rationalisation that domestic sewage will be innocuous and easily disposable, while trade effluent may not be and so requires specific consent. The granting of the exemption to laundries and its subsequent abolition is explainable therefore on the grounds that laundry effluent used to be but is not now inoffensive. So if the legal distinction is based on the nature of the activity, the reason for the distinction is probably concerned with the nature of the effluent itself. The position is further complicated by the fact that today the levying of charges is one of the most important consequences of the need for consent.

The statutory provision which empowers the imposition of charges (see s. 59 of the Public Health Act 1961) does not attempt to set out any binding criteria as to how much an authority can charge but only provides that regard should be had to certain factors. However these factors suggest that charges should attempt to reflect the cost of treatment and it is understood that water authorities do in practise try to calculate charges on this basis. Nevertheless, there must be a feeling among launderette owners, who in many cases will still have to pay charges for the reception of "true" domestic sewage, that they are paying twice.

TOWN AND COUNTRY PLANNING

Construction of earth embankments—alleged breach of development control as engineering operations—whether within Class II of Schedule 1 *to the General Development Order—also question of the application of the four years rule—Held, that the embankments were not permitted development as not a means of enclosure—also that the building of the embankment one single operation and the whole embankment could be required to be demolished even though part erected more than four years ago*

Ewen Developments Ltd. v. Secretary of State for the Environment and North Norfolk District Council (Divisional Court of Queen's Bench, Lord Widgery C.J. and Wien J., February 6, 1980) [5]

Ewen Developments Ltd. own a strip of land on the North Norfolk coast which is used as part of caravan site. They had created on this site a number of constructions or "embankments" without obtaining planning permission. The local planning authority considering that the creation of these embankments was a breach of planning control served an enforcement notice which stated that "It appears to the Council that there has been a breach of planning control in that the said land has been developed by the construction of artificial earth embankments on the site, such construction being the carrying out of an engineering operation without the grant of permission required in that behalf under Part III of the Town and Country Planning Act . . ." and went on to require the owners, within the period of six calendar months, to remove the artificial earth embankments.

The owners appealed and an inspector was appointed to hold an inquiry into the appeal. He concluded that a breach of planning control had occurred and rejected the appeal.

The owners applied to the Divisional Court for this decision to be quashed.

LORD WIDGERY C.J. said that first of all, it was alleged that the construction of the banks was an engineering operation. If it was an engineering operation, then it required planning permission to be carried out. The argument for the planning authority was that, there having been no planning permission granted, there was a breach of planning control when these embankments were built. The inspector had concluded that the building of the embankments was an engineering operation, which implied to his mind that the embankments were substantial, otherwise the expression "engineering operation" could hardly be appropriate for them. In any case no one seemed to have questioned that they did amount to "engineering operations."

However, the matter was taken further in the relevant statutory instrument which was the Town and Country Planning General Development Order 1977 because this Order granted permitted development for "The erection or construction of gates, fences, walls or other means of

[5] *P. B. Manleverer* (Sharpe Pritchard & Co.); *M. Howard* (Treasury Solicitor).

enclosure not exceeding one metre in height where abutting on a highway used by vehicular traffic or two metres in height in any other case, and the maintenance, improvement or other alteration of any gates, fences, walls or other means of enclosure . . ." see Schedule 1, Class II.

He would draw attention straight away to the fact that here they had a case which required the *ejusdem generis* doctrine to construe the regulations because they were dealing with activities of these descriptions: the erection or construction of gates, fences, walls or other means of enclosure. To bring these embankments within the phrase "other means of enclosure," which was what the appellants had to do, the *ejusdem generis* doctrine had to be applied. It was no doubt to the credit of the inspector, who held the inquiry that he knew all about the *ejusdem generis* doctrine and seemed to have applied it with considerable intelligence.

The question was therefore whether on the evidence the building of the embankments could be properly described as the construction of a means of enclosure. They had not been told much about the nature of the embankments but one thing was quite clear, and that was that the embankments in question did enclose land; in other words, they did not just go straight from one point to another; they went round in a rough circle and produced an enclosure. No doubt to that extent the word "enclosure" could properly be applied to them.

The argument for the appellants was therefore that earth embankments were traditionally in North Norfolk a substantial means of enclosure and were thus development permitted within the terms of article 3 and Class II of Schedule 1 of the Town and Country Planning General Development Order . . .

The inspector however had concluded that the earth embankments around the appeal site were not a means of enclosure. This was a conclusion which was largely one of fact and degree and there was nothing to show that the inspector had misdirected himself in coming to this conclusion. Therefore the court should not disturb his finding of fact. However, it had also been argued that the appellants could only be required to reduce the height of the embankments to the height at which they were four years before the enforcement proceedings began.

