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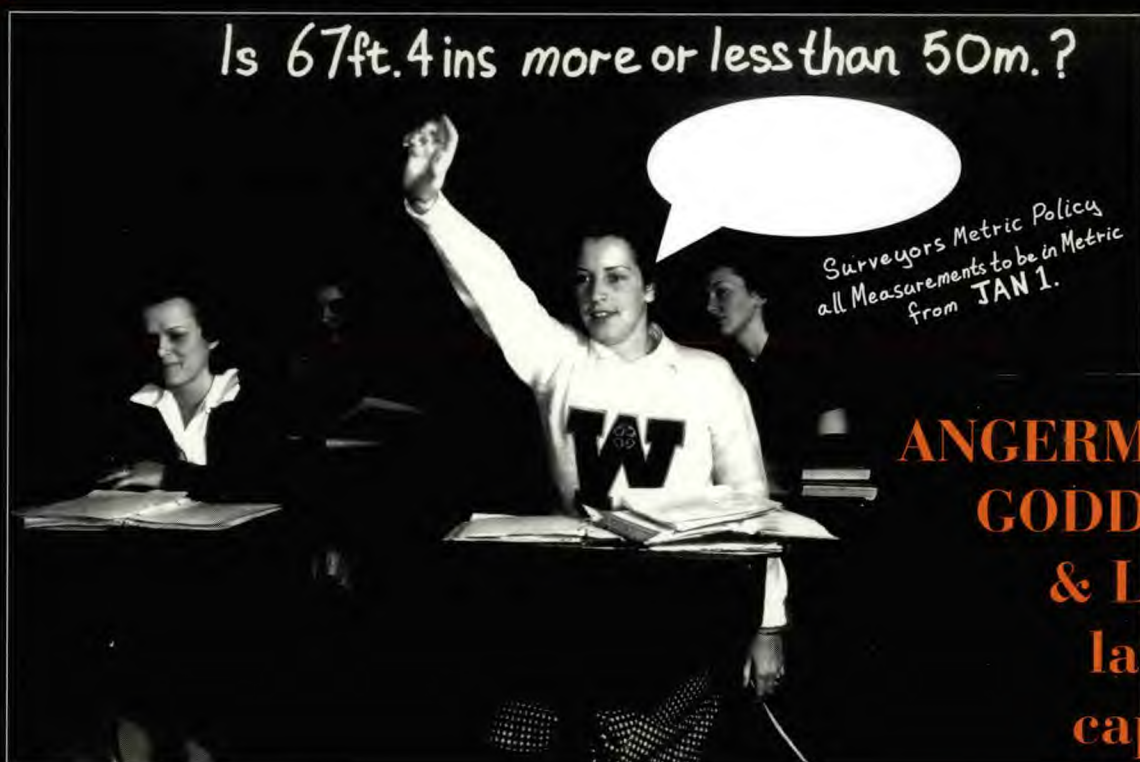
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The Eruv: material considerations

Those in the property world understand the importance of obtaining planning permission. What is not so readily appreciated, says Daniel Drukarz, are the factors which a local authority is legally obliged to take into account when deciding whether to grant planning permission.



Daniel Drukarz is head of the Town Planning Unit at solicitor Fladgate Fielder.

The starting point is section 70 of the Town and Country Planning Act 1990 (the 1990 Act). This requires the local planning authority, in determining applications, to have regard to the provisions of the development plan (the plan), so far as it is material to the application, and to any other material considerations. Section 54A of the 1990 Act, introduced by the Planning and Compensation Act 1991, now weights the balance in favour of the plan by requiring that the determination must actually be made in accordance with it, unless material considerations indicate otherwise.

This shift of emphasis towards the plan is reflected in the revised wording of Planning Policy Guidance 1 (General Policy and Principles), issued by the DOE in March 1992 (PPG 1). The guidance opens by stating that the planning system "should operate on the basis that applications for development should be allowed, having regard to the plan and all material considerations, unless the proposed development would cause demonstrable harm to interests of acknowledged importance". (Para 5.)

Para 25 of PPG1, however, goes on to point out that the effect of section 54A is to introduce a presumption in favour of development proposals in so far as they are in accordance with the plan. This is a shift away from the former general presumption in favour of granting planning consent. In other words, the focus has, over the past few years, been on a plan-led system.

Clearly, the effect of any proposal in terms of the policies contained in up-to-date relevant structure, local and unitary development plans will be of major importance — for example, in terms of policies relating to housing provision, employment, shopping etc. Many will have observed the increasing emphasis in recent years on policies relating to the protection of the rural and built environment.

But what if the plan is not relevant to the proposal in question? For example, the adopted London Borough of Barnet Unitary Development Plan contains no specific provision for a novel development such as the Eruv, involving the erection of street furniture in various locations within the borough, about which so much public debate has taken place. In such cases, paragraph 28 of PPG1 advises authorities to determine applications on their merits in the light of all material considerations.

What constitutes a material consideration is not defined in the 1990 Act. It has been left to the courts to establish what this means.

