sufficient." If intention is to be the governing test, and it always creates problems of proof, it is suggested that the test should be whether the operations are genuinely the commencement of the authorised development and not a device to save the life of the permission to provide a fall back alternative. It is not known what test was employed in the *Pedgrift* case as a transcript of this decision is not yet to hand. The Government's answer to the problem is to redefine commencement of development so that it will be necessary for developers to have completed work to the value of 10 per cent. of the total cost of the development as at the expiry of the time limit for commencement in order to keep a planning permission alive; see Efficient Planning: The Consultation Paper at C2, para. 34. The rationale presumably being that once such significant costs had been incurred there would be no going back.

Enforcement notice—gipsy caravans—stationing on land—abandonment of existing use—variation of enforcement notice—alleged prejudice to council—fee for deemed application not paid—effect of non payment—the Deputy Judge upheld the decision of the Secretary of State—abandonment issue was essentially one of fact—the variation was acceptable—reference to dual control over caravans—non payment of fees entitled the Secretary of State to refuse to determine a deemed application.

Northavon District Council v. Secretary of State for the Environment and Smyth (Queen's Bench Division, Judge Marder, Q.C. sitting as Deputy Judge, September 4, 1989)[4]

The Council served an enforcement notice on Mrs. Smyth, a gipsy, the owner of one acre of land in the Bristol Green Belt. This alleged, *inter alia*, the making of a material change in the use of the land to the purpose of siting residential caravans. On appeal, the Secretary of State upheld the notice in relation to the other matters. In relation to the siting of caravans, he treated the appeal as having been made under section 88(2)(*b*) of the Town and Country Planning Act 1971, *i.e.* that the use of land did not constitute a breach of planning control.

Paragraph 5 of the Secretary of State's decision letter issued on May 12, 1989, stated:

> "It is accepted that caravans began to be located on the land and used for residential purposes from 1945. Evidence was submitted on behalf of your client that a site licence for a moveable dwelling was issued in July 1945, under the Public Health Act 1936 . . ."

Then in paragraph 7 the Secretary of State said:

> "It is not disputed that there was a moveable dwelling on the site until 1969, when Mr. Barton went into hospital and subsequently into an old people's home. This use subsequently remained inactive until the death of Mr. Barton in 1981 and his granddaughter sold the site to your client in 1984 or 1985. The question for decision is whether the cessation of the use, between 1969 and 1984 or 1985, amounted to an abandonment of a use for the stationing of a residential caravan or moveable dwelling on the land. The view is taken that the temporary cessation of a use for a period, even amounting to several years, need not inevitably constitute abandonment of the use; and, in this case, as the caravan remained on the site in the expectation of Mr. Barton's return, the fact that it was not actually used for residential purposes is not

[4] *M. Burrell* (instructed by Messrs. Denton Hall Burgin and Warrens, London EC4) appeared on behalf of the applicant. *M. Kent* (instructed by The Treasury Solicitor) appeared on behalf of the first respondent.

> regarded as conclusive evidence of abandonment. In addition, no material change of use took place during the period. The Council referred to the application for a 'void allowance,' which was made in 1975, but it is considered that an application of this sort, made for domestic rating purposes, is not decisive of the lawful planning status of the land. After the death of Mr. Barton, in 1981, it is accepted that his granddaughter made a planning application, which was refused, for a permanent dwelling on the land; but, despite this, no steps were taken to introduce some other use or to terminate the use for a caravan or moveable dwelling. Within a reasonable time, the land had been sold to your client. It is considered that the planning application may be regarded as a speculative approach by [Mrs. Edwards] which did not amount to an irrevocable step to end the then existing use. The view is taken that, for the reasons stated above, the use for a residential caravan or moveable dwelling had not been abandoned between 1969 and 1984 or 1985. It follows from this conclusion that this use, which began in 1945, has continued since that date, albeit not always actively, and the appeal will therefore succeed on ground (b) in respect of this use."

The Secretary of State directed that the enforcement notice be varied by the deletion of the words "siting residential caravans." Subject to that, he dismissed the appeal and upheld the remainder of the notice.

