Planning Law Update Session - NAPE Conference 2022

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No5 BARRISTERS CHAMBERS

OUTLINE

- Look at some important cases since 2020
- Reminder as to what a breach of planning control is
- Some cases on the materiality of a change of use
- Clarification of the “10 year rule” on change of use
- Making the decision to take enforcement action
- Necessity, expediency and proportionality
- Owners and occupiers as targets for enforcement
- Injunctions against “Persons unknown”
- Enforcement to regularise development
- Q&A

A breach of planning control

171A.— Expressions used in connection with enforcement.

(1) For the purposes of this Act—(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted,

constitutes a breach of planning control.

Remember – planning permission can be granted under the GPDO.

Development

55.— Meaning of "development" and "new development".

(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, *"development,"* means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

Remember - some works / changes of use are not development.

Material Change of Use – Barton Parks Estates Ltd v SSHCLG [2022] EWCA Civ 833

Facts

- An Inspector's decision was upheld to dismiss an appeal against the refusal of an application for a CLEUD for the stationing of up to 80 caravans "*for the purposes of human habitation*".
- Planning permission allowed for *"9 residential vans, 16 holiday chalets, 18 static vans & 30 touring units*". There was no condition limiting the number of caravans/chalets to those specified in the description of development, although there were conditions restricting the number of months for which occupation could persist.

Barton Parks Estates Ltd v SSHCLG [2022] EWCA Civ 833

The Inspector was entitled to find, as a matter of fact and degree, that the proposed use would be a material change of use – since it "*would bring about a substantial and fundamental change in the character of the appeal site's use*" because:

- In place of a seasonal pattern of occupation, there would be unrestricted residential occupation which would generate a steady level of activity throughout the year;
- There would be a year-round presence in presently unoccupied parts of the site;
- The pattern of movement to and from the planning unit would be likely to change significantly; and
- Caravans in year-round occupation adjoining the entrance would have the effect of visually extending the existing caravan site.

The Oxford AirBNB appeal decision

APP/G3110/C/19/3239740 – 10 July 2020

- "The breach of planning control as alleged in the notice is without planning permission, change of use of the Land from dwellinghouse within Use Class C3 to short term let accommodation (sui generis use)."
- "The key question is whether *'development'* has taken place which requires planning permission and, if so, whether planning permission is granted or the development is otherwise deemed to be lawful."
- "there appears to be a largely transient pattern and frequency of occupancy, compared to the more consistent pattern of occupancy that would normally be associated with that of a dwellinghouse."
  - Turnover, parking, more comings-and-goings from visitors and cleaners, noise and disturbance,
- "the level and character of activities that occurred at the site were materially different from those associated with a dwellinghouse"

Bansal v SSHCLG [2021] EWHC 1604 (Admin)

- Conversion of dwellinghouse into two flats
- Ground (d) appeal
- Inspector found the 1st floor flat had been occupied continuously for more than 4 years. But not satisfied that the ground floor flat had been.
- Court held that under ground (d) the evidential burden was on the appellant. It was not sufficient for the appellant to establish that the property had been physically converted into two flats, nor that the first floor flat was occupied throughout the four-year period, as that would not have enabled the local authority to take enforcement action against the appellant in respect of the entire property, for a material change of use from a single dwelling house to two dwelling houses

The “10 year rule” clarified – R(Ocado) v Islington LBC [2021] EWHC 1509 (Admin)

- A lawful planning right which had accrued on the expiry of a time limit in s171B was not lost merely because subsequently it was not exercised for a period of time.
- The continuity requirement was only concerned with whether the time for satisfying an immunity period was running.
- Once an immunity period was satisfied, the s171B prohibited the taking of enforcement action thereafter. It followed that from then on, any question about whether there was an ongoing breach of planning control against which a local planning authority would be able to take enforcement action would be irrelevant. The law did not require that such a right was being exercised when an application for a CLEUD was made.
- Tips:
  - When did the claimed 10 year period end?
  - Was there continuity of use in that period?
  - Has the lawful use since been lost - e.g. abandoned?

Is enforcement action necessary, expedient and proportionate?

