APP 3

Deputy Judge is fully justified in holding that the Inspector erred in law by not giving full consideration to those policies. On the other hand, while it is true that the thrust of Circular 13/87 is that permission should only be refused on amenity considerations, another decision of Malcolm Spence in *Camden L.B.C.* v. *Secretary of State for the Environment* [1989] J.P.L. 613, emphasises that this cannot rule out regard being given to other material considerations such as the need to provide employment opportunities. So, to apply that principle to the present case, both the local planning authority and the Inspector on appeal can in law refuse permission for an estate agency on the grounds that although it would not directly have an impact on local amenity or the environment, it would be detrimental to the functioning and vitality of the shopping area.

Barn conversion—accommodation for housekeeper to main house or independent dwelling—incidental use—redundant barn definition of—relevance of present owners needs.

Whitehead v. Secretary of State for the Environment and Mole Valley District Council (Queen's Bench Division, Mr. Malcolm Spence, Q.C. sitting as Deputy Judge, July 10, 1991)[7]

The applicant owned a house with a 5 acre curtilage, within which stood a barn. He was refused planning permission to use the barn either as an annexe to the main house to accommodate a housekeeper or as an independent dwelling. The grounds for refusal included: "The building the subject of the proposed development is not considered to be genuinely redundant as it forms an ancillary building within the curtilage of Sloghterwyks incidental to the enjoyment of the dwellinghouse."

On appeal, the Inspector appointed to determine the appeals dismissed them. In her decision letter the Inspector wrote:

> Para. 6 "however, no common ground could be reached during the course of the inquiry as to whether or not this building is redundant, although it was accepted that this is a matter of fact and judgment rather than law.
>
> 7. The barn appears not to have been in agricultural use for some time. It no longer forms part of an agricultural holding, but has been subsumed into the residential curtilage of Sloghterwyks, where it may now have an established, although not necessarily lawful, use ancillary to the main dwelling.
>
> 8. Your client finds outbuildings, excluding the barn, sufficient for his present needs, although concedes that some items have been left in the building for many years. At the time of my visit I could see that the barn had been used as an animal shelter and was being used to store some items. It appears to be in good condition, and in my view could be more intensively used than the present owners choose to do. I am not therefore satisfied that it is a genuinely redundant building.
>
> Para. 10. In the absence of evidence to suggest that your client's proposal could be considered as falling within any of the categories specified as exempt from the general presumption against inappropriate development in the Green Belt, I intend to consider whether or not the proposals would cause harm to the Green Belt, were planning permission to be granted."

[7] *H. B. Sales* (Messrs. Ouvry Goodman & Co., Sutton). *D. J. Elvin* (the Treasury Solicitor).

The reference to the "categories specified" plainly included a reference to redundant buildings.

> Para. 13 "The barn is some distance from the main house and, to my mind, not in a definable residential grouping . . . In its present condition it could be used for purposes incidental to the enjoyment of the dwelling without a material change in the way it relates to the surrounding rural area. You have suggested that amendments to the submitted design could result in conversion works being undertaken to the building without development being involved. That may be the case. However, the use of the converted building as staff accommodation could not be considered as a purpose incidental to the enjoyment of the main dwelling as a new unit of living accommodation is being formed for which specific planning permission would be required.
>
> 14. I believe that the conversion of the building in the manner proposed would result in a material change in its appearance, by introducing a more urban form into a rural setting. Further, a dwelling could bring with it a requirement for a more orderly garden area and an assortment of domestic appurtenances and ancillary buildings associated with modern day living . . ."

The applicant appealed to the High Court under section 288 of the 1990 Act alleging that the Inspector had failed to determine whether the use of the barn for residential purposes ancillary to the use of the main dwelling constituted development requiring planning permission and that the Inspector had failed to determine whether the barn was redundant.

The DEPUTY JUDGE said that on the first point Mr. Sales submitted that in considering the relevant questions it was necessary to look at the whole of the area used for a particular purpose, including any part of the area incidental or ancillary to the achievement of that purpose. He referred to *Frith and Another* v. *Minister of Housing and Local Government* (1969) 210 *Estates Gazette* 212.

Secondly, if the use of the whole area was for residential purposes any part of the area could be used for any element of that purpose unless this was in breach of planning condition or amounted to a change of use.

He (the Deputy Judge) accepted that entirely.

Mr. Sales submitted that the last sentence of paragraph 13 of the decision letter was simply wrong. He further submitted that the use of a separate building for staff accommodation appurtenant to the main house was not a change of use needing permission whilst it remained so appurtenant.

