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Enforcement – Recent Developments

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Islington LBC v SSHCLG [2019] EWHC 2691 (Admin)

- Basement flat created without permission April 2013 rented out
- Nov 2013 to Feb 2014 renovation of basement – completely gutted and uninhabitable
- Would not have been possible to enforce during renovation as nothing to identify it as residential unit
- EN Jan 2018 – Jan 2014 cut-off

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Islington (2)

- C argued that period of renovation should be included in 4 years – needed it to make 4 year immunity
- C argued no abandonment of residential use amd always intention to resume residential use after renovation
- Argued for "presumption of continuance"
- Insp agreed and granted Certificate

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Islington (3)

- Held – Insp had erred in law
- Correct approach as set out in *Thurrock* [2002] EWCA (Civ) 226 and *Swale* [2005] EWCA (Civ) 1568
- Had to establish required period as continuous use during which enforcement action could be taken
- Enf action could not be taken during renovations – But why - Did not have to be practical to take enf action
- Difference of abandonment of lawful use and halting unauthorised use

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Miles v National Assembly Wales [2007] JPL 1235

- Farm owner sought LDC for use of land for motorcycling racing and practice activities based on long-standing breach of 28 day temporary uses limit
- Issues of whether race days and practice days could be aggregated
- BUT 18 month period when no activity due to foot and mouth outbreak
- Inspector concluded that that broke period to establish immunity

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Miles (2)

- Claimant argued that period of foot and mouth should be included
- C argued possible to take enforcement action
- Court disagreed – applying *Thurrock* – said no enf action possible when activity suspended
- Fact that suspension due to circumstances beyond control and intention to resume apparent was not relevant

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QM Development v Warrington BC [2020]EWHC 1511 (Admin)

- 2010 PP for two houses – pre-commencement gas remediation condition
- 2010 condition informally varied to allow commencement
- LPA not satisfied with subsequent discharge
- Litigation between developer and house owner
- Developer app for LDC granted with informative that info re condition still required

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QM Developments (2)

- JR of informative
- Common ground no legal effect
- C claimed informative wanted to establish position for county court litigation
- Held – inappropriate for JR – informative of no legal effect
- Position could as well be established in County Court – adequate alternative remedy

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Dill v SSCHLG & Stratford-on-Avon DC [2020] UKSC 20

- Two c18 lead urns by Flemish sculptor John van Nost
- Each rested by gravity on limestone plinth
- 1725 at Wrest Park, Bedfordshire – Duke of Kent
- Undoubted artistic value
- Removed in 1939 and eventually ended up at Idlicote House, inherited by Appellant

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- Urns sold at auction in 2009 and removed overseas

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- Idlicote House listed in 1966
- Items added to List in 1986
- Listing decision not found
- No notice of listing sent to owner
- English Heritage sent notice of sale in advance

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- Piers consisted of limestone pedestals of a slab rather than solid construction
- Pedestals rested on concrete slabs which were on the ground
- Urns sitting on the pedestals without any attachment
- When removed the urns and the top of the peers were lifted together, then the remaining part of each peer
- Urn and pier together 247 cm high

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- 2015 LPA writes to Dill requiring LB consent app
- LB consent applied for and refused; LB enf notice issued
- Appeal dismissed – Insp concluded that status of items as buildings had been settled by fact of listing and could not be considered again
- High Court and CA upheld that view – both accepted that issue of whether building could not be re-opened and so no consideration of it
- Appeal to Supreme Court

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SC identified two issues (but decided three)

- Whether Insp can consider issue of whether building
- If yes, what are correct criteria
- Also considered the "extended definition" of listed building definition in section 1(5)

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Legislation – LBA 1990

- s1(5) LB a building included in a list AND "object or structure fixed to the building" or "within curtilage … which form part of the land and has done so since before 1 July 1948" [the extended definition]
- "building" definition from s336 TCPA 1990 "includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building"

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- LB consent applications and appeals
- Consent appeals may include claim building not of special interest
- LB EN and appeals
- EN appeal may include claim building not of special interest
- SofS may remove "building" from list

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First Issue – Can status as building be raised?