In paragraph 10, in regard to the deemed planning application the Secretary of State, because the appellant had paid no fee upon the deemed application, said this:

> "The view is taken that the power, in section 88B(3), is a discretionary power and the Secretary of State is under no obligation to exercise it when the fee for the deemed application has not been paid. It follows from this view that when, as here, there is no possibility of granting planning permission (on the deemed application), there is no practical purpose in considering the appeal on ground (a). Accordingly, while the Inspector's recommendation is noted, no further action will be taken on the ground (a) appeal."

The council appealed to the High Court under section 246 of the 1971 Act.

THE DEPUTY JUDGE said that the first point raised by the Council was that relating to abandonment. In essence, the local planning authority alleged that the Secretary of State was wrong as a matter of law to have found that the residential caravan use of the land had not been abandoned. Whilst accepting that the matter was ultimately one of fact, Mr. Burrell had argued forcibly that the framing of the Secretary of State's decision on this point indicated clearly that he had disregarded material evidence and thus rendered his finding nugatory and erroneous in law.

Reference was made to a number of cases on abandonment relating to the abandonment either of the benefit of a grant of planning permission or the abandonment of existing user rights. It was clear that whatever might be the position in respect of the express grant of planning permission, circumstances could arise in which the benefit of existing use rights might be found to have been abandoned. This was most recently reaffirmed in the case of *White* v. *Secretary of State* [1989] 15 E.G. 193, C.A.

It was equally clear that the question of whether or not the right had been abandoned was essentially one of fact. The classic exposition was to be found in the case of *Hartley* v. *Minister of Housing and Local Government and Another* [1970] 1 Q.B. 413, C.A.

In determining that issue of fact, no doubt there would generally be a number of relevant factors to be taken into account. In the case of *The Trustees of the Castell-y-Mynach Estate* v. *Secretary of State for Wales and Taff Ely Borough Council* [1985] J.P.L. 40, Nolan J. accepted, as was common ground between the parties, that there were four factors principally to be considered: (a) the physical condition of the building in question (b) the period of non-use (c) whether there was any supervening use (d) evidence as to the owner's intentions.

The weight to be attached to the evidence however was plainly a matter for the judge of fact, in this case the Secretary of State. It was not a ground for this court's interference that the Secretary of State might have attached more weight to some part of the evidence than to some other part. Within the confines of these principles, Mr. Burrell nevertheless submitted that on reading paragraph 7 of the Secretary of State's decision, dealing with the question of abandonment, it was apparent that he had failed to take account of material evidence.

In submissions, it was pointed out that it was a lengthy paragraph, that it contained a detailed examination of the evidence as seen to be relevant, and that there was no mention in it of the finding of the previous Inspector in 1984, that the structures then on the land were "dilapidated" and "ramshackle" and "in a condition making them unsuitable for human habitation." Since there was no mention of that evidence in the Secretary of State's letter, Mr. Burrell submitted that it must have been left out of account.

He (the Deputy Judge) could not accept that submission. It was plain that that evidence was before the Inspector at the 1989 inquiry. It was referred to specifically in his report, and in his findings of fact. The fact that the Secretary of State had not seen fit to make specific mention of that particular item of evidence in determining the question of abandonment suggested no more than that it had not carried weight with him such as to outweigh the other matters that he had specifically mentioned and considered.

The Secretary of State had to determine as a matter of fact whether the use of this land for stationing residential caravans, which undoubtedly commenced prior to July 1948, had subsequently been abandoned. Because evidence from Mr. Barton and from his granddaughter, Mrs. Edwards, was not available, that task required the drawing of inferences from a relatively limited amount of information. The Secretary of State concluded that there had been no abandonment. He was entitled to reach that conclusion on the evidence that he had, and there was no reason to suppose that the evidence, including that of the finding of the previous Inspector, was not considered and taken into account in reaching that conclusion.

