SECTION 106 AGREEMENT TO SECURE MITIGATION MEASURES

I have been asked to advise on the use of a Section 106 agreement to secure possible mitigation measures which have been and may further be, proposed by Network Rail (“NR”)/Southern Rail (“SR”). This is a difficult case and the approach suggested is novel in light of the fact that NR/SR’s case has always been that the development undertaken at Streatham Hill is permitted pursuant to Parts 11 and/or Part 17 of the GPDO 1995. However, the Council has determined that some of the works do constitute a breach of planning control and the next issue to be determined is whether it is expedient to issue an enforcement notice.

One of the issues that arose at the meeting on 16 September 2008 was how best to secure mitigation measures which have been proposed by NR/SR as a way, in part, to overcome the concerns of residents and Members. Further discussions are to be held with NR/SR as to what other measures could be sought. However, in the meantime, there needs to be a detailed consideration as to how to entrench those measures in a way that will ensure the Council can take some form of enforcement action if the works are not undertaken or not done in a satisfactory way.

The Council is not able to secure the measures by condition in light of the fact that there is no planning permission against which to impose those conditions. However, use of a Section 106 agreement is possible. Section 106 is usually entered into in the context of planning permissions, but the Act does not say that it has to be. A unilateral undertaking could therefore be submitted to the Council without the exercise of any public law power (for example, the grant of planning permission) by the local authority.

It has been argued that NR/SR would be unwilling to enter into such an agreement in light of the stance they have taken thus far, however, the Council has not agreed with their stance and furthermore they have offered mitigation measures. All the Council seeks to do is formalise those measures in a document. Additionally, the guidance set out in PPG18 encourages LPAs and developers to seek to find a compromise solution or explore mitigation measures, prior to issuing an enforcement notice. Seeking to negotiate a Section 106 agreement to secure those mitigation measures properly, in my view, complies with this guidance.
NR/SR have already experienced negative publicity as a result of this case. They should be encouraged to try to turn this around by taking steps to address some of the concerns raised by residents if possible. The negotiation of a Section 106 agreement to secure these measures would be seen in a more positive light.

NR/SR could submit a unilateral undertaking, but this will need to be checked very carefully and it is probable that a level of negotiation would be required before that document is in a form that is acceptable to the Council. In light of that, the best option would be to enter into a bilateral agreement with them. Obviously considerable input will be required by the Council’s rail expert to detail the level and nature of works required if agreed by NR/SR.

If NR/SR are willing to enter into a bilateral Section 106 agreement to secure the mitigation measures, the Council should seek to secure the measures in this way.
Meaning of the term ‘expedient’ in the context of section 172(1) Town and Country Planning Act 1990

We have been asked to consider what the meaning of expedient is in the context of section 172(1) Town and Country Planning Act 1990.

Section 172(1) of the Town and Country Planning Act 1990 states:
“The local planning authority may issue a 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.”

The term ‘expedient’ is not defined in the Town and Country Planning Act 1990 and as such we assume that the word ‘expedient’ should be interpreted in the context of its ordinary, natural meaning.

The Oxford English Dictionary defines expedient as meaning fit, proper or suitable to the circumstances of the case. This suggests that the local authority’s power to issue an enforcement notice is discretionary and their decision on whether or not they consider it is expedient to issue an enforcement notice will depend upon the facts and nature of the case in question.

The discretionary nature of the test is highlighted in the Planning Encyclopedia Volume 2 at page 2.3607 where it states that even in a case of a flagrant breach of planning control the local authority are not compelled to take enforcement action – it is optional.

In R. v Leominster DC Ex p. Pothecary (1998) 76 P. & C.R. 346, the Court of Appeal held that the that the assessment of facts and the weight to be given to different considerations in deciding whether a development was compatible with the local plan under the section 54A of the Act, was a matter for the local planning authority and not one for the court on an application for judicial review. Schiemann LJ noted:-

“The authority are only empowered by section 172(1) to issue an enforcement notice if it appears to them that it is expedient to issue the notice, having regard to the provisions of the development plan and to other material considerations.

I therefore reject the submission that a planning authority is never entitled to consider the likelihood of enforcement action at the time when the application for retrospective planning permission for a building erected without planning permission is before them. It is not rare that buildings are put up without the appropriate planning permission. Sometimes there is no planning objection at all. Sometimes there is an insuperable objection. There are many situations between the two ends of what is a continuum. There are situations where the authority would not have given permission for the development if asked for permission for precisely that, which has been built, but the development is not so objectionable that it is reasonable to require it to be pulled down. To require this would be a disproportionate sanction for the breach of the law concerned. That is why Parliament has imposed the requirement of expediency. What weight the authority gives to the existence of the building is a matter for the authority.”
In *R (on the application of Jeffrey) v First Secretary of State* [2006] EWHC 2920; [2007] EWCA Civ 584, the issue was whether it was expedient (in the interests of proper planning of the area) for a discontinuance notice to be confirmed by the Secretary of State under section 103 of the Act. The challenge arose from an inadvertent grant of planning permission in 1999 for the permanent siting of touring caravans and tents within the coastal preservation area of Dawlish, Devon, rather than a temporary grant to house the large number of visitors expected with the solar eclipse. In 2003, the landowner implemented the 1999 consent and also applied for the erection of a permanent toilet and shower block to replace the existing portable structures. In the event, the council not only refused that application, but also made a discontinuance order and served an enforcement notice. An inspector recommended quashing the enforcement notice, but that the discontinuance order should be confirmed. This was affirmed by the Court of Appeal.