The basis of that ingenious argument was that under the general law as contained in the Act enforcement in broad terms could not be undertaken more than four years after the development took place. What they were being asked to say was that they should allow the same quantity of embankment to remain as would have remained if the building had been stopped at a situation four years preceding the enforcement.

The inspiration for that argument came from the fact that, very often when they were dealing with uses and enforcement against uses, it was necessary to see that the uses which were not the subject of prohibition should not be unwittingly included in the rest. But he knew of no case in which the court had done that in regard to construction. It seemed quite wrong to do it in regard to construction, and indeed they were referred to an authority which he found conclusive on that point.

It was *Prengate Properties Ltd. and Another* v. *Secretary of State for the Environment and Others* (1974) 25 P. & C.R. 311. This again was a case of constructing a wall, and there was a good deal of very useful and helpful dicta about cases of that kind.

The point he was dealing with now had been specifically dealt with in his own judgment at page 315 where he had said this: "I think that the real argument on behalf of the Secretary of State is that one ought here to look at the earth moving, the terracing, the building of the retaining wall, as though it were a single engineering operation. Looked at as such, it would not of course be authorised by the terms of the Schedule, and I think that the argument for Mr. Slynn amounts really to this: that, that being so, the operation must stand or fall as a whole and that it is not open to the appellants to dissect that operation, to look at the wall in isolation and to say that the wall at

any rate is saved from the wreck by virtue of Class II. 1 of Schedule 1. I adhere to the principle which I was endeavouring to express in *Garland's* case; there will very often be cases in which a single piece of engineering development contains within itself something which can fairly be described as a wall, and, since the development as a whole is not permitted, the development in part will not be permitted either. I can see that such instances will often arise, but I cannot bring myself to say that the present is such an instance." He understood that to mean that in dealing with a single operation of construction as they were here, if enforcement proceedings could properly be brought against the construction as a whole, it was no answer to say "We will keep part of it because you could not have enforced against us if part only had been in question."

He was comforted in dismissing this appeal by the thought that when reference was made to the appellants in the course of the hearing, someone on their behalf had said, with great commonsense that what mattered to them was to get a quick answer and to be confident that it was a final one. He hoped at least they could do that for the appellants, but in respect of the appeal itself he would dismiss it.

WIEN J. agreed.

Comment. One of the most obvious features of the judicial review of development control is that the "fact and degree" approach of the courts means that they very rarely upset the Minister or his inspector's finding as to whether an activity constitutes development. This decision of the Divisional Court is nevertheless an extreme example of the limitations of judicial review. First the court appears to have been provided with very little information as to the detailed nature of the earth embankments. From *Coleshill* v. *Minister of Housing and Local Government* [1969] 1 W.L.R. 746, it is well known that the removal of earth embankments is capable of being an engineering operation and so presumably the creation of earth embankments can also be an engineering operation. However this must vary depending on the nature of the embankments and the method of construction. The point was not argued before the court but it nevertheless seems a pity that no attempt was made to provide any guidance on such questions. Secondly, from the transcript of the decision, the inspector does not appear to have given any reasons why he determined that the embankments were not "other means of enclosure." It is all very well to state that the question is one of fact and degree but questions of fact and degree are not concluded in a vacuum and must have some grounds on which they are determined. The third and more substantial point that can be made about this judgment, concerns the application of the four year rule to operations. As is well known in *Thomas David (Porthcawl) Ltd.* v. *Penybont R.D.C.* [1972] 1 W.L.R. 1526, the Court of Appeal held that with mining operations, each shovelful or cut was a separate breach of planning control and so enforcement action could be taken against shovelfuls taken less than four years ago but not against operations instituted more than five years ago. It has therefore been a popular examination question in planning law to pose the problem of whether the same rule applies to building or engineering operations; *i.e.* whether, if part of the whole building or engineering operation took place more than four years ago, action can be taken against the whole or only part. The crucial question being whether an unauthorised building or engineering operation constitutes a series of breaches of planning control or only one. Lord Widgery's view is that there is only a single operation of construction, though he does not make clear when that single operation takes place, though it is fairly implicit that time runs from the completion of the operation. This is a practical solution to the problem and one taken by most of the commentators; see Purdue, *Cases and Materials on Planning Law*, pp. 289 to 290, and Alder, *Development Control*, p. 50.

On the other hand, it can be pointed out that the cases quoted by Lord Widgery C.J., *Prengate* and *Garland* v. *Minister of Housing and Local Government* (1970) 21 P. & C.R. 555, are not concerned with the four year rule *per se* but more with the scope of the classes of permitted development. It could be argued that they are only authority that if permission is granted to build a house of a certain size and type, a house which is either smaller or larger is completely unauthorised, *i.e.* the development must fit exactly the terms of the permission. A similar point arose in *Copeland* v. *Secretary of State for the Environment* (1976) 31 P. & C.R. 403.