Lord Carnwath –

- Deals with "relatively shortly"
- Based on individuals' "fair opportunity" to challenge legal measures taken against them (*Boddington* [1999] 2 AC 143
- SofS argued ability to judicially review listing decision was sufficient protection – cited *Wicks* [1998] AC 92 which held wrt planning enforcement notice that statutory scheme had to be considered.

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Two reasons to reject

- Wicks based on planning EN and explicitly said statutory grounds of appeal "*are so wide that they include every aspect of the merits of the decision to serve*"
- Statutory definition of LB includes both inclusion in the list and fact of being a building; in the absence of explicit statutory exclusion (which does not exist) no reason not to be able to argue that not a building
- Appeal allowed on first issue

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The extended definition

- Carnwath refs the wide range of items which might be listed which are contained within this issue and refs Historic England garden and park structures listing selection guide December 2017
- Notes the absence of any clear criteria for the selection/ decision to consider as buildings

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- Important to note that extended definition does not result in the object becoming a building in its own right – it is simply treated as part of the building to which it is attached, or in whose curtilage it stands
- This distinction blurred in official publications
- Authorities found in the law of real property concerning fixture to the land
- Some non-attached objects may be considered as "fixed" if they are an essential part of the design of the house and grounds

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Extended Definition

- *Berkley v Poulett* [1977] 1 EGLR 86
- Statue and sundial in gardens
- Tests (1) method and degree of annexation and (2) object and purpose of the annexation
- In this case, not fixed to land and, as brought on after construction of house, not for object and design of house/gardens
- Not within extended definiton

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Second Issue – Proper test for building

- Analyses line of authority from *Cardiff* [1949] 1 KB 385 (rating case) through *Barvis* (1971) 22 P&CR 710 (incorporates principles into planning) to *Skerritts* [2000] JPL 1025 (first CA consideration)
- References marquee erected for season in hotel grounds
- No reason not to use *Skerritts* tests for whether an object is building (para 52)

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Skerritts three-fold test

- (1) Size – with some reference to whether it would ordinarily be brought to site assembled
- (2) Permanence – 5 month summer season was enough
- (3) Degree of physical attachment – spikes into ground for marquee
- Some degree of movement permitted – mobile crane in *Barvis*
- Policy objectives… see Barvis – LPA should have control

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This case

- Remitted for re-hearing
- Sympathy for Mr Dill that still can't get decision
- Factors in both directions
- Strong suggestion that no longer expedient to pursue….

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Takeaways

- Hard cases/bad law? A potentially wide ranging adaptation of the grounds of appeal – will it be applied in other circumstances?
- Strong note to heritage authorities to clarify guidance/criteria
- Clear guidance on principle to apply
- Recognition a very fact based exercise

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Tower Hamlets v. SSCGL

- A planning inspector allowed appeals against rebuilding orders made after the unlawful demolition by persons unknown of three unlisted buildings in a conservation area of Tower Hamlets. The inspector effectively reasoned that the demolition had done more good than harm as it would lead to suitable development of the site.
- Issue: whether the "public benefits of the proposal" (NPPF/196) should extend to likely benefits of new development of a site, facilitated by demolition of buildings on the site, where there is no current application for planning permission to develop the site; or whether those words are restricted to the public benefits of demolishing the buildings, without considering any likely future development.

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Tower Hamlets ctd

- In the DL, the Inspector said that as there was no current planning application, the benefits were "speculative"; but it was "highly likely" a suitable proposal could be found [24].
- Court found that the Inspector had been entitled to take into account likely future benefits (bearing in mind the particular circumstances of the case) [63-67].

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1a) *Binning Property Corp Ltd v SSHCLG* [2019] EWCA Civ 250; Lindblom LJ; Facts..

- EN issued by the LB Havering alleging: the unauthorised storage of aggregates and containers
- Appellant appealed under s.174 (2) but inspector dismissed appeal
- Appellant appealed under s.289 to EWHC against dismissal of appeal. Requires leave (s.289 (6))
- EWHC refused leave to appeal
- Appellant applied for permission to appeal to EWCA against that refusal. EWCA held oral hearing

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1b) *Binning Property Corp Ltd v SSHCLG* [2019] EWCA Civ 250; What was in issue?

- Issue- does EWCA have jurisdiction to hear an appeal against a decision of the EWHC under s.289 (6) refusing leave to appeal against the dismissal by an inspector of an enforcement appeal?..
- Not a new issue, EWCA has previously said no: *Wendy Fair Markets Ltd (Strandmill Ltd) v SOSE* [1996] J.P.L.649, *Prashar v SOSETR* [2001] EWCA Civ 1231 and *Walsall MBC v SSCLG* [2013] EWCA Civ 370
- But Appellant submitted previous EWCA decisions have since been overtaken by changes to the arrangements for the determination of statutory proceedings challenging the validity of planning decisions:
    - Reform of the procedure for costs capping in Aarhus Convention claims (by the Criminal Justice and Courts Act 2015 s.90 and the Civil Procedure Amendment Rules 2017 (SI 2017/95) r.8(5)) under Part VII of CPR Part 45 which meant that it is clear that all claims should be treated alike: judicial reviews, "reviews under statue" (s.288 and includes s.289)
    - Amendments to the TCPA 1990 e.g. introducing a leave filter for s.288 challenges (s.288 (4A) as inserted in October 2015) for the purposes of filtering out unmeritorious claims which means it is no longer possible to rely on a "disparity" between s.288 and s.289..

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1c) *Binning Property Corp Ltd v SSHCLG* [2019] EWCA Civ 250; EWCA's decision and reasoning

- Dismissing appeal, EWCA held it does **not** have jurisdiction to hear an appeal. EWCA bound by previous authority..
- Previous EWCA authority based on the following which still prevails:

- Basic principle from *Lane v Esdaile* (1891) A.C. 210 which runs through the EWCA cases and has been applied in the s.289 context still prevails: *"the general proposition that whenever a power is given to a court or tribunal by legislation to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive"*. Subject to residual jurisdiction/discretion which did not apply on the facts here: to overturn a decision of the EWHC to refuse leave to appeal to itself if the process by which that decision was made has demonstrably been vitiated by misconduct or unfairness

- A EWHC judge's refusal of leave to bring a s.289 appeal before the court is not caught by s.16 of the Senior Courts Act 1981: it is not a "judgment or order of the High Court" in relation to which the EWCA has "jurisdiction to hear and determine appeals"

- The absence of an express right of appeal under s.289 (6) TCPA 1990 to the EWCA against refusal of leave to appeal by the EWHC

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1d) *Binning Property Corp Ltd v SSHCLG* [2019] EWCA Civ 250; EWCA's decision and reasoning

- The general rule in s.54 (4) Access to Justice Act 1999 applies that "[no] *appeal may be made against a decision of a court under this section to give or refuse permission"* because no rules have court have provided otherwise when they could have (& as they do for JRs and s.288s)

- Policy reasons still prevail and continue to justify difference of s.289 vs. JRs and s.288s: to discourage unmeritorious appeals especially those made for the purpose of suspending the effect of the EN pending the final determination/withdrawal of the appeal..

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2a) *LB Brent v SSHCLG* [2019] EWHC 1399 (Admin); Neil Cameron QC sitting as a DHCJ; facts..

- In April 2017 LB Brent issued EN in respect of land controlled by a school (as amended by the inspector at the inquiry): *"without planning permission the material change of use to a mixed use as a school…and parking (i.e. parking that is not ancillary to the uses as a school…"..*

- The school appealed against the EN relying on *inter alia* ground d), asserting that the use was lawful as it had taken place for in excess of 10 years prior to the date of the enforcement notice (April 2017)..

- Inspector allowed ground d) appeal because she found on the evidence that the mixed use (i.e. including primary not ancillary parking) commenced on 24 March 2007 and continued for a period of 10 years prior to the EN being served

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2b) *LB Brent v SSHCLG* [2019] EWHC 1399 (Admin); s.289 appeal; issue

- Council appealed under s.289 on the ground that the inspector: failed to "grapple" with its case put in the alternative that a second material change of the use of the land (the first of which started on 24 March 2007) occurred in 2016 through intensification. That alternative case was put in Council's closing submissions where it mentioned a change in the 'character' of the use together with a reference to *Hertfordshire* [2012] EWCA Civ 1473 which was also placed before the inspector..

