee's failure to have proper regard to the planning history of the site. The attack is now directed at the manner in which the planning history came to be dealt with in the course of the committee's meeting in February 2009. In particular, Mr Elvin submitted that the provision to the members outside the meeting of the ten documents comprised in Annex B to the committee report was procedurally unfair. The documents were not attached to the officers' report when it was made available to the public, nor were the public given the chance to comment on them. Despite the obvious importance of the history of the site, no advice was given to the committee during its meeting about the position the Council had previously taken on the presence and extent of a lawful Class B2 use on the site. No privilege could be claimed for the documents. Indeed, they were all familiar to Gazelle. There was, therefore, no good reason for the members to receive or consider the documents in private. Gazelle would have wanted to address the committee on the historic use of the site had it known this was going to feature in the members' deliberations. This was particularly unsatisfactory because Gazelle had been assured by Mr Trigwell that the rationale for any enforcement action, in the light of the planning history and the Council's understanding of the planning unit, would be explained to it. It was not fair to Gazelle that the members received advice on those matters "in secret". Mr Elvin referred to the well-known observations of Lord Russell of Killowen in *Fairmount Investments Ltd. V. The Secretary of State for the Environment* [1976] 1 W.L.R 1255 (at pp. 1265A to 1266A) on the need for parties to be given "a fair crack of the whip", and to the speech of Lord Mustill in *R. v. The Secretary of State for the Home Department, ex parte Doody* [1994] 1 A.C. 531 (at p. 560):

> "… Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; … . Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

The reason for withholding from the public the information which the Council had about the site's planning history had not been explained, said Mr Elvin, and the unfairness of its having done so taints both the committee's and the officer's decision.

93. Mr Towler submitted that this part of the claim is misconceived. The members' decision to adjourn was properly taken. There was no closed session of their meeting. They simply adjourned to enable themselves to retire and consider the papers comprising Annex B to the officers' report. Those papers had been compiled by the officers to assist the members in their understanding the planning history of the site. This reflected the complaint, made on behalf of Gazelle in its solicitors' letter dated 15 December 2008 preceding the first claim for judicial review, that at the October 2008 meeting the members had been given an incomplete history. This amounted to no

more than doing what the Council had been asked to do by Gazelle's solicitors. What had happened in this instance was no different from the quite normal giving of informal advice to members before or during a committee meeting. To accept the principle that such briefings should never occur in private would, as Mr Towler put it in his skeleton argument, "cause chaos to local government administration".

Discussion

89. I consider that Mr Towler's submissions on this issue are correct.

90. In the circumstances I see nothing sinister or untoward in the documents that were provided to the members being given to them outside the meeting. No real prejudice or unfairness to anybody resulted from this. Gazelle had seen, or had had access to, all of these documents. Their solicitors had been able to comment on them in representations to the Council, and the members had those representations before them.

91. Reference to Annex B was made in the list of annexes on the first page of the report for the February 2009 meeting. The document referred to there was a front sheet identifying the documents mentioned in paragraph 6 of Gazelle's solicitors' letter of 15 December 2008. All of the documents identified were in Gazelle's possession and their solicitors had already commented on the matters they raised not only in that letter, which was itself provided to the members, but also, at length, in Mr Bosworth's letter of 30 June 2008 to Mr Trigwell. Indeed, it was for this very reason that the documents were made available to the committee. I do not doubt the evidence which has been given about what happened during the adjournment of the committee meeting, by Ms Horrill in her witness statement of 21 August 2009 (in paragraph 10) and by Ms Bartlett in hers of 20 October 2009 (in paragraph 78), the gist of which is that during the adjournment copies of the documents referred to in Annex B to the officers' report were made available to the members, but that neither any other material nor any additional advice was given to them by the officers.

92. This was not a case of members of a committee receiving, outside the meeting of that committee, entirely new material relating to an item on their agenda or material which had not previously been seen by the parties involved. What happened in this instance was that the committee was given the very material the absence of which at its meeting in October 2008 had moved Gazelle's solicitors to complain in their letter of 15 December 2008. The complaint had been that the officers' report to the October meeting had failed to provide the committee with a full picture of the planning history of the site. Behind this lay Mr Bosworth's letter of 30 June 2008 identifying the occasions on which the Council had previously confirmed the Class B2 use of the site.