- Important issues:
  - Evidence – why the breach is unacceptable in planning terms; why is the action to be taken the right one?
  - Identifying the authorised decision-taker
  - The advice to the decision-taker
  - The decision-taker's reasons are recorded
- Proportionality – see Thurrock Council v Stokes & others [2022] EWEHC 1998 (QB):
  - 'Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought — here the safeguarding of the environment — but also that it does not impose an excessive burden on the individual whose private interests are at stake.'

Who should action be taken against?

- Who is responsible – Owners? Occupiers?
- Who are they?
- s330 – Notice requiring information as to interests in land
- s171C – PCN. Information about activities on land
- Russnak-Johnston v Reading Magistrates' Court [2021] EWHC 112 (Admin) - includes the power to require the provision of documents; documents are "information".

“Persons Unknown” – Barking & Dagenham [2021] EWHC 1201 (QB); [2022] EWCA Civ 13

- The Court of Appeal overrules the High Court and resurrects injunctions against “persons unknown”.
- Key Take-aways
  - Injunctions bite against newcomers
  - LPA should make reasonable efforts to identify named defendants
  - Care must be taken to effect service by alternative means
  - Borough-wide injunctions are inherently problematic; targeted injunctions are the way forward.

- Practical Tips:
  - Pre-issue – LPA must regularly engage with the Gypsy and Traveller community. If it consideres that an injunction is the only way forward, then it will still be important to engage with that community.
  - Welfare assessments should be carried out, particularly in relation to children.
  - Draft up-to-date Equality Impact Assessment
  - LPA should have “clean hands” – Is there unmet need? Is there a nearby transit site?

Taking urgent action

- Temporary Stop Notice – See PPG ID17b 036-065
  - Stop activity immediately – a prohibitory notice.
  - Can’t be used to require positive action to be taken.
  - May not prohibit the use of a building as a dwellinghouse.
  - 28 days time limit.
  - Quick but adequate assessment of the likely foreseeable consequences.
  - Only prohibit what is essential to safeguard amenity or prevent serious or irreversible harm.
  - Consider any alternative ways of overcoming objection.

Taking urgent action

- A “Without Notice” Interim Injunction
  - No order should be made in civil proceedings without notice to the other side unless there is a very good reason for departing from the general rule that notice must be given (e.g. where to give notice might itself defeat the ends of justice).
  - When making applications without notice, there is a “high duty” on an applicant to make full, fair and accurate disclosure of material information and to draw the Court’s attention “to significant factual, legal and procedural aspects of the case” (*Memory Corporation plc v Sidhu* [2000] 1 WLR 1443, CA. This includes identifying the crucial points for and against the application and any potential defence. There is, in addition, a personal duty on the applicant’s advocate (for which the Court may subsequently hold the advocate to account).
  - Evidence needs to give an explanation. Why is “short notice” not an alternative?

Inviting a planning application to regularise development

- Allows LPA to impose conditions / obligations
- What do you do if no application is forthcoming? Options:
  - Under-enforcement – see s173(11)

    Where—

    (a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and

    (b) all the requirements of the notice have been complied with,

    then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of s73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.

Bhandal v SSHCLG [2020] EWHC 2724 (Admin)

- Planning permission granted for replacement sunroom at restaurant. Not built in compliance with permission. Appeal against refusal of permission for “as built” dismissed. Enforcement Notice issued requiring removal.
- Ground (a), (f) and (g) appeals on basis of alternative development:
  - (1) the replacement of the unauthorised roof with a flat glazed roof;
  - (2) the replacement of the roof, but with the addiction of making the upper section of the elevations compliant with the original planning permission;
  - (3) a provision to enable the closure of the opening that would result from the sunroom's removal.

- The inspector rejected the appeal on ground (a) finding that it was not within his power to grant planning permission as the alternative proposals involved new works, and ground (f) finding that the enforcement notice did not exceed what was necessary. He partially allowed the appeal under ground (g) and extended time for compliance to nine months to allow for the exploration of alternative schemes.
- Held:
  - Inspector had broad discretionary powers to consider “obvious alternatives”.
  - If alternatives are obviously connected to the matters enforced against planning permission could be granted under s177(1)(a).
  - The court would not interfere with the inspector's conclusion that the installation of folding doors did not form part of the development enforced against and that it was a proper case in which to extend time under (g) so the planning authority could consider the merits of the proposed solution.