On the other hand, as Lord Denning might have said, there is something even higher than the Minister and that is the Law. What Woolf J. is really stating in this decision is that if the inspector had applied the Minister's policy and thus ignored the Chatham Dockyard site, he would have been erring in law by ignoring a material consideration. As Woolf J. emphasised, a policy can decide the weight to be placed on various material considerations but cannot remove a material consideration out of the focus of the decision-maker. If a policy did purport to prevent the consideration of the argument that there were potential sites available (where a specific five-year supply had not been proved), it would be unlawful.

Planning committee passed a resolution that planning permission be granted subject to the execution of a section 52 agreement—details of resolution notified to applicants by letter—subsequently application refused on archaeological grounds—Held that the resolution and letter did not constitute a formal grant of planning permission.

R. v. West Oxfordshire D.C., ex parte Pearce Homes Ltd. (Queen's Bench Division, Woolf J., December 6, 1985)[4]

Pearce Homes Ltd. were refused planning permission in September 1984 to construct two-storey elderly persons flats and convert and rebuild a property in Witney, on the grounds that the site was of considerable archaeological and historic significance and that the remains of a 12th century palace were enhanced by their setting in close proximity to the parish church and green within the conservation area.

Subsequent to that decision the site was scheduled by the Secretary of State for the Environment under section 1 of the Ancient Monuments and Archaeological Areas Act 1979 as being one of national importance:

The company applied for judicial review of the council's decision on the grounds that prior to September 18, 1984 the Council had already on May 22, 1984 passed a resolution which had the effect of granting the planning permission which they were seeking; and if, contrary to their primary contention, that resolution did not in itself constitute the grant of planning permission, they were granted planning permission by a letter of June 11, 1984 which notified the company that their application for planning permission had been approved subject to certain conditions. The resolution was passed and the letter was written because at the time the Council was unaware of the importance of the site. The importance of the site only became apparent as a result of the company allowing the Oxford Archaeological Unit to carry out excavations after June 11, 1984, and the company feels aggrieved that their public spirited cooperation with the Archaeological Unit should have resulted in what they regard as a planning permission being revoked.

WOOLF J. said that in his submissions on behalf of the company Mr. Scrivener had stressed that the importance of the application from the company's point of view was not that they, now the discovery had been made, so much wanted to build on the site but because, if they had the planning permission to which he contended they were entitled, they would receive compensation if it was formally revoked under section 45 or section 46 of the Town and Country Planning Act 1971, but they would not receive compensation if the refusal of planning permission of September 18, 1984 was allowed to stand.

The application for the planning permission was made on February 17, 1984. There were then the usual negotiations between the company and the officers of the Council and by May 22, 1984 the scheme as revised had the support of the Chief Planning Officer. He recommended that permission should be granted subject to the conditions and subject to the company entering into a section 52 agreement restricting occupation of the proposed residential units to persons over 60 years of age. On May 22, 1984 the authorised sub-committee of the Council considered the Chief Planning Officer's report and resolved:

"That the decisions on the undermentioned application be as indicated, the reasons for refusals or conditions relating to a permission be as recommended in the report of the Chief Planning Officer subject to any amendment as detailed hereunder:

(with regard to the relevant application) permitted subject to the applicants completing a legal agreement restricting occupation of the proposed units to persons over 60 years of age."

[4] *A. Scrivener Q.C.* and *V. Pugh* (L. Graham, agents for G.J Northover, Bristol) *R. N. K. Gray Q.C.* and *B. Ash* (Sharpe Pritchard & Co, agents for M.J Abbey, solicitor to the West Oxfordshire District Council).

The letter of June 11, 1984 followed and was in the following terms:

"I refer to your application in respect of the above development which was received and considered by the area planning sub-committee at its recent meeting.

I am pleased to confirm that your application was approved subject to conditions as detailed on the enclosed schedule attached and also to you entering into an Agreement restricting occupation of the proposed residential units to persons over 60 years of age because as you have already discussed with the planning officer concerned the car parking standard will be below the normal County Council requirements.

If I can have your confirmation of the preparation of an agreement in accordance with the above terms I will draft this for your perusal as soon as possible and when it is completed by both parties the planning permission can then be issued."

The company was happy to enter into the agreement, and to assist prepared a draft of that agreement themselves which was forwarded to the Council who apparently raised no objections to its terms. The agreement was however never executed because of the archaeological discovery.