93. I accept that the officers who were briefing the members at the committee meeting in February 2009, and presumably the members themselves, wanted to ensure that the Council could not again be criticized for failing to have regard to the planning history as it was displayed in materials which Gazelle, or their solicitors, thought significant. Had the documents not been provided to the committee, it seems likely that the complaint made in the first claim would have been repeated in the present proceedings. The point now taken is a very different one. It is not about the adequacy of the information the members received but about the circumstances in which they were given it. If the documents had been produced and discussed in the meeting itself Gazelle could not, and presumably would not, have complained. This does not mean, however, that the submissions made by Mr Elvin are cogent. In my judgment, for the reasons I have given, they are not.

Conclusion

94. This ground of the application therefore fails.

Issue (6): the planning unit

Submissions

95. Mr Elvin's submissions on this issue took as their starting point the complaint made in Gazelle's first claim for judicial review that, in their report for the committee meeting in October 2008, the Council's officers had failed to apprise the committee of the considerations necessary to ascertain the relevant planning unit. The essence of the complaint was that although the officers' had recognized the

relevance of the concept of the planning unit in a case where dispute had arisen as to a material change of use, had set out for the members the considerations bearing on the proper identification of the planning unit, and had suggested the location and extent of the planning unit within which the composite use was said to have been begun, they had not properly assessed the planning unit to which the lawful Class B2 use related. Mr Elvin submitted that this shortcoming had not been put right in the report for the committee meeting in February 2009. Once again the officers had acknowledged that it was necessary to identify the planning unit to which the enforcement action might relate. But again they had failed to come to come to grips with the question of what the planning unit actually was. Had they done so the members might never have concluded that the taking of enforcement action was expedient.

96. Mr Towler submitted that the question of the true extent of the planning unit was not a matter for the court, but for an inspector hearing a section 174 appeal. In other words, this issue lies beyond the scope of the court's jurisdiction on a claim for judicial review. In any event, the question of the planning unit was addressed, and properly addressed, in both the October 2008 and the February 2009 committee meetings. The members were shown a power-point presentation and various drawings, as Ms Bartlett had described in her evidence. The Council's contention was that a new chapter has opened in the planning history of the site, changes having taken place in the extent of planning unit and in the uses going on within that unit. But, be that as it may, the committee did not fall into any justiciable error when grappling with this aspect of the whole matter.

Discussion

97. I accept Mr Towler's submissions on this issue.

98. Here, in my judgment, although Mr Elvin maintained that this part of the challenge went no further than to impugn the process by which the planning unit had been considered, or not considered, by the Council, the claim does trespass into the territory defined by the statutory grounds of appeal in section 172 of the 1990 Act. The court's jurisdiction is therefore excluded by section 285 of the 1990 Act. There is good reason for this. Matters of fact and degree are quintessentially the responsibility of inspectors dealing with enforcement and other planning appeals. Inspectors find the facts. They scrutinize the relevant planning history. If there is dispute, which often there is, as to the implications of events that have occurred in what may be a lengthy and complex history, for example a material change in the use of land within or including the site on appeal, or the abandonment of a particular use or the intensification or expansion of a particular activity, it is for the inspector to resolve. He hears the evidence and submissions. He inspects the site and its surroundings. Ascertaining the extent of the planning unit, if that is controversial, will be a basic exercise for him to undertake, applying tests which are well established. None of this is the business of the court on a claim for judicial review.

99. It is true that Mr Elvin's submissions acknowledge all of that. He was careful to stress that his aim was at the procedural, not the substantive dimension of the Council's decision. But the divide is not distinct. When one looks at the statutory grounds which have been submitted to the Planning Inspectorate on behalf of Gazelle in its appeal against the first enforcement notice, one sees in the appeal on ground (b) that the issue of the true extent of the planning unit is squarely raised:

> "The enforcement notice alleges that a single composite planning unit has been created throughout the area referred to in the notice. This is not the case. Although the freehold of the land identified in the notice is in one ownership the uses described in the notice are neither functionally nor physically related to one another and the change of use that is alleged has not occurred."

Should those contentions be resisted by the Council this would be an issue for the inspector hearing Gazelle's section 174 appeal. The strength of either side's case on that issue is not for the court to decide. Within the statutory process Gazelle would be able to put forward its case, through evidence and submissions, on the extent of the planning unit which it believes has the benefit of a lawful use in Class B2. The Council, whether or not it has so far considered the question as closely as Gazelle suggests it ought to have done, would have to confront that case. The inspector would have to decide which case was right. If the Council has not yet addressed its mind to the question, though it seems firm in its belief that it has, it would be well advised to do so before producing its evidence for the appeal. If its case did not stand up to scrutiny and it were shown to have behaved unreasonably in this respect it would be exposed to the possibility of costs being awarded against it. Those matters, however, would be for the inspector; they are not for the court.

