Landmark Chambers

Thorny Issues in Planning Enforcement

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Overview: three areas which can cause problems

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1. Factual/legal issues when defining the breach

2. Dealing with alternative/fallback developments

3. Declining to determine applications under s.70C

1. Defining the breach / requirements

- EN Checklist
  - Fully describe the breach so that recipient knows what it is (*Miller Mead*)
  - Identify if s.171A(1)(a) or (b) applies
  - Give reasons which :
    - State immunity period
    - Explain harm and why contrary to policy
    - Make clear whether purpose of notice is to remedy breach or injury to amenity (which should generally at least include the first – see discussion under issue 2)
  - Specify requirements (NB need for precision)
  - Date taking effect and time for compliance
  - Additional information

Key issues

- Under-enforcement
  - S.173(11) deemed planning permission for works or activities which could have been specified but were not.
  - NB does not apply to other works or activities which do not form part of the breach of planning control: ***Fidler v FSS*** [2005] JPL 510

- