LOCALISM ACT 2011: ENFORCEMENT

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SCOPE

1. This paper describes and discusses to some degree Chapter 5 of Part 6 of the LA 2011, which contains the following provisions:

    - Retrospective planning permission (section 123);
    - Time limits for enforcing concealed breaches of planning control (section 124);
    - Assurance as regards prosecution for person served with enforcement action (section 125);
    - Planning offences: time limits and penalties (section 126); and
    - Powers in relation to: unauthorised advertisements; defacement of premises (section 127).

    It focuses on sections 123-126; and these provisions will come into force on such day as the SoS may by order appoint (section 240(2)). More particularly, *'The Government cannot give a cast-iron guarantee about timing. On current estimates (as of November 2011), however, we aim for many major measures to come into effect in April 2012. These include: … planning reforms including the changes to planning enforcement rules'*[1] .

2. PEGLA is, in fact, very economical so far as its discussion of *'strengthening enforcement rule'* is concerned:

    > *'For people to have a real sense that the planning system is working for them, they need to know that the rules they draw up will be respected. The Localism Act will strengthen planning authorities' powers to tackle abuses of the planning system, such as deliberately concealing new developments.'*

    And its concluding summary of the overall effect of the Act does not revert to these measures. That is a fair reflection of the relative significance of the changes made to the enforcement regime compared to other changes to be brought about by the Act. This is, overall, a modest attempt at a re-settlement of enforcement powers in the context of the localism agenda. It is true to say that, as PEGLA reflects above, the 'deliberate concealment' provisions are the apparent centre-piece of these changes, though one might, on reflection, consider that the 'retrospective pp' provisions are likely to have a wider impact.

[1] A plain English guide to the Localism Act (DCLG, November 2011) ('PEGLA')

RETROSPECTIVE PLANNING PERMISSION (section 123)

Description

3. The Act deals, under this heading, with two situations.

Power to decline

4. An LPA in England may decline to determine an application for pp for the development of any land if granting pp would involve granting, whether in relation to the whole or any part of the land to which a pre-existing EN relates, pp in respect of the whole or any part of the matters specified in the EN as constituting a breach of planning control (a pre-existing EN is one issued before the application for pp was received by the LPA).

Ground (a) appeal foregone

5. An appeal may not be brought against an EN on ground (a) (assuming the land to which the EN relates is, again, in England) where the EN was issued (i) after the making of a related application for pp, but (ii) before the end of the period for appeal against deemed refusal of the application (an application for pp is related to an EN if granting pp would involve doing so in respect of the matters specified in the EN as constituting a breach of planning control).

Discussion

Power to decline

6. The Act seeks to address the stringing out of planning enforcement by repeat planning applications and to focus attention on the ground (a) appeal as the means of securing a final determination of the planning merits. These provisions are as they appeared in the original Bill subject the introduction of reference to 'a pre-existing EN', which secures clearly that LPAs may not seek to contrive access to this power by issuing an EN after the submission of a planning application. Applicants may be well-advised to 'head off' enforcement and a decision to decline by submitting a planning application, once they get any inkling that enforcement action is on the horizon; and it may, indeed, be that this is what the power to decline is intended to encourage.

7. The power to decline operates across the board (though gypsies and travellers were referred to as particular bones of contention in political debate) and entirely without time limit, where an EN is in place.

8. There is no means of testing a decision to decline on its merits; and an application for JR provides a blunt check on the exercise of this power – particularly where there are no statutory criteria for its exercise (it remains to be seen what guidance may be provided). There exists, in any case, an alternative course of action: an LPA may refuse pp, and may be awarded costs in the event of a wholly unmeritorious appeal against that refusal. It is not objectionable in principle that a landowner or occupier should seek to test the 'continuing expediency' of an EN on its merits.

9. It appears that a LPA may strengthen its hand in the exercise of the power to decline if it were to place recipients of an EN on notice of its existence and alert them to the prospect

that they may seek to exercise it. It would, indeed, appear to be sensible that advice along these lines should find its way into letters accompanying ENs.

Ground (a) appeal foregone

10. This provision remains, to my mind, curious. The RTPI advised that: *' Whilst the clause seeks to prevent developers running a ground (a) appeal and a retrospective planning application at the same time, it should be borne in mind that, in the event that a retrospective application is submitted closely followed by an enforcement notice, a right of appeal against the refusal of planning permission will still exist. ... If the intention is to retain this right of appeal then any appeal should be submitted including the appellants statement within 28 days of the date of refusal. The appeal should then be automatically converted to a ground (a) enforcement appeal so that in essence only one appeal is running'*[2]; but this was not taken up. If the objective is that those in breach of planning control should have just one bite of the cherry, there is much to be said for that bite occurring in the context of an enforcement notice appeal.