- There was no indication in the inspector's DL that she considered this matter, the issue was whether she was obliged to consider it and deal with it in her DL

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2c) *LB Brent v SSHCLG* [2019] EWHC 1399 (Admin); EWHC decision and reasoning

- As a matter of statutory construction, there is no obligation on an inspector to cast around to ascertain whether some further or different breach of planning control to that alleged in the EN has occurred (in this case intensification which was not in the EN)..
- As a matter of statutory construction specifically in relation to intensification, an inspector is not, in every case, required to consider whether the use subsisting 10 years before the EN was issued has, within the 10-year period ending on the date the enforcement notice was issued, changed to such an extent as to be intensification constituting a material change of use
- But appeal was allowed because on the facts of this case:
    - Council's closing submissions did contain a clear indication that a material change of use arising by way of intensification was being relied upon in the alternative. Although it would have been desirable for that alternative argument to have been raised earlier: either in the EN as an alternative matter appearing to LB Brent to be a breach of planning control or earlier in the inquiry it was not essential..
    - it was plainly relevant to the issue which the Inspector had to determine pursuant to s.174(2)(d) TCPA 1990 and was capable of defeating the school's ground d) appeal..

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3a) *Meisels v SSHCLG* [2019] EWHC 1987 (Admin); Mr CMG Ockelton (Vice President of the Upper Tribunal), background on conditions precedent..

- Distinction between pre-commencement conditions and conditions precedent:
  - Pre-commencement condition = a condition which merely requires that something must be done before development commences
  - Condition precedent = a condition which goes further and requires that development cannot commence unless it is complied with

- Why does it matter?
  - If a condition precedent is not complied with then the development is commenced unlawfully without planning permission and all of the development undertaken under the permission is unlawful and can be enforced against, see *R (Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin)..

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3b) *Meisels v SSHCLG* [2019] EWHC 1987 (Admin); facts

- Condition in question required submission to and approval by the Council of the materials to be used in constructing an extension to a synagogue before works began
- Condition was not complied with and an EN was issued against all the development under construction i.e. Council were saying it was a condition precedent
- Inspector upheld EN, holding that the condition went to the heart of the PP and was a condition precedent because it fundamentally controlled the final appearance of the building and its relationship to its surroundings
- Appellant appealed to EWHC under s.289

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3c) *Meisels v SSHCLG* [2019] EWHC 1987 (Admin); EWHC decision and reasoning

- Whether a condition went to the heart of the PP could only be answered by a fact-sensitive inquiry into the terms of the condition in the context of the PP i.e. it is not just about the wording of the condition, and Councils identifying on PPs the conditions they believe to be conditions precedent is not determinative. This is a question of planning judgment (not for the court) and unless the decision maker's decision on the issue was at fault in a *Wednesbury* sense, the court would not intervene..

- The court refused to interfere with the judgment of the inspector

- In England, under The Town and Country Planning (Pre-commencement Conditions) Regulations 2018 it is now a requirement that an applicant agrees to pre-commencement conditions before they can be imposed..

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4a) *R v Panayi* [2019] EWCA Crim 413; Males LJ; facts..

- Appeal against sentence following conviction of failure to comply with an EN contrary to s.179 (1)-(2)..

- D obtained PP to build a mansard roof extension to his freehold property. However, when constructed, it materially exceeded the dimensions for which PP had been given, was visible from the street and detracted from the character of the conservation area. LB Islington issued an EN dated 22 August 2003

- D took no steps to modify the roof extension to comply with the EN. He unsuccessfully appealed against the EN under s.174, unsuccessfully applied for an LDC, and unsuccessfully appealed against the refusal of an LDC. In the meantime, he let out and received rent on two self-contained flats in the roof extension

- D was charged with failure to comply with an EN, on or about 18 February 2016..

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4b) *R v Panayi* [2019] EWCA Crim 413; issue on appeal

- Convicted at Highbury Corner MC and committed to Blackfriars CC for sentence and for a confiscation order to be considered (pursuant to section 70(5) of the POCA 2002)
- Blackfriars CC imposed a fine of £25k and in confiscation proceedings under section 6(5)(b) of the 2002 Act, D was made subject to a confiscation order in the sum of £95,920, payable within three months, with one year's imprisonment in default. That sum represented half the rental income received by D from letting the two flats occupying the roof space from 28 March 2007 onwards..
- D appealed against sentence and the confiscation order
- Issue- can the calculation of benefit for the purposes of confiscation proceedings extend over any greater period than the one charged (in this case one day)?