The next point taken by the planning authority related to the amendment made by the Secretary of State to the enforcement notice, the amendment by deletion of all reference to the siting of residential caravans. The local planning authority said that the Secretary of State ought not to have done that and was wrong, as a matter of law, in doing that. If there was an existing use right, then it was clear from the evidence, and from the decision letter itself, that it was limited to the stationing of a single caravan. If the owner had a right to be protected, then that was the extent of the right. That protection could have been afforded to her by amending the enforcement notice so as to prohibit stationing of all caravans in excess of one, or by some such wording.

In the course of the hearing, Mr. Burrell conceded that the owner's right would be to station on the land, not necessarily one residential caravan but such number of residential caravans as did not amount to development by a material change of use, that was to say development by an intensification of use. Mr. Burrell was bound by authority to make that concession and, in consequence, he suggested a further amendment of the enforcement notice in order to incorporate that right.

It was that amendment which the local planning authority said was what the Secretary of State, as a matter of law, was required to do. His failure to do that "has the effect of widening the existing use right" and prevented the exercise by the local planning authority of effective planning control in relation to the siting of residential caravans on this land. Thus it was argued that the local planning authority had suffered injustice by the amendment that was made, and the Secretary of State was only empowered by section 88A(2) to amend the enforcement notice if he could do so without injustice to the parties.

He (the Deputy Judge) accepted the submissions made on behalf of the Secretary of State on this aspect of the case. The local planning authority served the enforcement notice. They alleged development by the stationing of residential caravans on the land. The appellant, Mrs. Smyth, succeeded in showing on the facts that there had been no such development in breach of planning control. The Secretary of State accepted that the use had commenced before 1948 and that that use had not been abandoned.

It followed accordingly that the enforcement notice could not stand unamended without thereby revoking or abrogating the appellant's existing use right. The effect of that right was that the owner was entitled to station any number of residential caravans on the land, up to the indeterminate point at which it could be said that the use of the site had been materially changed. The power to amend the enforcement notice, contained in section 88A(2), was a discretionary power, and it was said on behalf of the Secretary of State that it could not be right in an enforcement notice bearing a penal character to amend it in such a way as to cut down the existing use rights.

Furthermore, he also accepted the submissions of the Secretary of State that the dire consequences of this amendment, foreseen by the planning authority, were illusory and, if they existed at all, would exist equally if the enforcement notice were to be amended in the manner that the planning authority had contended for. It would, in the circumstances of this case, remain open to the planning authority to serve a further enforcement notice if and when the time came that the use of this land had been, in their view, materially changed by intensification of use for the stationing of residential caravans. Their hands were not tied in this respect by the Secretary of State's action on this enforcement notice.

It was also right to bear in mind the system of dual-control which was exercised exclusively in relation to caravan sites. This council was also the site licensing authority for the purposes of the Caravan Sites and Control of Development Act 1960 and was empowered under that Act, in particular to prosecute the operator of the caravan site who did not have a licence for that site. No site licence could be granted without there first being a grant of planning permission, and planning permission had not been granted so far in respect of this land either by the local planning authority or by the Secretary of State. It was thus open to the local planning authority, as licensing authority, to exercise their powers under the 1960 Act if they saw fit to do so.

Turning to a somewhat esoteric point that was raised in relation to the payment of fees. Since 1980, fees had been chargeable on making an application for the grant of planning permission and upon making certain other applications. Normally such an application would be made to the local planning authority, and the fee would be paid to them. But the system extended likewise to the deemed application for planning permission that arose by virtue of section 88B(3) of the 1971 Act upon the launching of an appeal to the Secretary of State against an enforcement notice.

This matter of fees was dealt with in section 87 of the Local Government Planning and Land Act 1980. The regulations that were made under those provisions were the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1983. It was the practice of the Department to acknowledge the notice of appeal from an enforcement notice and to request the payment of a fee in respect of the deemed application for permission at that point. That practice was in accordance with the regulations. That practice was followed in this case but no fee was in fact received from the appellant.

It would perhaps be preferable to refer specifically to that procedure or practice in a future decision letter. The decision letter set out, in paragraph 10, how the Secretary of State dealt with this matter in the absence of the receipt by him of the prescribed fee. He declined to determine the deemed application for planning permission. The local planning authority objected to that refusal or failure on the part of the Secretary of State to adjudicate in the matter; they found it inconvenient.