11. It is, in any case, unclear that any very substantial mischief is being addressed by avoiding EN appeals on ground (a) and retrospective planning appeals being run in parallel. Parallel appeals don't in practice appear to raise any significant administrative issues. And there may be sensible reasons for parallel appeals – the allegation (and therefore deemed planning application) may not be fit for purpose in all respects, or it may simply be sensible to give the Inspector a further choice.

TIME LIMITS FOR ENFORCING CONCEALED BREACHES OF PLANNING CONTROL (section 124)

Description

12. Section 124 introduces three new sections into TCPA:

- 171BA Time limits in cases involving concealment
- 171BB Planning enforcement order ('PEO')s: procedure
- 171BC Making a PEO

These provisions were formulated without apparent reference to the existing regime on concealed breaches of planning control (*Fidler* and *Welwyn Hatfield*); and I return to it below.

Applying for a PEO

13. Where it appears to the LPA that there may have been a breach of planning control in respect of any land in England, the authority may apply to a magistrates' court ('MC') for a PEO in relation to that apparent breach. An application for a PEO may be made within the 6 months beginning with the date on which evidence of the apparent breach sufficient in the opinion of the LPA to justify the application came to its knowledge. A certificate signed on behalf of the LPA and stating the date on which evidence sufficient in the authority's opinion to justify the application came to its knowledge is conclusive evidence of that fact (and a

[2] RTPI Issue Briefing: Enforcement [29th June 2011) ('RTPI Briefing') paragraphs 9 & 10.

certificate stating that matter and purporting to be so signed is to be deemed to be so signed unless the contrary is proved).

Granting a PEO

14. A MC may make a PEO in relation to an apparent breach of planning control only if: (i) the court is satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to some extent) been deliberately concealed by any person or persons and (ii) the court considers it just to make the order having regard to all the circumstances.

Effect of a PEO

15. If a MC makes a PEO in relation to an apparent breach of planning control, the LPA may take enforcement action in respect of the apparent breach or any of the matters constituting it at any time in 'the enforcement year', i.e. the year that begins at the end of 22 days beginning with the day on which the order is given (subject to an application for statement of case for opinion of High Court). This (i) applies whether or not the time limits under section 171B have expired and (ii) does not prevent the taking of enforcement action after the end of the enforcement year but within those time limits.

PEO procedure

16. Where the LPA apply to a magistrates' court for a PEO in relation to an apparent breach of planning control, the authority must serve a copy of the application on (i) the owner and occupier of the land and (ii) on any other person having an interest in the land that is an interest which, in the authority's opinion, would be materially affected by the taking of enforcement action. The persons entitled to appear before, and be heard by, the court include (a) the applicant, (b) any person on whom a copy of the application was served by the authority, and (c) any other person having an interest in the land that is an interest which, in the opinion of the court, would be materially affected by the taking of enforcement action in respect of the apparent breach.

Postscript: time for taking enforcement action

17. In determining whether the time for taking enforcement action in respect of a matter has expired for the purposes of TCPA section 191, that time is to be taken not to have expired if: (i) the time for applying for a PEO in relation to the matter has not expired; (ii) an application has been made for a PEO and the application has neither been decided nor withdrawn; or (iii) a PEO has been made and not rescinded and the enforcement year for the order has not expired (whether or not it has begun).

Discussion

Applying for a PEO

18. The Act does not impose any general time limit on making an application for a PEO: a PEO may be applied for at any time following substantial completion of development. Neither is there any express prohibition on repeat applications, though it may be that it is to be inferred from the provisions dealing with the LPA's knowledge that these provisions provide a once-and-for all window of opportunity for enforcement. But this remains to be seen.

19. It is the '*appearance'* to the LPA that there '*may'* have been a breach of planning control that triggers the ability to apply for a PEO; and it would, no doubt, be helpful if guidance is issued on the circumstances in which it is to be expected that these thresholds should be considered to be satisfied. The self-certification procedure appears to be intended to deal with issues that may arise in terms of different officers or departments of the authority acquiring fragments of knowledge over time and, therefore, uncertainty as to when time begins and expires for the purpose of making a PEO application. There is a degree of flexibility available to the LPA in terms of the 6 months limitation period bearing in mind that it runs from when the LPA has (or certifies that it has) sufficient evidence in its opinion to justify an application – and not simply of the apparent occurrence of a breach of planning control.