Mr. Justice Sullivan pointed out that it is important to consider not just the word ‘expedient’ but also the reality of the decision-making processes behind the words, ‘otherwise the exercise is simply one of semantics, devoid of any substance’.

He further said that ‘in deciding what is ‘expedient’ the fact that the development has been carried out and is therefore in existence on the ground, and is not simply proposed may well be one of the ‘other material considerations’ which will have to be taken into account’. Thus, it was held that although the inspector did consider all the material considerations in respect of ‘expediency’ these did not outweigh the serious environmental and policy objections to the use of the land for camping and caravanning.

These cases can be compared to the position under Section 185B(1) of the Act on the issue of injunctions. This provision gives the local authority the power to seek an injunction where they consider it ‘necessary or expedient’ that the breach should be restrained by injunction. For instance, in gypsy enforcement cases such *South Buckinghamshire DC v Porter* [2002] J.P.L. 608, where there were compelling personal and human rights considerations, coupled with an inadequacy of provision of gypsy sites in the local area, a challenge might be made on the basis that enforcement action was manifestly inexpedient, especially if it could be maintained that the circumstances were such that no judge would ever enforce the draconian sanction of committal to prison against those subject to the enforcement action.

The cases of *Bryan v UK* [1996] 21 EHRR 342 and *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929 (which related to questions of whether an inspector was an independent and impartial tribunal) also seem to suggest that when a decision turns upon questions of policy or ‘expediency’, it is not necessary for the appellate court to be able to substitute its own opinion for that of the decision-maker.

However, if neighbours and other interested parties complain to a local authority about a breach of planning control, as the local authority are responsible for safeguarding the local residents from issues such as adverse affects on their amenity or unauthorised building works affecting their privacy or area, the local planning authority should at least consider whether or not to take enforcement action where there has been a breach of planning control and this has caused concern from local residents.
Is a local authority's decision to issue or not to issue an enforcement notice challengeable?

The local authority's decision not to issue an enforcement notice was considered in the cases of *R v Sevenoaks District Council ex parte Palley [1995] J.P.L 915* and *Perry v Stanborough (Developments) Ltd [1977] 244 Estates Gazette 551*. The case of Palley highlighted the fact that a local authority’s refusal to issue an enforcement notice is unchallengeable unless the decision not to issue the enforcement notice was founded on an error of law, or tainted by impropriety or bad faith.

In the case of Perry the Court held that the power to issue an enforcement notice is discretionary and the decision by a local planning authority whether or not to issue a notice may not be challenged except on the ground that its issue was arbitrary of capricious.

In the case of *R v Caradon District Council ex parte Knott [2000] 3 PLR 1* a local authority’s decision to issue an enforcement notice was successfully challenged. In this case a discontinuance order and a revocation order had already been confirmed by the Secretary of State requiring the removal of the unauthorised development prior to the issue of the enforcement notice. As such, Mr Justice Sullivan concluded that the issuing of an enforcement notice would merely duplicate the powers which were already in existence and the enforcement notice would achieve no more in terms of the Council’s planning objective. He further stated at paragraph 110 of his judgement that:

> “Under section 172(1), it must appear “expedient” to issue an enforcement notice, not for any purposes, but for a proper planning purpose….. the reduction of a potential liability to pay compensation is not, on its own, such a purpose.”

The Human Rights of a Neighbour

In *Antonetto v Italy (Application No.15918/89)*, the applicant successfully challenged the legality of a building permit under which the next door site to land in her ownership was developed, resulting in partial restriction of views from and light reaching her property.

The European Court of Human Rights found that there had been violations of her rights, both under Article 6 of the Convention on Human Rights: Right to a fair trial and under Article 1 of the First Protocol to the Convention; Obligation to respect human rights. The article 6 point arose because, even though the applicant had had access to a court, there had been no enforcement of the decisions in her favour and no extinction of the effects of the matters affecting her. Her property rights were violated because, in the absence of effective enforcement, her property suffered a loss of amenity and a decrease in value.

The decision would suggest that there is already a presumption that enforcement action should be taken when the unauthorised development affects someone’s rights under the Human Rights Act 1998.
Also, it would be possible to challenge by way of judicial review a decision not to take enforcement action, where it was alleged that the LPA had not had sufficient regard to the need to protect neighbours’ human rights.

However, a claimant would still need to satisfy the court that the local planning authority concerned had exercised their discretion unlawfully in failing to take enforcement action.

Moreover, the Court of Appeal decision in *Lough v First Secretary of State [2004] EWCA Civ 905*, shows that such rights have to be balanced against the property rights of the developer as well and that the planning authorities have a large margin of discretion.

In conclusion, as stated above, the test of whether or not it is expedient to issue an enforcement notice having regard to the development plan and other material considerations is a discretionary one which will depend upon the facts and nature of the case. It appears from the above case law that the material considerations to which the local authority should have regard to when considering whether or not to issue an enforcement notice should be planning considerations.

Therefore, if there has been a breach of planning control and having regard to the development plan and other material considerations the local authority consider that an enforcement notice should be issued (as there is a proper planning purpose for the issue of such an notice and the issue of the notice is appropriate to the circumstances of the case) the test of expediency will be fulfilled.