After the Council had taken legal advice from leading counsel as to whether or not they were entitled to do so, the Council refused planning permission, having given the company opportunity to make further representations.

The company appreciated that, from the company's point of view, the letter of June 11, 1984 was not in as favourable terms as the resolution and it was because of this that Mr. Scrivener put in the forefront of his submissions that it was the resolution of May 22, 1984 which amounted to the grant of planning permission to the company, and the letter of June 11 was merely the notification of the decision which had previously been taken by the Council. Mr. Scrivener submitted that whether it was the decision of a planning authority or the notification of that decision which amounted to a planning permission was still an open question which had not been authoritatively decided by the Courts, and that the proper view was that it was the resolution which was the important matter. The notification was merely an administrative act which followed that decision. The planning authority were under a statutory duty to give this notification and this duty could be enforced by an order of mandamus.

As was made clear by the House of Lords in *Pioneer Aggregates Ltd.* v. *Secretary of State for the Environment and the Peak Park Joint Planning Board* [1984] 2 All E.R. 358, [1984] 3 W.L.R. 32, planning law was the subject of a comprehensive legislative code and in general it was an impermissible exercise of the judicial function to go beyond the statutory provision in order to ascertain the effect of that legislation. Whether or not Mr. Scrivener was right in his contention was therefore to be ascertained from the provisions of the Town and Country Planning Act 1971 and the relevant subordinate legislation which for the present purposes was contained in the Town and Country Planning General Development Order 1977. Accordingly he was taken by counsel on an instructive and detailed conducted tour of all the relevant sections of the Act and the provisions of the Development Order. He did not propose to lengthen this judgment by setting out those provisions because they were clearly chronicled in the helpful analysis of Sir Douglas Frank in his judgment in the *Cooperative Retail Services Ltd.* v. *Taff-Ely Borough Council and Another* 38 P. & C.R. 156, [1979] J.P.L. 466.

Suffice it to say that even in the absence of authority he would, from an examination of the code, find a clear indication that it was the notification which amounted to the grant, and that where the notification was preceded by a resolution of the authority that resolution should be regarded as a resolution that planning permission should be granted and that the resolution was intended to be implemented by the notification which amounted to the grant. Accordingly until there had been notification, an applicant for planning permission had not received permission.

Consistent with this approach, in the ordinary way in deciding what planning permission had been granted in respect of a particular site, all it was necessary to do was to look at the actual notification of the decision. Normally, it was not permissible to look at the resolution (see *per* Lord Denning M.R., *Slough Estates* v. *Slough*

B.C. [1969] 2 Ch. 315, [1969] 2 W.L.R. 1157; not on this point affected by the decision of the House of Lords in *Pioneer Aggregates Ltd.* v. *Secretary of State* [1984] 2 All E.R. 358, [1984] 3 W.L.R. 32).

However there could be situations where it was necessary to look at the resolution, where issues of a different sort from those in this case arose, for example whether or not the officer of the council had authority to give the notification of the grant of planning permission which he did. This was the issue which the House of Lords and the Court of Appeal considered it was not necessary to resolve in *Cooperative Retail Services Ltd.* v. *Taff-Ely* 39 P. & C.R. 2/3 and 42 P. & C.R. 1.

He found support for this approach in the judgment of the Master of the Rolls, Lord Denning, and the judgment of Sir Douglas Frank at first instance in the *Taff-Ely* case, and most importantly in the decision of a strong Divisional Court in *R.* v. *Yeovil Borough Council, ex parte Trustees of Elim Pentecostal Church* 23 P. & C.R. 39, 70 L.G.R. 142, a decision which he regarded as binding on him. In the last mentioned case there was, as in this case, a change of heart by a planning authority who had previously resolved to grant planning permission and the applicant applied for an order of mandamus requiring the council to issue the planning consent in accordance with their previous resolution. More than one ground for the decision was relied on by Lord Widgery C.J. in his judgment, with which Browne J. and Bridge J. agreed, and at p.44 Lord Widgery C.J. said: "That ground, no doubt, is sufficient to dispose of the present application, but another important matter has been canvassed and I think it appropriate to express a view upon it. Mr. Seward has supported his resistance to Mr. McCulloch's application in this case on a very broad ground indeed, namely, that within this legislation there is in effect no planning permission unless and until the written notice of the planning authority's decision has been given to the applicant. Of course, if this is right it again would be a complete answer to the present claim because here no written notice of approval was ever given and it would follow that the planning authority was perfectly free to withdraw its decision prior to its issue of the formal written notice. Mr. McCulloch says that it could not do so because it was *functus officio,* but on this approach to the matter it would not be *functus officio* until it had issued the written notice. No doubt when that notice had gone out it would be *functus officio* but not until then.