Granting a PEO

20. It is worth comparing section 171BC(1) as enacted (summarised at paragraph 13 above) with section 171BC(1) & (2) as they appeared in the original Bill, i.e.:

> *'(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 actions of a person or persons have resulted in, or contributed to, full or partial concealment of the apparent breach or any of the matters constituting the apparent breach, and (b) the court considers it just to make the order having regard to all the circumstances.*
>
> *(2) For the purposes of subsection (1), a person's actions are to be taken to include— (a) representations made by the person, and (b) inaction on the person's part'.*

21. The primary changes are, it appears, first the inclusion in the Act of *'deliberate'*. As previously formulated, these provisions would have facilitated the making of a PEO where the element of concealment involved had been entirely innocent (the ability to secure a PEO was previously independent of the state of mind of the landowner); whereas it is now apparent that some element of knowledge and maybe intention is required. The second primary change is the omission of the extended definition of 'actions'. Planning professionals may wonder why the existence of this element should be relevant to the availability of enforcement powers in respect of a breach of planning control at all; but it is plainly relevant to do so in the real world and the context of the localism agenda. But issues of definition and application are very clearly going to arise in respect of the occurrence of deliberate concealment particularly as, as the National Association for Planning Enforcement ('NAPE') observed, *''concealed breach' .. is what happens in all enforcement cases to varying degrees'*[3].

22. It may also be observed that the emphasis has shifted during the parliamentary process, quite appropriately, from the actions of persons to the concealed breach. This has been accompanied by the dropping of (unnecessarily complex) reference to *'... have resulted in, or contributed to, full or partial...'*; and their replacement with a simpler formula. It does appear from the wording as enacted that partial deliberate concealment may expose the entirety of a breach to enforcement.

[3] Memorandum submitted by NAPE (L116) (February 2011) ('NAPE memo')

23. It is perfectly clear from the reference to 'just' in this context that the MC is not to be confined to determining whether there has been an apparent breach and whether it has been deliberately concealed. Hearings in the MC will not be confined to determination of whether a *prima facie* case has been made out. It is to be expected that they will instead range widely and consider any matter that might be thought relevant to the justice of the decision to be made. The generalised invocation of justice as key to the magistrates' decision is an implicit recognition of the potential for injustice to arise from these provisions; and it is also the platform upon which it is entirely reasonable to anticipate that MCs will be obliged to host wide-ranging hearings. It is arguable and LPAs may seek to persuade the MC that it should not hear representations relevant to the planning merits because the landowner will have the opportunity to raise them on an appeal against any EN; and that may very well be a point to look out for on appeal by case stated.

Effect of a PEO

24. A PEO 'restarts the clock' and makes available any of the enforcement options under TCPA Part VII for a period of one year (as defined).

25. It is not entirely clear why an LPA would seek a PEO before the time limits in section 171B have expired or why it was regarded as necessary or appropriate to provide that these provisions do not prevent the taking of enforcement action within those time limits but after the end of the 'enforcement year'.

PEO procedure

26. The prospect of substantial hearings before the MC is reinforced by the provision that the applicant, person on which a PEO application has been served and other person whose interest in the land concerned would, in the MC's opinion, be materially affected by the taking of enforcement action are entitled to appear before *'and be heard by'* the Court.

Postscript

27. This is, it would appear, the centre-piece amongst the changes to the enforcement regime; but, one has to wonder just how frequently LPAs will seek to exercise these very demanding powers. The RTPI referred to this measure as *'a sledge hammer to crack a relatively small nut'* and *'unnecessarily complicated'*[4]; and both of these comments appear be fair.