It might well be, as the local planning authority suggested, that it would be better for all concerned to have a decision on the merits in respect of this land. If the Secretary of State had been minded to grant planning permission, then it would be open to the local planning authority, as licensing authority, to issue a site licence upon which they would be able to impose appropriate conditions regulating the use of the site, whereas if, on the merits of the case, the Secretary of State had refused planning permission for caravans on this land, then the local authority would be in a "less exposed position" if they decided to prosecute for the absence of a site licence under the 1960 Act.

Inconvenience to a local planning authority, however, was not in itself a ground for the intervention of this court, and he failed to understand how the Secretary of State could be said to have erred in law by refusing to adjudicate on the deemed application until the appropriate fee had been paid. There was nothing in the regulations that prevented him from adopting that stance. Indeed it was somewhat ironic for the local planning authority to take that point, as no doubt they would require payment of the appropriate fee before accepting an application for planning permission for their consideration and determination—and rightly so, as the regulations specifically provide. There was therefore, nothing in that point.

An alternative point was raised that the Secretary of State had no jurisdiction to hear the section 88 appeal at all, in that no fee had been paid as prescribed.

There was a plain distinction between the appeal from an enforcement notice on what might be described as the technical grounds raised in paragraphs (*b*) to (*f*) of the grounds which can be raised in section 88 on the one hand, and on the other hand ground (*a*) and the deemed application for planning permission which related to the merits of the matter rather than the technicalities. In respect of the former, the appeal on technical grounds,

no fee was chargeable. That was not surprising, as the recipient of an enforcement notice had to be entitled to defend himself against the allegations of breach of planning control, raised against him in the enforcement notice, without having to pay a fee for the privilege.

It followed from that that non-payment of the fee which was chargeable on the deemed application for planning permission could not deprive the Secretary of State of the power to adjudicate on the allegations of breach of planning control in the context of a section 88 appeal.

Appeal dismissed.

Comment. The issue, regarding the extent of the existing use rights to use the site for the stationing of residential caravans, can be described as a reverse *Mansi* as it turned on how far the Inspector in varying an enforcement notice should protect the position of the local planning authority. The argument put forward by the local planning authority was that the Inspector by deleting completely the reference to the siting of residential caravans, had in effect widened the existing use rights of the site. As Judge Marder pointed out this could only apply if the local planning authority was in some way estopped or prevented from in the future taking enforcement action if the number of caravans were to be drastically increased. The House of Lords decision in *Thrasyvoulou* v. *Secretary of State for Environment* 1990 means that the finding, that the existing user rights had not been abandoned, cannot be reopened if another enforcement notice is served. It does not mean that it cannot be argued in the future that a material change of use by intensification has taken place, though the case law suggests that once a residential caravan use has been established the increase in numbers must be extreme to be material; see *Guildford R.D.C.* v. *Fortescue* [1959] 2 Q.B. 112 and *Esdell Caravan Parks Ltd.* v. *Hemel Hempstead R.D.C.* [1966] 1 Q.B. 895. In this respect it is interesting to compare this present case with *Davies* v. *Secretary of State for the Environment* [1989] J.P.L. 600 where it was accepted that use of a site for caravans could be too casual and intermittent to establish user rights.

Where a planning application is made direct to the local planning authority, provided the correct fee is paid and the application is otherwise in order, the local planning authority is under a legal duty to determine that application; see *Bovis Homes (Scotland) Ltd.* v. *Inverclyde D.C.* [1983] J.P.L. 171. Where no fee is paid or the incorrect fee is tendered, article 23(3)(c) of the General Development Order 1988 deals with the situation by providing that the application is not taken to have been received until the required fee has been paid. This might suggest that if no fee is paid the local planning authority has no jurisdiction to determine the application. But article 23(3) specifically states that it is for the purposes of article 23 that the application is taken to have been received when the fee is paid. So this would suggest that the rule is only concerned with fixing the date from when the eight week time limit runs and so it may be that a determination would still be valid even though no fee has been paid.