"I for my part think that this argument of Mr. Seward's also is well founded. Somewhat surprisingly, it has not arisen for direct decision in the twenty-five-odd years in which the modern town planning code has been in force, but it was touched upon briefly by Lord Denning M.R. in *Slough Estates Ltd.* v. *Slough Borough Council (No. 2)* [1969] 2 Ch. 315, [1969] 2 W.L.R. 1157. The extract from Lord Denning M.R.'s judgment comes where he is considering the permissible aids to the construction of a written planning permission. He says this:

'The permission must be construed together with the plan which was submitted and was incorporated into it: see *Wilson* v. *West Sussex County Council* [1964] 2 Q.B. 764, [1963] 2 W.L.R. 60. I confine myself to the plan. I do not think it is permissible to look at the resolution of the county council or the correspondence, for neither of them was incorporated into the permission . . .'

"There in terms one finds Lord Denning M.R. saying that it is not permissible to look at the resolution to construe the written permission; one asks oneself why not if, as Mr. McCulloch contends, it is the resolution and not the written permission which really matters.

"Lord Denning M.R. goes on: 'The reason for excluding them is this: The grant of planning permission has to be in writing' (and he refers to the then current General Interim Development Order) 'and it runs with the land. The grant is not made when the county council resolve to give permission. It is only made when their clerk, on their authority issues the permission to the applicant.'

"I respectfully think that that is entirely right, and its effect in this case is that there never has been a planning permission granted here. Salmon L.J. in dealing with this point did not concern himself directly with the effect of the resolution preceding the issue of the written planning permission

but he adopted the same approach as Lord Denning M.R. with regard to the admissibility of the documents to explain a written planning permission and again one asks oneself how it can be that the resolution is the all-important step if one cannot even look at it to construe the written notice. I gain a measure of further support for this view, if further support be required, from the terms of section 64(5) of the Act of 1968 which I have already read. I drew attention there to the fact that the draftsman had thought it desirable to say that a determination by an officer of the planning authority under delegated powers should not be effective unless and until it was communicated to the applicant in writing. In my judgment, therefore, for either of the two reasons submitted by Mr. Seward it must necessarily follow that the situation had not been reached here in which a planning permission had been granted and only a ministerial act remained to complete the applicant's title to it."

Mr. Scrivener submitted that the ground for the decision was not binding upon him (Woolf J.). He submitted that that passage was *obiter*. He (Woolf J.) disagreed. Where two grounds were given for a decision it was not correct to regard a ground for the decision as being *obiter* merely because it was the second ground which was put forward. Both grounds formed part of the ratio.

Secondly, Mr. Scrivener submitted that both the *Yeovil* case and the judgment of the Master of the Rolls in *Slough Estates Ltd.* v. *Slough Borough Council* [1969] 2 Ch. [1969] 2 W.L.R. 1157 (upon which Lord Widgery C.J. relied) were influenced by the different legislation then in force, in particular by the terms of the Development Order of 1945 Article 12, which specifically stated that the grant or refusal of permission to develop land shall be in writing, and section 64 sub-section (5), which provided that where there had been delegation, then if this determination "is notified in writing to the applicant" it was to be "treated for all purposes as a determination of the delegating authority." However, although Article 17 of the General Development Order 1977 was in different terms from Article 12 of the 1945 Order, it had precisely the same effect. Article 7(7) provided:

"Every such notice shall be in writing and (a) in the case of an application for planning permission . . . where the local planning authorities decide to grant permission or approval subject to conditions or refuse it, the notice shall: (i) state the reasons for the decision . . ."

That part of the article presupposed a decision to grant followed by notification of the grant. The decision accordingly was not in itself either the grant of the permission or the permission.

So far as section 64(5) of the 1968 Act was concerned, although there was no directly corresponding provision in the 1971 Act, section 101 of the Local Government Act 1972 did allow for decisions to be taken by an officer and in the case of such decisions there would be no resolution and the notification would be the only evidence of the decision, which was the situation which section 64(5) recognised.