Last year this issue faced members of the planning committee in Barnet who were being asked to decide whether to grant planning permission for the street furniture required to facilitate construction of an Eruv, an area within which some of the normal Sabbath restrictions of orthodox Jews are relaxed. The

Eruv is being promoted by the United Synagogue, the main body of orthodox Jews in Britain, and affects an area of approximately 6 square miles (16km²). Although the perimeter of the Eruv is over 11 miles (18km), extensive use is made of existing natural and man-made boundaries, such as the M1 and the tracks of the Northern Line.

However, a system of some 85 poles and wire is required to span the gaps occurring in these boundaries and it is the erection of this system of poles and wire at various points in the borough which formed the basis of the planning applications in 1992.

Fierce controversy surrounding the proposals arose which captured much media attention at the time, not least the debate concerning integration of minority groups versus segregation. In an article appearing in *The Economist* shortly before the committee meeting, Lord McGregor, chairman of the Press Complaints Commission and past-chairman of the Hampstead Garden Suburb Trust (he had resigned over the Eruv at a stormy meeting the previous September) expressed his fear that by introducing religious considerations into planning decisions the Eruv would set a dangerous precedent.

A packed public chamber watched as Barnet's Planning Committee overturned their

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own officer's recommendation and dismissed one of the applications, on grounds of visual impact and perceived harm to the Hampstead Garden Suburb Conservation Area. Appeals were lodged by the promoters and, given the intense public interest, Environment Secretary John Gummer recovered these for his own determination. Following the public inquiry held late last year, the Secretary of State upheld his inspector's recommendation and granted planning permission for the Eruv on September 20 1994 (DOE ref:A/93/224571 and 229477).

Though a "material consideration" should relate to the use and development of land, this does not exclude the protection of private interests in appropriate circumstances.

Lord Scarman recognised in *Great Portland Estates plc v Westminster City Council* 1985

THE PROPOSED ERUV



THE TIMES

AC 661 that "the human factor is always present, of course indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance".

The religious requirements of the Latter Day Saints Church, for example, were considered in a February 1992 appeal decision (DOE ref: A/91/188660/P2). This involved the refusal by Carrick District Council to grant planning permission for the change of use of an office building serving an industrial site to a religious meeting house at Devoran, Cornwall. The inspector at the public inquiry examined whether there were any special circumstances that would justify an exception to the prevailing planning policies which sought to preserve the supply of industrial premises in the area.

In allowing the Church's appeal, he considered that the proposal satisfied a genuine need (ie suitable accommodation as a religious meeting house), for which specific provision had not been made in local planning policies, and concluded that such need represented special circumstances which outweighed the limited harm that would result to the supply of industrial buildings.

In the case of the application for the street furniture required for the Eruv, notwithstanding the plethora of views expressed by objectors, the Secretary of State isolated the salient material planning considerations, namely: the

effect of the poles and wire on the character and appearance of the street scene in parts of Barnet including the Hampstead Garden Suburb Conservation Area; whether, if there were any planning objections, the need for the proposal outweighed those objections; and whether there were any other material considerations which were sufficient to amount to a compelling objection.

Having satisfied himself that there would not be any adverse effect on amenities or substantial harm caused to the character of the conservation area, the Secretary of State agreed with the approach taken by the inspector that there was therefore no requirement to examine the question of need.

So far as whether other issues raised at the public inquiry amounted to a compelling planning objection, the inspector did devote several paragraphs in his report to the Secretary of State to the concern expressed by objectors regarding the effect of the proposals on social harmony.

In his view, there was little direct guidance from legislation, the development plan or the courts on this issue. While acknowledging the Great Portland Estate case as authority for the proposition that the human factor is a material consideration in exceptional or special circumstances, and recognising that social harmony was clearly a human factor and was identified in Barnet's UDP first Main Aim as contributing to the quality of life, the inspector

found that the objectors' assertions that social harmony would be destroyed because "the mere existence of the poles would be an offensive and upsetting reminder of the holocaust to Jews" were difficult to substantiate, and the connection between land-use planning and social harmony arguments was "too tenuous to be convincing". On that basis, the inspector did not accept that the social harmony argument constituted a proper material consideration and concluded that such argument was of insufficient weight

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to amount to a planning objection which justified dismissal or refusal of the proposals.

In terms of the wider implications of this decision, Orthodox Jewish Communities elsewhere in London and in other parts of the country will also no doubt have been awaiting the outcome of the Environment Secretary's deliberations with keen interest. Does his decision therefore, set a "precedent" for such facilities elsewhere?

The precedent effect of a decision is a material planning consideration. In *Poundstretcher Ltd v Secretary of State for the Environment* [1988] 3 PLR 69, the High Court reviewed the existing case law on the point and concluded that the mere fear of a precedent effect would not normally be a sufficient ground to refuse an application. For their part, the appellants in the present case refuted that a harmful precedent would be set and pointed out that each planning application for a similar facility would need to be determined on its individual merits. It was interesting that the council did not even advance the precedent effect in their evidence as a potential ground for refusal, concentrating instead on visual impact considerations and the perceived harm to the conservation area. It was left to third parties to do so, but the inspector concluded that this consideration was of insufficient weight to cause him to reach a different conclusion on the proposals. ■