

31 May 2002

By hand

Rt Hon John Prescott MP
Deputy Prime Minister
Office of the Deputy Prime Minister
Whitehall
London SW1

Dear Mr Prescott

Town and Country Planning Act 1990
Land at 307 Huntingdon Road, Girton, Cambridge
Proposed development: erection of building for B1(b) research use
Appeal reference: APP/W0530/A/02/109018
Appellants: The Chancellor, Masters & Scholars of the University of Cambridge

You will be aware of this planning application by Cambridge University which is now under appeal. It has received a considerable amount of media attention, not least as a result of the Prime Minister's speech to the Royal Society on 23 May and the launch the same day of the results of the BUAV's undercover investigation into the university's existing primate research. The BUAV objected to the planning application along with large numbers of others. I understand that, following the cabinet reshuffle, you have assumed responsibility for planning matters.

I note that the university's solicitors, Hewitson Becke + Shaw, wrote in their letter of 7 May 2002 to the planning inspectorate:

'We also consider that this is a matter in which the Secretary of State should exercise his discretion to recover jurisdiction from the Inspector and decide the appeal himself'.

They were, of course, referring to the discretion given to you by paragraph 3(1) of schedule 6 to the Town & Country Planning Act 1990 ('the 1990 Act') to decide a planning appeal yourself rather than leaving it to an inspector.

We have taken legal advice as to whether that this is an appropriate case to invoke the recovery jurisdiction. We do not believe that it is. In essence, this is because a recovery decision allowing the appeal would be infected by bias or the appearance of bias and that the High Court could not cure the defect thereby created on an appeal under section 288 of the 1990 Act. As a result the appeal process would be in breach of Article 6 of the European Convention on Human Rights (right to a fair hearing).

In his speech to the Royal Society, the Prime Minister said this:

'We're faced with a current example, where Cambridge University intends to build a new centre for neurological research. Part of this would involve using primates to test

potential cures for diseases like Alzheimer's and Parkinson's. But there is a chance the centre will not be built because of concerns about public safety dangers and unlawful protests. *We cannot have vital work stifled simply because it is controversial* (my emphasis).

That was the clearest possible signal that the Prime Minister wants the planning application now under appeal to be granted. In these circumstances it is very difficult to see how you could approach a recovered appeal with a sufficiently open mind. All ministers are, of course, beholden to the Prime Minister of the day and are most unlikely to go behind his clearly expressed wish. In any event, whatever the reality, I am advised that the *appearance* of bias is sufficient to condemn a judicial or quasi-judicial process (such as a recovered appeal). I understand that last year the House of Lords laid down the test for apparent bias in these terms in *Magill v Porter*:

'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.

I have a copy of the letter which Lord Sainsbury of Turville, the science minister, wrote to Sir Alec Broers, vice-chancellor of the university, in April 2001. Lord Sainsbury went out of his way to support the proposed expanded primate research facility. He concluded the letter thus:

'Finally, I fully recognise that the location of the Centre is a matter for the university and the planning authorities. Planning applications are properly for the planning authorities, and they need to take a range of considerations into account in reaching their decision. *I am content for you to release this letter to them, and for them to make it available to all parties with an interest in any planning application for the proposed Centre*' (my emphasis).

Despite Lord Sainsbury's rather disingenuous disclaimer in the first two sentences, there can be no doubt that the letter was designed to convey the clear message that the Government wanted the application to be granted. This was an extraordinary – and we believe wholly improper – intervention by a government minister in the planning process. To the planning authority's credit, it resisted the pressure. What matters for present purposes, however, is that the intervention is further evidence that the Government's mind is already made up: planning permission should be granted. Were you to recover the appeal, there can be no doubt that, under the *Magill v Porter* test, a decision to allow the appeal would be impugned: a fair-minded and informed observer would conclude that there was a 'real possibility' – to put it at its lowest – that you were biased.

Indeed, it is significant that the university is positively suggesting that you should recover the appeal: it clearly calculates that that represents its best chance of succeeding.

I am advised that it is these features which distinguish the appeal from the recent House of Lords decision in *R v Secretary of State for the Environment, Transport and the Regions ex parte Holdings and Barnes PLC* ('*Alconbury*') (2001). In particular:

- in *Alconbury*, the House of Lords said that the fact that the Secretary of State would be deciding a recovered appeal in the context of the Government's policy objectives did not matter. In the present case, however, the Government has not only adopted a particular policy but has also, at the highest level, decided *in advance* how the policy should be applied *in the particular case under appeal*.
- in *Alconbury*, the House of Lords held that the alleged problems with the recovered decision in question could be cured by the High Court. That would not, however, be possible with a recovered decision in the present case. This is because the High Court, if it agreed that there was actual or apparent bias, would have to remit the decision to you. It would not, of course, decide the planning appeal itself. Remittal would clearly be a pointless exercise since a fresh decision by you would also be infected by bias. In the phrase used by European Court of Human Rights ('ECTHR') caselaw, the court would not,

in the particular circumstances, be one of 'full jurisdiction'. I am advised that the ECtHR decision in *Kingsley v UK* last year is directly in point.

Indeed, in his concurring judgment in *Bryan v UK* (ECtHR, 1995), Mr Nicholas Bratza made it clear (in a passage approved of by Lord Hoffmann in *Alconbury*) that whether a judicial review was sufficient to cure a defect depended (*inter alia*) on the subject matter of the dispute. For the reason already given, such a review could not cure the defect in the present case.

For these reasons, we believe that it would be wholly inappropriate, and unlawful, for you to recover the appeal. Were you to do so, both the planning authority and the objectors would have a legitimate grievance that the appeal was a foregone conclusion. We believe that the appeal should be left with the planning inspector. She would, of course, have to take proper account of governmental policy. Crucially, however, she has not already committed herself to a particular outcome and would not be subject to the same personal and political pressures as you would be. Although inspectors are not independent or impartial in the Article 6 sense, the High Court would have 'full jurisdiction' to cure any defect in her decision.

I would welcome your views.

Yours sincerely

A handwritten signature in black ink that reads "Michelle Thew". The signature is written in a cursive style and is underlined with a single horizontal line.

Michelle Thew
Chief Executive