Mr. Scrivener also relied on the fact that the provisions of the Order of 1977 were made pursuant to section 31(1)(*d*) which required the Order to regulate the manner in which the applications for planning permission to develop land were to be dealt with by local planning authorities and in particular:

"For requiring the local planning authority to give any applicant for planning permission within such time as may be prescribed by the order such notice as may be so prescribed as to the manner in which the application has been dealt with;"

Mr. Scrivener drew attention to the use of the past tense as supporting his argument. He (Woolf J.) did not dismiss this point but when compared with the material indicating an opposite conclusion, he did not regard it as significant. Without drawing attention to each of the provisions he limited himself to pointing out that time was treated as running not from the decision of the authority but the notice of the decision, and in particular under section 37, for the purposes of an appeal, an application was deemed to have been refused unless notice in writing had been given by the authority within the prescribed or agreed time.

In the light of those conclusions he considered whether or not the letter of June 22, 1984 amounted to the grant of a

planning permission. He had no doubt that it did not. He did not base himself on the fact that it did not comply with the requirements of a notification contained in Schedule 2 of the General Development Order 1977 (see *Brayhead* v. *Berkshire County Council* [1964] 2 Q.B. 303, [1964] 1 All E.R. 149). He regarded it as preferable to answer the question by construing the letter. The letter clearly anticipated that it was to be followed by a formal grant of planning permission when the agreement under section 52 of the Act had been completed. In the meantime the approval which was referred to in the letter was not a permission but a statement indicating that it was the intention to grant an approval when the formalities had been completed.

This being the situation the authority were required to reconsider the situation once they were aware that their previous decision was made in ignorance of very material archaeological considerations. In order to be fair in reconsidering the matter the Council had to take into account the effect which the letter of June 11, 1984 would have had on the company and the extent to which they would be adversely affected by a change of policy. However the Council gave the company an opportunity to make further representations and it was not being suggested, and indeed it could not be suggested, that having regard to the importance of the site the Council, if they were entitled to reconsider the matter, could not properly and fairly come to the decision to refuse permission.

Mr. Scrivener indicated that his clients were also contending that the Council were estopped from changing their decision. However, he did not develop that submission because it was now clearly established that in this area of law where a planning authority were performing a public duty in the interest of the public as a whole as well as in the interests of the applicant the private law doctrine of estoppel had no place. However, even if it were possible to rely upon estoppel the company would not be in a position to do so because it could not on the evidence establish that it did not fully appreciate the true situation.

Finally, in deference to Mr. Scrivener's argument on this point, even if he had thought that the resolution of May 22, 1984 was the critical decision he would not have interpreted that decision as being the grant of permission. Properly understood, it had no effect unless and until a section 52 agreement was completed. To use Mr. Gray's words, it authorised the planning officers to complete the "modalities."

Application dismissed.

Comment. Before turning to the main legal issues, it is worth noting that the developers had no firm intention of building on the remains of the Bishop of Winchester's palace and the main purpose of the litigation was to obtain compensation. To obtain compensation the persons with an interest in the land would have had to prove that a valid planning permission had been granted and then have that revoked causing them loss or damage. So if the applicants had succeeded in getting a declaration that a valid planning permission had been granted, the company would then have been forced to threaten to go ahead with the development. The site has now been scheduled by the Secretary of State under section 1 of the Ancient Monuments and Archaeological Areas Act 1979. Under section 2 of that Act it is a criminal offence to demolish or damage a scheduled monument. So even if the permission was not revoked, the company could not have taken advantage of it without obtaining scheduled monument consent. However if consent had been refused, compensation is payable under section 7 for loss or damage where the proposed works "are reasonably necessary for carrying out any development for which planning permission had been granted (otherwise than by a general development order) before the time when the monument in question becomes a scheduled monument and was still effective at the date of the application for scheduled monument consent." So even, if the permission had not been revoked, compensation would have been payable in the end.

