# Enforcement Update

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## Jackson v Secretary of State for Communities and Local Government *[2015] EWHC 20 (Admin)*

(1) Clarification of the *Welwyn* principle
(2) Commentary on Planning Enforcement Orders ("PEO's")
(3) The interaction between the two

**Allegation:** Change of use from an agricultural barn to a mixed use as an agricultural storage barn and a self-contained unit of residential accommodation.

**Steps required:** Permanent cessation of residential use, removal of residential items, restoration.

**Appeal:** Ground (d). Ground (d) established as a matter of fact but opposed by LPA under *Welwyn*.

## *Welwyn*

Paragraph 56 identifies four features which removes a case outside of the protection of s.171B(2):

i) positive deception in matters integral to the planning process;

ii) that deception was directly intended to undermine the planning process;

iii) it did undermine that process and;

iv) the wrong-doer would profit directly from the deception if the normal limitation period were to enable him to resist enforcement.

- No additional test of exceptionality.
- Not all features of *Welwyn* are necessary to remove a case from s.171B(2)
- Eg *Fidler* no false representations during the planning consent process
- *"The decisions of the courts to date have been fact-sensitive and there is some uncertainty as to the overall range of circumstances in which the public policy principle may be applied."*

## PEO's

**171BC Making a planning enforcement order**

(1) A magistrates' court may make a planning enforcement order in relation to an apparent breach of planning control only if—

(a) the court is satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed by any person or persons, and

(b) the court considers it just to make the order having regard to all the circumstances.

[44] *The magistrates' court may only grant a PEO under section 171BA(1) if satisfied on the balance of probabilities that the breach which appears to have occurred, or any of the matters constituting the apparent breach, has to any extent been deliberately concealed by any person, and the court thinks it "just to make the order having regard to all the circumstances" (section 171BC(1)). Thus, the legislation employs a relatively simple and broad definition of deception which embraces and goes beyond the Welwyn type of case. But the broad scope of that definition is balanced by a requirement that the court should be persuaded that the making of the PEO is just in all the circumstances.*

## PEO's as a replacement for *Welwyn?*

NO!

- No linguistic intention to remove
- Intention is to create an additional power
- No inconsistency with the continued application of *Welwyn*
- *Welwyn* bites in both Enforcement and CLEUD cases

## Ioannou v Secretary of State for Communities and Local Government *[2014] EWCA Civ 1432*

**Allegation**: Change of use from a single family dwelling house into five self-contained flats.

**Steps required:** To cease the use and to remove the various facilities necessary for the use as five flats.

**Appeal:** Grounds (a), (d), (f) and (g). Argued that under ground (a) a three flat scheme could be substituted for the five flat scheme or alternatively this could be required by ground (f)

**Ground (a):** Decision in the High Court confirmed. Ground (a) cannot be used to introduce an alternative scheme-

[11] *Both the ground (a) appeal and the deemed application for planning permission under sub-s 177(5) are tied to the breach of planning control alleged in the enforcement notice. This is mirrored by the power to grant planning permission under sub-s 177(1) which is limited to a power to grant permission in relation to the whole or any part of those matters.*

**Ground (f):** Decision in the High Court over turned-

*[33] … where Parliament has provided for planning permission to be granted in response to an appeal under s 174 against an enforcement notice, but has deliberately limited the scope of both the ground (a) appeal and the deemed application for permission to the matters stated in the enforcement notice as constituting a breach of planning control, and has limited the permission that may be granted under s 177(1) to the whole or any part of those matters, it would not be appropriate to sidestep that limitation by adopting an interpretation of sub-s 173(11) which would, when taken in conjunction with a successful ground (f) appeal, have the effect of granting a planning permission for matters other than those specified in the notice as constituting the breach of planning control.*

*[38] It is unnecessary to adopt a strained interpretation of sub-s 173(11) in order to ensure that enforcement proceedings retain their remedial character. If, as in the present case, an alternative scheme is put forward which is not part of the matters stated in the enforcement notice as constituting a breach of planning control, but which the Inspector considers may well be acceptable in planning terms, he can follow the course which the Inspector adopted in the present case: allow the appeal under ground (g) and extend the period for compliance with the notice so that the planning merits of the alternative can be properly explored: see para 7 (above). Local planning authorities usually issue enforcement notices as a last resort when persuasion and negotiation with the landowner has failed. It is open to a landowner who wishes to obtain planning permission for such an alternative scheme to apply for planning permission for that scheme at any time, whether before or after an enforcement notice has been issued. The local planning authority's power in s 70C to decline to determine applications for planning permission made after an enforcement notice has been issued applies only if granting the permission would involve granting permission "in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control".*

## Miaris v Secretary of State for Communities and Local Government *[2015] EWHC 1564 (Admin)*

**Allegation**: Change of use from a restaurant to a mixed use of restaurant, drinking establishment and nightclub.

**Steps required:** Cease (i) use as a drinking establishment; (ii) use as a nightclub; (iii) DJs being allowed to perform.