Conclusion

100. This ground of the claim therefore fails.

Issue (7): whether the Council's continuing decision to enforce is vitiated by failure to reconsider the expediency of enforcement action in the light of the proposed allocation of the Fuller's Earth Site in the emerging Joint Waste Core Strategy

Submissions

101. Mr Elvin submitted that, irrespective of the position in February 2009, the mandate to enforce conferred on the officers then could not survive the subsequent proposed allocation of the site for a waste recycling facility in the development plan. This was a material change of circumstances calling for the matter to be put back before the members, or, at least, for the officers to exercise their own discretion again. Neither had happened. It was, Mr Elvin submitted, well established that a decision coming after a claim for judicial review had been made might itself be reviewed if it were germane to the one already impugned. For this proposition he cited three immigration cases, namely *R. v. The Secretary of State for the Home Department, ex parte Alabi* [1997] I.N.L.R. 124, *R. v. The Secretary of State for the Home Department, ex parte Turgut* [2001] 1 All E.R. 719 and *E v.The Secretary of State for the Home Department* [2004] Q.B. 1074, and two planning cases, namely *Kides* (to which I have already referred) and *R.(on the application of Dry) v. West Oxfordshire District Council* [2010] EWCA 1143. Mr Elvin submitted that in a case such as the present, in which more than 20 months have elapsed since the decisions under challenge were made, it was not merely possible but necessary for the court to have regard to the situation as it is now. For the Council to persist now in its decision that enforcement action is expedient in this case, without formally reconsidering that decision, was irrational. The exercise of the statutory discretion to take enforcement action is predicated, in the first place, on it appearing to the local planning authority that a breach of planning control had emerged, but also, secondly, on the authority considering it expedient to enforce having regard to the development plan and other material considerations. It is pertinent that, once an enforcement notice has been issued, the authority has power, under section 173 A of the 1990 Act, to withdraw it, or to waive or relax its requirements, at any time. The existence of this power implies the need for a continuing discretion to be exercised in the enforcement of planning control in the light of circumstances as they evolve. Analogous to this requirement, Mr Elvin argued, is the duty of a local planning authority, under section 70(2), to take into account, before issuing its formal decision on an application for planning permission, any new material consideration – indeed, anything that might rationally be regarded as a material consideration – arising after the resolution to grant or to refuse has been made. This duty had been underlined by the Court of Appeal's decisions in *Kides* and *Dry*. The principle was the same in an enforcement case. Enforcement action engages the public interest. If it ceases to be in the public interest to pursue it the local planning authority should not do so. In the present case it was obvious that the Council ought to have asked itself whether it ought to withdraw the enforcement notices once it had decided to promote the allocation of the site for waste recycling development in the joint waste core strategy. Having maintained that proposal in the face of opposition to it at the public examination of the draft core strategy, the Council now has no sensible choice but to desist from enforcing against industrial use on the site.

102. Mr Towler did not accept the concept that a local planning authority which has initiated enforcement action is under a continuing duty to review the appropriateness of proceeding with such action. None of the authorities cited by Mr Elvin sustains the proposition he sought to gain from them. Both of the planning cases relied upon could be materially distinguished on their facts. The immigration cases Mr Elvin relied on are also distinguishable. As Ms Jacques had explained in her witness statement of 16 November 2010, the present uses on the site which have been enforced against are contrary to Green Belt policy. The use now proposed to be allocated by the Council in the Joint Waste Core Strategy would also be contrary to that policy. That use is a "sui generis" use and is therefore not the same as the use for which planning permission is being sought through the ground (a) appeal against the first enforcement notice. Moreover, as Ms Jacques had said, even if the site is eventually allocated, the Council does not envisage a waste facility being built on it for some five years hence. The timescale for the site's development in accordance with the allocation remains to be resolved. Thus, on the facts of the present case, taking the question of the expediency of enforcement action back to the committee could not be justified. Only when the result of the Inspector's deliberations on the proposed allocation and the outcome of the present proceedings are known would it be right for the committee to consider the matter afresh. Gazelle has a remedy. If the Inspector who hears Gazelle's appeals against the enforcement notices concludes that the notices ought to have been withdrawn

before the inquiry and, therefore, that the Council had behaved unreasonably, he would be able to award costs in favour of Gazelle.