28. Quite apart from the scant level of resources routinely available for planning enforcement, these provisions appear to have been wholly or substantially superseded in advance by the Supreme Court's decision in *Welwyn Hatfield Council v. SSCLG & Beesley*[5]. Lord Mance (with whom Lord Phillips, Lord Walker, Lady Hale and Lord Clarke agreed) said this in paragraphs 53, 54, 56 and 58 of his judgment:

> *'53. Since the ultimate question is whether it can have been the intention of the legislator that a person conducting himself like Mr Beesley can invoke the benefits of sections 171B and 191(1), I do not consider that there can be any absolute principle that public policy can only bear on the legislator's intention in a context where there has been the commission of a crime. The principle described in the passages cited from Halsbury and Bennion is one of public policy. The principle is capable of extending*

[4] RTPI Briefing paragraph 16
[5] [2010] UK SC 15

more widely, subject to the caution that is always necessary in dealing with public policy […]

54. Whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. Here, the four-year statutory provisions must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield, and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale […]

56. Here, Mr Beesley's conduct, although not identifiably criminal, consisted of positive deception in matters integral to the planning process (applying for and obtaining planning permission) and was directly intended to and did undermine the regular operation of that process. Mr Beesley would be profiting directly from his deception if the passing of the normal four-year period for enforcement which he brought about by the deception were to entitle him to resist enforcement. The apparently unqualified statutory language cannot in my opinion contemplate or extend to such a case.

For the reasons I have given, I do not consider that sections 171B(2) and 191(1)(a) are applicable to the facts of this case. Had I considered otherwise, I would have concluded that their language could not have been intended to cover the exceptional facts of this case, where there was positive deception in the making and obtaining of fraudulent planning applications, which is directly designed to avoid enforcement action within any relevant four year period and succeeded in doing so […]'

And in paragraphs 62 and 63 of his judgment, Lord Rodger said this:

'62. In this case, however, Mr Beesley took effective steps to conceal the true nature of the development over the four-year period since the change of use occurred in particular, he deliberately concealed the fact that the structure was being used, and was intended to be used, as a single dwellinghouse on greenbelt land. The concealment worked and the true position came to light only when Mr Beesley triumphantly revealed his dwellinghouse immediately after the four years had expired. He does not suggest — and it would not lie in his mouth to suggest – that, despite his efforts, the council should have spotted the true position before the four years expired.

63. In that situation, where Mr Beesley deliberately set out to conceal the true nature of the development during the whole four year period, with the aim that the council would be prevented (as happened) from taking enforcement action within the four-year period, there is no justification for cutting off the council's right to take enforcement action. To hold otherwise would be to frustrate the policy, indeed the raison d'etre, of section 171B(2) of the 1990 Act: in short, it is unthinkable that Parliament would have intended the time limit for enforcement to apply in such circumstance.' (underlining added)

29. These passages were cited by Sullivan LJ in the course of giving judgment during the course of the death-throws of *The Queen (on the application of Fidler) v. SSLG & Another*[6](the setting aside of permission to appeal), where he concluded:

'12. … I readily accept that whether or not there has been such deception as to disentitle an appellant from relying on the four-year rule is a fact-sensitive question.

[6] [2011] EWCA Civ 1159

> *The difficulty from the appellant's point of view in the present case is that the Inspector's findings of fact, based upon the appellant's own evidence, are perfectly clear. In the present case the deception was not the making of a false planning application, but the deliberate hiding of building operations behind a shield of straw bales the top of which was covered by a tarpaulin. On the appellant's own evidence, the bales were deliberately erected to conceal the construction of the dwelling; this was not a case of someone merely refraining from drawing attention to themselves by, for example, not applying for building regulations approval; here, there was positive conduct, and the avowed intention of that positive conduct was to deceive the local planning authority so that it would not realise building operations had been carried out until after the four-year period had expired.* (underlining added)
>
> *13. It seems to me that upon the facts found by the Inspector, this is a paradigm case of deception which disentitles an appellant from relying upon the four-year rule; it simply does not lie in this appellant's mouth to say that this local planning authority should have spotted the building which he had so carefully concealed at some earlier stage, were he to do so it would indeed frustrate the underlying statutory purpose. It is therefore of no consequence whatsoever whether the bales were or were not part of the building operations; the short point is that this was a deliberate deception which plainly falls within the principles set out in the Welwyn Hatfield case, the consequence of which is that this appeal has no prospect whatsoever of succeeding.'*

30. LPAs is, then, on the face of it left to weigh up whether the circumstances of the matter in hand bring it within 'the principle in Welwyn Hatfield' or whether they should adopt the procedures in sections 171Ba, BB & BC. Or perhaps the Act will be held to have superceded Welwyn Hatfield – and to have actually restricted the window of opportunity within which enforcement action might be taken in respect of concealed breaches. The Bill's Impact Assessment characterised the likely frequency of PEO applications as *'rare'*, and the underlining above suggests a broad, maybe total, overlap between this principle of law and these provisions. It may be that it is difficulties in inferring deception as the rationale for the deliberate concealment that should influence a decision to prefer the new statutory route; but, then again, it does not involve an Olympian leap from a finding of deliberate concealment to the inference of an intention to deceive. It will be interesting, again, to see how guidance addresses this interface.