He referred to a number of authorities, including the case of *Wakelin* v. *Secretary of State for the Environment and Another* (1983) 46 P. & C.R. 214, which was a case before the Court of Appeal in which the main matter for consideration was the division of a planning unit into two separate planning units. But there was an interesting passage at the beginning of the judgment of Lawton L.J. on page 218 where he said:

> "On the evidence in this case, in 1975 when the property Bourne Martyn was put on the market it could have been described by an old-fashioned estate agent as 'a gentleman's desirable residence with two acres of garden and outbuildings providing accommodation for staff and garaging for three cars.' Such a description in planning

jargon is of a single unit of occupation; and that clearly was what it was when Mr. Wakelin entered into negotiations for its purchase."

Mr. Sales also referred to a decision of the Secretary of State [1987] J.P.L. 144 where at the bottom of page 145 the Secretary of State said:

> "The view is taken that the word 'incidental,' on the other hand, means something occurring together with something else and being subordinate to it. Accordingly, a purpose which is incidental to the enjoyment of a dwelling-house is distinct from activities which constitute actually living in a dwelling-house. Incidental purposes are regarded as being those connected with the running of the dwelling-house or with the domestic or leisure activities of the persons living in it, rather than with the use as ordinary living accommodation. Similarly, with regard to the earlier case cited in [1975] J.P.L. 104, the Department's present view is that the use of an existing building in the garden of a dwelling-house for the provision of additional bedroom accommodation is not now to be regarded as being 'incidental' to the enjoyment of the dwelling-house as such for the purposes of section 22(2)(*d*) [the Town and Country Planning Act 1971]: it merely constitutes an integral part of the main use of the planning unit as a single dwelling-house and, provided that the planning unit remains in single family occupation, does not therefore involve any material change of use of the land; in those circumstances it is now considered that there is therefore no need to rely on section 22(2)(*d*)."

Section 55(2)(d) of the Town and Country Planning Act 1990 provided:

> "(2) The following operations or uses of land shall not be taken for purposes of this Act to involve development of the land— . . .
>
> (d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such."

In the light of those submissions Mr. Sales submitted that permission was not needed to use the barn for residential purposes in connection with the primary use of the main house and that planning permission for some alterations would not be needed.

He said that the Inspector had gone fundamentally wrong in not paying regard to this or rather and more especially erroneously determining in paragraph 13 the issue about it. Therefore she had fallen foul of the well established principle that a decision-maker when considering whether or not to grant planning permission must take into account the existence of another extant permission or of other changes that could be made without the grant of permission and all the potential consequences flowing therefrom. See, for example, *Spackman* v. *Secretary of State for the Environment* [1977] 1 All E.R. 257 as well as other High Court authorities.

Mr. Elvin, showed that the applicant and his advisers hardly took this line or pressed this point at all. Indeed their application was for a "change of use." That was the theme of their pre-inquiry statement and it ran throughout most of the expert's proof of evidence. All that was said about this point was a short passage at paragraphs 7.15 and 7.16 of his proof. 7.15:

> "If, as the council claim, it is correct to view the appeal building as an 'ancillary building . . . incidental to the enjoyment of the existing house' this suggests to me that planning

> permission should not be required for the change of use in the case of the ancillary proposal. In these circumstances planning permission would only be required (at all) for the ancillary proposal in circumstances in which the physical conversion works did not fall to be considered as permitted development."

Paragraph 7.16 was to like effect. Of course, that was merely a reference to the point in the proof of evidence of the planning witness and did not, of course, deal with the submissions that were made by counsel at the inquiry. It would be in the submissions that one would expect it and in this case submission was made about the point. First of all, it might well be that the form of the application and the pre-inquiry statement were somewhat inept in this respect, but that in no way bound the appellants as to the conduct of their case at the inquiry itself. It frequently happened that by the date of the inquiry the appellants found that they need to make more of a point than they had so far. If they took a point, even if they took it in not too forceful a fashion, in his judgment, they were entitled to have proper consideration given to it. He was in no doubt that the Inspector was under a duty in this case to give such consideration to this important principle, namely, whether or not it would have been possible to form almost the same type of unit as that for which planning permission was sought without the need for applying for permission at all.

Mr. Elvin pointed out that the Inspector had dealt with this matter in paragraph 13. It was true that she had. The question was whether she had got it right.

It was common ground that this barn was within the curtilage of the dwelling-house and there was apparently no discussion about the planning unit in the context of the first appeal before the Inspector, no reference to it in the decision letter and nothing to suggest that the planning unit was any different from the curtilage.