Discussion

103. In *Kides* the authority's committee had resolved in 1995 that it was minded to permit residential development subject to the completion of a section 106 agreement. That was done five years later, whereupon planning permission was issued by an officer without referring the matter back to the members for them to consider whether any new considerations which might cause them to change the authority's decision had arisen in the meantime. The Court of Appeal held that there was no requirement to take the proposal back to a committee in the particular circumstances of that case. Parker L.J. stated (in paragraphs 125 and 126 of his judgment):

> "125. … where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.
>
> 126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not might *reach*) the same decision."

In *Dry*, Carnwath L.J. referred to what Parker L.J. had said in *Kides* (in paragraph 126) and stated (in paragraph 16):

> "Without seeking to detract from the authority of the guidance in *Kides*, I would emphasise that it is only guidance as to what is advisable, "erring on the side of caution". Furthermore, in that case there had been a gap of five years between the resolution and the issue of permission. The guidance must be applied with common sense, and with regard to the facts of a particular case."

104. I see a distinction between the situation in which a local planning authority has not yet issued a statutory decision on an application for planning permission, though it may have resolved to grant such permission, and that in which it has both resolved to issue and has issued an enforcement notice to remedy a breach of planning control. The former situation can be said to be one in which the particular statutory process involved is still incomplete; in the latter the relevant process has reached its finality. But, as Mr Elvin points out, the position is not quite as simple as that. The existence of the power in section 173A to withdraw or amend an enforcement notice after it has been issued, and even after it has taken effect, implies a continuing responsibility for the authority to keep under review the expediency of the action it has decided to take.

105. Whether or not it would be right to construct from section 173A a continuous, proactive duty to review, as Mr Elvin's submissions suggest, it is only necessary for the purposes of the present case to discern the requirement that the power conferred by this provision be exercised in accordance with public law principle. What this means at least, in my view, is that when there emerges, while an enforcement notice subsists, some new factor of which the local planning authority is or should be aware, and which is material to the expediency of the notice, the authority should consider whether to exercise its power to withdraw or amend. It seems to me that this accords with the rather broader statement in the note at P173A.03 in the Encyclopedia of Planning Law and Practice, which I would respectfully endorse:

> "The ability to withdraw a notice that has come into effect allows the authority to sweep clean the planning title of a site where the enforcement notice is no longer relevant."

106. What then are the consequences of such a requirement in this case? I think they are clear. In pursuing the allocation of the site for a waste recycling facility the Council has self-evidently accepted the principle of this form of industrial use on the site, no matter whether it is properly to be categorized as a "sui generis" or as a Class B2 use. To have done this the Council must presumably have considered whether such a facility could be acceptable in principle, notwithstanding the site's presence in the Green Belt and its proximity to the Area of Outstanding Natural Beauty and the World Heritage Site. As Mr Elvin observed, the fact that the site had originally been kept out of the emerging core strategy, and was only put in after enforcement action had been taken, is itself a material change in circumstances. I do not think that the fact that any redevelopment of the site for such a waste recycling facility would necessarily require planning permission, or the fact that the Council apparently does not see the site being required for this purpose immediately, goes against that acceptance in principle. In my judgment, the fact of the site's having been promoted for waste recycling development is, on any sensible view, a consideration relevant not merely to the merits of Gazelle's ground (a) appeals against the enforcement notices but also to the expediency of the very decision to enforce.

107. Although the Allocation of the Fuller's Earth Site in the waste core strategy is not yet certain, the fact of its promotion by the Council is. It seems plain from paragraph 23 of Ms Bartlett's witness statement of 16 November 2010 that neither by a decision of its Development Control Committee nor by Mr Trigwell exercising his delegated authority – if, having issued the enforcement notices, he retains such authority – has the Council considered whether the progress of the proposed allocation and its own support for that allocation are factors which would justify the exercise of the power available to it under section 173A. I accept the submission of Mr Elvin that this ought to have been done. At this stage the proposed allocation is, without doubt, a material consideration which goes to the expediency of the enforcement action which the Council has seen fit to take. And for this reason, in my judgment, it is a matter for the members, not Mr Trigwell, to weigh.

Conclusion

108. For the reasons I have given this ground is sustained.

109. To the extent that I have indicated this application therefore succeeds. I shall hear counsel as to the appropriate form of relief.