In the case of the Secretary of State, the tacking on of the deemed application to the enforcement notice appeal, inevitably means that the procedures are not precisely set out. Thus while section 88B(3) states that there is always a deemed planning application imposed alongside every enforcement notice appeal, section 88B(1) merely states that on the determination of an enforcement appeal, the Secretary of State may grant permission. This would suggest that the Secretary of State does not have to determine the application *even* if the fee is paid. Indeed where the Secretary of State finds that no breach of control has taken place, there may be no necessity to grant permission. This is recognised by regulation 10(12) of the Fees for Applications and Deemed Applications Regulations 1989 (the 1989 Regulations have substantially replaced the 1983 Regulations), which provides for a refund of the fee where an appeal against an enforcement notice has succeeded on grounds set out in section 88(2)(b) to (f), or if the notice is invalid or fatally flawed. Significantly regulation 10(12) does not apply in the case of an enforcement notice alleging a breach of planning control by the use of land as a caravan site. This must be because even where the enforcement notice is quashed, the appellant will normally still want to obtain planning permission in order to obtain a site licence.

Unlike the case with a direct application to the local planning authority neither the 1989 Regulations or the General Development Order 1988, deal with the position where no fee is paid. If in such a

case the Secretary of State still had to determine the application, there would be no inducement to pay the fee at all. So it must be correct that failure removes any obligation to determine the deemed application. On the other hand where a fee is paid, there must be an obligation either to determine the application or to refund the fee. Also the twin track nature of an enforcement appeal equally supports Judge Marder's view that a failure to pay the fee does not mean that the enforcement notice appeal has to be refused.

The apparent mystery about this case is why the local planning authority was so keen to get a decision on the deemed application. Without a formal grant of planning permission, a site licence cannot be obtained and this leaves the occupier open to criminal prosecution. On the other hand, a local authority who brought a prosecution would be likely to be exposed to criticism and so in reality they are stuck with a caravan site on which they can't impose site conditions. It would presumably still be open to the occupier to apply for planning permission even though his use of the land is not unlawful under section 23 because of Schedule 24, paragraph 12. However this requires the cooperation of the occupier. So the solution from the viewpoint of the local planning authority might be to bring a prosecution to force the occupier to apply for planning permission and then for a site licence.

Lapsed planning permission—residential development—outline permission granted on appeal—means of access to the site—applicants only owned site itself—approval of reserved matters—vehicular access on land not owned or controlled by applicant—function of Inspector on appeal relating to points of law—relevance of Grampian style condition.

Proberun Ltd. v. Secretary of State for the Environment and Medina Borough Council (Queen's Bench Division, Sir Frank Layfield, Q.C. sitting as Deputy Judge, October 9, 1989)[5]

The applicants owned 105 acres of land at Medham Farm, Cowes, in the Isle of Wight. The main bulk of the site lay at some distance from the nearest highway of importance, namely the Newport Road. The main bulk of the site was linked to the Newport Road by a long narrow strip of land called Medham Way, owned by the applicants and the site was connected by no other relevant vehicular means.

In 1978 the applicants sought full planning permission for residential development on the site.

Full permission was granted on February 22, 1979. No condition with regard to access was imposed, the access proposals on the site having been shown on a layout plan sent in with the relevant application for which approval had been obtained. That layout plan showed that Medham Lane was proposed to have a "16 foot wide Macadam road with dished channels either side," and it was described on the plan as "access to be upgraded as for previously approved plans." It was evidently the only vehicular access proposed. The plan to which that comment referred showed that Medham Lane, Newport Road junction was in the form of a simple bellmouth. It also recorded that the junction would use "new visibility line road improvements recently completed by the council to improve the junction at Medham Lane and the A302," that was to say Newport Road.

Concurrently with the grant of the 1979 permission, a section 52 agreement was reached between the applicants and the council. It was illustrated by a plan which showed the land in the ownership of the applicants to be the same, for all present purposes, as the site for

[5] *A. Trevelyan-Thomas* (Messrs. Titmuss, Sainer & Webb). *I. Burnett* (the Treasury Solicitor).