Mr. Elvin referred to *Emin* v. *Secretary of State for the Environment and Mid-Sussex District Council* [1989] J.P.L. 909 which was a decision of Sir Graham Eyre, Q.C. sitting as a Deputy Judge of this court. Sir Graham said this at page 912, referring to a case where one was concerned with the question of incidental use of buildings within the curtilage of a dwelling-house:

> "The arbiter of the facts in a case such as this would need to concern himself with the nature of the activities carried on in the proposed buildings so as to ensure that they were incidental or conducive to the very condition of living in the dwelling-house and, in that sense, further that condition. In that connection the scale of those activities was obviously an important matter because there had to be a prospect that the nature and scale of such activities could go beyond a purpose merely incidental to the enjoyment of the dwelling-house as such and constitute something greater than a requirement related solely to that purpose. In that context the physical sizes of buildings could be a relevant consideration in that they might represent some indicia as to the nature and scale of the activities.
>
> The fact that such a building had to be required for a purpose associated with the enjoyment of a dwellinghouse could not rest solely on the unrestrained whim of him who dwelt there but connoted some sense of reasonableness in all the circumstances of the particular case. That was not to say that the arbiter could impose some hard objective test so as to frustrate the reasonable aspirations of a particular owner or occupier so long as they were sensibly related to his enjoyment of the dwelling. The

word 'incidental' connoted an element of subordination in land use terms in relation to the enjoyment of the dwellinghouse itself. He (the Deputy Judge) would endorse the general approach adopted by the Secretary of State in the present case. He was correct in stating that the overriding factor in deciding the question as to whether uses of the proposed buildings could properly be regarded as incidental to the enjoyment of the dwellinghouse had to concern the incidental use, which, in that context, had to be a use which occurred together with something else but nevertheless remained at all times subordinate to it. The view was also taken by the Secretary of State, and he agreed, that the test to be applied was whether the uses of the proposed buildings, when considered in the context of the planning unit, were intended and would remain ancillary or subordinate to the main use of the property as a dwellinghouse."

He (the Deputy Judge) gratefully followed the words of Sir Graham Eyre.

Mr. Elvin went on to deal with the decision letter of the Secretary of State, [1987] J.P.L. 144, referring to the distinction between a building which constituted an integral part of the main use of the planning unit as a single dwelling-house and the use of a building which may be incidental to the enjoyment of a dwelling-house within the meaning of section 55(2)(*d*).

He (the Deputy Judge) did not intend to decide this case upon any such fine distinction nor say whether or not, in his judgment, the language of the Secretary of State, was correct, although he was inclined to think that it was.

The general point for consideration by the Inspector was to almost the same effect upon either basis. It was apparent that the Inspector in paragraph 13 had had in mind much of the relevant material. She had referred to the fact that the barn was some distance from the main house. She had referred to the fact that it was suggested that amendments to the submitted design could result in conversion works being undertaken to the building without development being involved and accepted that that might be the case. That was because she was not shown actual drawings. She did not have to be shown actual drawings. It was good enough, provided she appreciated that so far as the physical works of conversion were concerned it might be that they could be carried out in a form which did not require the grant of planning permission.

One was left with the real point at issue, namely, the use to which the building would be put. Given that, the whole purpose of this application, as opposed to the second application, was to provide live-in accommodation for a housekeeper, it seemed impossible to hold that the use of the building thus converted would be otherwise than for a purpose incidental to the enjoyment of the main dwelling as a unit of living accommodation or, alternatively, having regard to the Secretary of State's language, would form an integral part of the main use of the planning unit as a single dwelling-house. It mattered not, whether this building, as converted, happened to include its own kitchen or bathroom. Nevertheless, the whole purpose of it was to provide somewhere to live for the housekeeper, who would doubtless be looking after the house at all relevant times, and walking to and fro the short distance to the house to cook meals in it and so on.

For that reason, that sentence was simply wrong, and the determination of what was an important point in the case, having regard to the facts, was one which the Inspector could not possibly have reached.

Mr. Elvin submitted that he (the Deputy Judge) ought not to exercise the discretion of the court to quash this decision. He could not accept that. The case needed to be reconsidered properly upon the basis as set out and having fully in mind that this building might be used for the purpose of providing living accommodation for a housekeeper without the need for planning permission for that use.

He returned to deal with the second point, namely, the redundant barns. He was satisfied that the Inspector had not made any error of law upon the point. Mr. Sales had produced the *Oxford Dictionary* definitions of the word "redundant." He said that the meaning of a word was a matter of law for the court and that the Inspector had erred in law.

However, on looking at the relevant paragraphs, 6 and 8 of the decision letter, there was nothing to suggest that the Inspector had misconstrued the word "redundant." The Inspector had in paragraph 8 properly approached the matter by taking the word "redundant" and considering it in the light of the relevant facts. First, she has acknowledged, that the other outbuildings are sufficient for Mr. Whitehead's present needs. On the other hand, she has paid regard, quite legitimately, to the fact that at the time of her visit it was being used to store some items. Moreover, it appeared to be in good condition and could be used more intensively.