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4c) *R v Panayi* [2019] EWCA Crim 413; decision and reasoning re confiscation order

- EWCA allowed appeal against confiscation order and reduced the sum payable under it from £95,920 to £58
- Reasoning based on words of POCA 2002:..
  - Under s.76 the benefit which the court needs to identify (from which the recoverable amount is taken) is the benefit obtained "as a result of or in connection with" the criminal conduct of which the defendant has been convicted or in respect of which he has pleaded guilty..
  - LPA chose to charge D by reference to a single day, namely 18 February 2016; that the benefit obtained "as a result of or in connection with" the particular criminal conduct, had to be referable to the offence with which D was charged and of which he was convicted. In this case the rent obtained by D's letting out the flats in question from 2005 or 2007 onwards could not be regarded as having been obtained "in connection with" the criminal conduct of which he was convicted
  - The words in the charge "on or about" 18 February 2016 do not assist the Council because those words are there to provide for the possibility that the offence in question may not have been committed on 18 February but on some other single day at about that time

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4d) *R v Panayi* [2019] EWCA Crim 413; decision and reasoning re sentence

- However, EWCA did uphold fine of £25k. It was not wrong in principle or manifestly excessive. Reasoning:
    - Even though the conviction related to conduct on a single day, court took into account the fact that it was accepted that D had acted unlawfully from 2005 onwards by failing to comply with the EN..
    - D offended deliberately and with a view to financial gain
    - Planning harm (extension visible from street, had a poor design, which also detracted from the character and appearance of the conservation area
    - Numerous pre-convictions

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5a) *R (Finnegan) v Southampton City Council* [2020] EWHC 286 (Admin); Lang J; background on s.70C..

"70C Power to decline to determine retrospective application

(1) A local planning authority [...] may decline to determine an application for planning permission [or permission in principle] for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.

(2) For the purposes of the operation of this section in relation to any particular application for planning permission [or permission in principle] , a "pre-existing enforcement notice" is an enforcement notice issued before the application was received by the local planning authority."

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5b) *R (Finnegan) v Southampton City Council* [2020] EWHC 286 (Admin); facts

- Claimant occupied a site the last lawful use of which had been office use. The Council served an EN on the claimant, alleging a breach of planning control by the change of use of his site to a mixed use of storage, display and sale of motor vehicles and residential use

- Claimant's appealed against the EN seeking permission for essentially what were the matters constituting the breach of planning control in the EN. The appeal was dismissed and the EN was upheld

- Thereafter, the claimant applied for PP for a different proposal: change of use to a sui generis use for the sale of motor vehicles, limited to the southern part of the site and subject to new conditions (e.g. that the premises would not be open to members of the public visiting for the purchasing of motor vehicles)

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5c) *R (Finnegan) v Southampton City Council* [2020] EWHC 286 (Admin); facts

- Council declined to determine the application, concluding that there had been no material change in circumstances since the EN had been issued and that it was entitled to rely on s.70C(1)

- Claimant sought JR of that decision contending that the purpose of s.70C was to prevent an applicant from having the same proposal considered twice, whereas the merits of his current application had not been considered previously since the proposal considered by the inspector on the enforcement notice appeal had been something different

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5d) *R (Finnegan) v Southampton City Council* [2020] EWHC 286 (Admin); decision and reasoning

- Court dismissed the claim
- Court emphasised that S.70C conferred a broad statutory discretion on the Council whether to decline to determine a planning application. This broadness furthered the purpose of s.70C: to ensure that effective enforcement could not be avoided or delayed by those in breach of planning control having multiple bites of the cherry; it would be contrary to the statutory purpose to allow an application for a proposal which overlapped with a previously issued enforcement notice to proceed if it would merely and self-evidently create future enforcement issues.
- In that regard, the issue was whether the applicant had had an opportunity to canvas the planning merits of a proposal, not simply whether that opportunity had been taken..
- Moreover, the discretion required an exercise of judgment by the Council which can only be impugned if it had fallen into legal error..

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Webinar: Planning Enforcement – Recent Case Law & Other Developments

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