**Appeal:** Ground (f) – cessation of drinking establishment excessive; and cessation of DJs served no useful purpose.

**Issue for the Court:**

*[2] When planning permission is not sought for any of the matters constituting a breach of planning control to which such a notice relates, may the Secretary of State entertain an appeal against the notice on the basis that any of the steps it contains exceed what is necessary to remedy any injury to amenity caused by the breach and, if so, in what circumstances?*

*[68] … an appeal against an enforcement notice made under ground (f), on the basis that any step specified in an enforcement notice exceeds what is necessary to remedy any injury to amenity caused by the relevant breach of planning control, cannot be entertained when (i) there is no appeal under ground (a) that planning permission should be granted and (ii) the planning objections which the step addresses are not limited to any injury to amenity. An appeal on that basis when there is no appeal under ground (a) may be considered on its merits, however, if the step in issue is one solely to remedy any injury to amenity caused by the breach of planning control. Whether an appeal lies on this basis under ground (f), therefore, is not determined by the particular paragraph in section 173(4) on which the local planning authority may have relied to specify the step in issue. It depends on the nature of the planning objection that the step seeks to remedy.*

## R (Evans) v Basingstoke and Deane Borough Council

## *[2013] EWCA Civ 1635*

**Facts:** A farm had moved from agricultural use to a mixed use with the industrial element being predominant. Planning application for development on the farm approved on the grounds that the previous change of use was immune from enforcement due to the passage of more than 10 years.

**Issue:** Accepted that the change of use would have been EIA Development within Schedule 2 and that the EIA requirements had not been complied with. Claimant sought to argue that the s.171B TCPA 1990 time limits should be disapplied in respect of EIA development.

**Decision:** Time limits for taking enforcement are not in principle incompatible with the EIA Directive. However:

*[31] Enforcement powers are not conferred on individuals, but they can and do seek to persuade local planning authorities to exercise their enforcement powers. If a local planning authority wrongly fails to exercise those powers in respect of EIA development, an individual can seek a mandatory order in judicial review proceedings, as was done in the Ardagh Glass case [2009] Env LR 698.*

*[47]While the time for securing compliance with the Directive has passed, the local authority is still able to take action under section 102, if it considers it expedient to do so, if the use of the site is having a significantly adverse effect on the environment. If it is not having such an effect, then it is difficult to see how a section 102 notice could be justified, but whether a section 102 notice would be expedient in the interests of an amenity is a matter for the local authority to decide.*

## R (on the application of Maistry) v London Borough of Hillingdon

## *[2013] EWHC 4122 (Admin)*

**Allegation:** construction of a front wall and canopy without planning permission.
**Challenge:** Judicial Review.
(1) Service of EN without considering that there had been a breach of planning control
(2) Unlawful to refuse an extension of time to appeal the EN
(3) Lack of authority to issue

**Ground (1):** Arguments as to whether or not a breach of planning control has actually occurred are plainly issues which are to be addressed through an appeal.

**Ground (2)**: *[34] If one stands back and looks at what one can assume the purpose of the section to be, namely to permit the local authority to withdraw or, less drastically, to waive or relax provisions of the notice, there does not seem to be any clear reason why that should not be all-embracing and extend in the way for which Mr Fraser argues. Given that the wording is not entirely clear and that there is no case law on point, it seems to me one should look at the purpose of the section. I repeat, as I see it, there seems no particular reason why (8) should be singled out as something unusual in which the local authority has no power to amend.*

Whether or not a decision not to extend time can be subject to challenge on grounds of *Wednesbury* unreasonableness. Simply because a decision is harsh is not sufficient to amount to an unreasonable decision nor is it realistic to expect a Council to provide a detailed analysis of the consequences of failing to grant an extension.

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Thank you

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