It was manifest that a building such as this might well come in useful within a domestic curtilage such as this. It extended to five acres. Almost any use of five acres required maintenance with equipment of various kinds. Even though the building was little used at the time of the inquiry, it was perfectly legitimate to consider that "it could be more intensively used." In considering whether a building was redundant one was not confined to the present; none of the definitions in the *Oxford Dictionary* suggested that. The future might be just as relevant for consideration as the present, especially in the case of a building which was in good condition. He could detect no error of law and no incorrect approach to the matter in this Inspector's finding that the building was not redundant.

That was sufficient to deal with this second point, but it might assist to say that in order for a building to be redundant one was not confined by law or practice to a consideration of the present owner's means.

Mr. Sales referred to a decision of the Secretary of State on an appeal T/APP/C/88/L3625/32/P6 where there was a passage in the decision of the Inspector at paragraph 34 "I can find nothing in the policy statements or elsewhere to indicate that redundancy of an agricultural building . . . means anything other than redundant to the immediate needs of the landowner."

It was not completely clear what that sentence meant.

Mr. Elvin said if that meant that consideration had to be confined to the needs of the present owner, then the Secretary of State would not wish to follow what was said in that sentence.

He (the Deputy Judge) would agree with that. He accepted completely that a building might well not be redundant if it would or might be useful for a future owner's needs. Again, nothing in any of the *Oxford Dictionary* definitions caused him to hold that it could relate only to the present owner's needs. It might be entirely unused by the present owner but yet potentially useful to a future owner and so not be redundant. In practice much would depend upon the nature and condition of the building and the nature of the existing and potential use of the surrounding land, rather than upon the needs or intentions of the present owner.

For those reasons the application was upheld in respect of the first appeal and the decision on that appeal quashed. But the application in respect of the second appeal was dismissed.

Comment. This is quite an unusual decision because the Deputy Judge was not able to point to any explicit error of law in the approach of the Inspector and was holding it was a decision which the Inspector could not possibly reach. It would therefore seem to follow that the use of a building, reasonably near to a dwelling-house, for the live-in accommodation for a housekeeper to that dwelling-house cannot normally amount to a material change of use. To this commentator this is too rigid an approach and there could be situations where even though the occupier of one dwelling works in another nearby dwelling this does not automatically mean that both dwellings form one unit of occupation and that the occupation of one dwelling is ancillary or incidental to the other. The work relationship is just one factor to be considered and there could be other factors such as the comparative size of and distance between the two dwellings and the facilities for separate living.

However it does appear that where one property is owned by a family the courts are very reluctant to hold that two physically distinct parts of that property can be treated as being used as separate dwellings where the occupants are related or where there are ties of domestic employment. It will be recalled that in the very recent case of *Uttlesford* v. *Secretary of State for the Environment* [1992] J.P.L. 171 Lionel Read, Q.C. sitting as a Deputy Judge similarly took the view that the fact that a building has all the facilities for separate living does particularly mean that the use by a relative is a separate dwelling-house use.

Compulsory purchase order—control order under Housing Act 1985—date of making the order—date of sealing—delay—allegation of criminal forgery—allegation of nullity.

Burke v. Secretary of State for the Environment and the London Borough of Camden (Queen's Bench Division, Brooke J., May 10, 1991)[8]

The applicant applied to the High Court under section 23 of the Acquisition of Land Act 1981 for an order that the London Borough of Camden (43 Fitzroy Street, London W1) Compulsory Purchase Order 1987, be quashed. The grounds upon which the action was based were first, that the order was not made validly within 28 days of the making of a control order dated February 13, 1987, and was *ultra vires* the terms of Part IV of the Housing Act 1985, Sched. 13. Secondly, the purported order was a forgery within the meaning of section 9(1)(*b*) of the Forgery and Counterfeiting Act 1981, in that the date upon which the order was sealed was some three months after the date on the order itself. Thirdly, as a reason of this the order was a nullity and could not be validly confirmed by the Secretary of State. The delay incurred in sealing the order was apparently due to administrative difficulties within the authority.

Brooke J. said that Mr. Payton, on behalf of the applicant, submitted that the order was a forgery. He drew attention to section 9(1)(*g*) of the Forgery and Counterfeiting Act 1981, which was concerned with the identification of an instrument as false for the purpose of Part I of that Act. This subsection provided that an instrument was false if it purported to have been made on a date on which it was not in fact made. He submitted that the second respondents were, in effect, responsible for a forgery because a false instrument was made with the intention that the maker of it would use it or induce somebody to accept it as genuine and, by reason of so accepting it, to do or not to do some act to his own or any other person's prejudice within the meaning of the Forgery and Counterfeiting Act 1981, s.1.

[8] *B. Payton* (Messrs Iqbal & Co., London W2). *N. Pleming* (the Treasury Solicitor. *J. Burton* (the Solicitor to London Borough of Camden).