31. It is noted, finally, that the Explanatory Notes to the Bill indicated that the Government would ensure that no unfairness resulted by reason of retrospective effect.

ASSURANCE AS REGARDS PROSECUTION FOR PERSON SERVED WITH ENFORCEMENT NOTICE (section 125)

Description

32. When, or at any time after, an EN is served on a person, the LPA may give the person a letter:

- Explaining that the LPA was, once the EN had been issued, required to serve the notice on the person;
- Giving the person an assurance that, in the circumstances as they appear to the authority, the person is not at risk of being prosecuted under section 179

either (i) in connection with the EN or (ii) in connection with the matters relating to the EN that are specified in the letter;

- Explaining, where (b)(ii) applies, the respects in which the person is at risk of being prosecuted under section 179 in connection with the EN; and

- Stating that, if the authority subsequently wishes to withdraw the assurance in full or part, the authority will first give the person a letter specifying a future time for the withdrawal that will allow the person a reasonable opportunity to take steps necessary to avoid any risk of prosecution that is to cease to be covered by the assurance.

33. The LPA may at any time give the person who has been given a letter containing an assurance a letter withdrawing it (so far as not previously withdrawn) from a time specified in that letter, the time specified being such as will, again, allow the person a reasonable opportunity to take steps necessary to avoid any risk of prosecution that is to cease to be covered by the assurance.

34. Withdrawal of an assurance does not withdraw the assurance so far as it related to prosecution on account of steps not taken prior to its withdrawal.

35. An assurance is binding on any person with power to prosecute an offence under section 179 – so far as not withdrawn.

Discussion

36. Whilst an assurance is 'binding', the protection it provides is, on the face of it, more apparent than real by virtue of the LPA's ability to withdraw it at any time - in whole or in part.

37. The provision securing that withdrawal does not operate retrospectively is perfectly sensible; but the fact that the LPA may take back the option to prosecute and underlines the ephemeral nature of the protection provided.

38. Bearing in mind the withdrawal provisions and the reluctance that LPA's are likely to feel in terms of exercising this power at all, it appears to be unlikely that many assurances will be asked for or forthcoming.

PLANNING OFFENCES: TIME LIMITS AND PENALTIES (section 126)

39. The maximum fine for breach of a breach of condition notice is raised to £2,500 in England (and remains £1,000 in Wales); and it remains, therefore, modest.

40. The time limits for prosecution for non-compliance with the tree preservation regulations and advertisement regime are relaxed to enable proceedings to be brought within 6 months beginning with the date on which the prosecutor had sufficient knowledge, in his opinion, to justify the proceedings. This is so in England only and subject to an overriding time limit of 3 years and self-certification (as to knowledge) as above.

AN OVERVIEW

41. In conclusion:

- This is a mixed bag of measures, and one whose scope is, one has to say, quite limited. NAPE argued strongly[7] for the introduction of a statutory requirement to notify the commencement of development akin to section 6 of the Planning etc (Scotland) Act 2006; and the RTPI contended for the imposition of a statutory duty to require the submission of a retrospective planning application where a breach of planning control has occurred (with fixed penalties in default)[8]. Both were debated by the House of Lords in Committee; but neither was adopted[9]. It is striking that the opportunity has not been taken to introduce more radical 'main stream' reform along these lines;

- The power to decline may be the most significant introduction and should focus landowners more closely on either heading off enforcement action by application or pursuing vigorously their potentially final right of appeal on ground (a) and is capable of imposing greater discipline on landowners;

- The inclusion of 'deliberate' may serve to limit the scope for enforcement action 'out of time', but uncertainty must remain concerning the operation of the 'concealment' provisions and the rarity of their use;

- The assurance letter appears to have little going for it; and

- Perhaps more remarkable than any of these provisions is the complete and disappointing absence of reference to the role of enforcement in the draft National Planning Policy Framework, which appears to be a serious omission in light of the citation from PEGA at the outset of this paper.

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I am grateful to Neil Cameron QC for the opportunity to draw on a paper prepared by him in order to finalise this paper.

[7] NAPE memo; see also RTPI Briefing paragraphs 24-29.
[8] RTPI Briefing paragraphs 11-14.
[9] Lords Hansard text for 19 Jul 201119 July 2011 (pt 0003).mht