The crucial issue was whether a valid planning permission had been made either by the resolution of the planning committee or the letter sent out by the officer. Like the position in the *Yeovil* case Woolf. J. in fact accepted that the resolution of the committee was not an unqualified decision. In *Yeovil* it was held a resolution that the clerk be authorised to approve the application "when evidence of an agreement about car-parking facilities has been received" was a delegation of the power of decision and not a final decision. In the present case Woolf J. similarly held that even if the resolution had been the critical decision it would have had no effect unless and until a section 52 agreement had been completed. This is interesting as it suggests that a permission can be made conditional on a section 52 agreement being completed. It has generally been accepted that a permission cannot be subject to a condition that

a planning agreement be entered into; see Circular 1/85 which without giving any reasons firmly states that ". . . permission cannot be granted subject to a condition that the applicant enters into an agreement under section 52 of the Act or other powers." para. 63. Yet it would seem the same result can be achieved by making it a *pre-condition* of the permission taking effect that there should be such an agreement.

As to when a grant is made, the Act itself does not spell out when the grant is made. However both sections 36 and 37 make a distinction between the decision and the notification of the decision. The General Development Order then requires the notification to be in writing and makes clear that the time in which an appeal must be made, runs from the date of receiving that notification; see Article 7(7) and Part II of Schedule 2. So the main justification for the interpretation fixed by the courts is that notification is an important formal step in the decision-making procedure and so must be regarded as mandatory. To this writer's mind, this helps to explain the various decisions. A valid planning permission requires two main conditions: First a substantive decision by an authorised body or person with the requisite jurisdiction and second the necessary steps of formal notification. Both are required. So a formal notification has no effect if the notification is contrary to the substantive decision or if the decision was *ultra vires*; see *Norfolk C.C.* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1400 and *Cooperative Retail Services Ltd.* v. *Taff-Ely B.C.* (1979) 39 P. & C.R. 223. Equally as in the instant case even where there has been a substantive decision, it can be rescinded up until the formal notification.

What remains uncertain is the case where the notification differs materially but not substantially from the resolution of the committee. In other words can you look to the wording of the resolution to explain or supplement the notification? According to *Slough Estates* you cannot look to the resolution but this point may have to be reviewed in the future.

Outline planning permission granted for a major redevelopment—application for reserved matters omitted certain uses previously agreed to—Court of Appeal held, applying Heron Ltd. v. Manchester City Council [1978] 3 All E.R. 1240, that as a matter of fact and degree a planning authority was entitled to decide that the omission of a particular use did not put the application for approval of detail outside the ambit of the original outline permission.

R. v. Hammersmith and Fulham L.B.C., ex parte G.L.C. (Court of Appeal, O'Connor L.J., Glidewell L.J., Sir Edward Eveleigh, October 11, 1985)[5]

In 1980 Hammersmith council granted the London Transport Executive outline planning permission to redevelop the "island site" in the centre of Hammersmith. The major development comprised the erection of a new bus garage, bus station, refurbished booking hall for the underground station, a new bus/rail interchange, office development, public library, car parking facilities and the provision of a large open space. At that time the London Transport Executive were in urgent need of a bus station, so reluctantly the Councils agreed to its inclusion in the scheme. However at a later date the existing bus garage closed and the L.T.E. decided it did not need to replace it, at any rate in this locality.

One day before the end of the three year period from the grant of the outline permission, the L.T.E. made application for approval of details, omitting the bus garage and public library. Knowing that the L.T.E. no longer required a bus garage, Hammersmith council obtained counsel's opinion on the validity of such an application. The G.L.C. as highway authority were consulted about the application for approval of details.

On April 4, 1984 Hammersmith's Planning Policy Committee approved proposals for public consultation and consideration of the application for approval of detail, having decided to accept it as being valid.

On July 12, 1984 the head of the legal branch of the G.L.C. wrote to Hammersmith a letter in which he said, referring to the application for approval of detail: "I note that the application was submitted on November 23, 1983, that is the day before the three year period expired, and that no material was 'submitted in relation to the bus garage or library which were included in the consent, but which are no longer required as part of the overall scheme'. Counsel's opinion has been obtained and this Council is now firmly of the opinion that this omission of the new bus garage and library from the scheme invalidates this application as a proper application for

[5] *J. H. Sullivan Q.C.* and *J. G. Hobson* (R. Lanham, legal branch, G.L.C.) *P. Boydell Q.C.* and *J. D. B. Milner* (Underwood & Co.). *J. Goudie Q.C.* and *A. F. Wilkie* (Borough Solicitor, Hackney and Fulham L.B.C.).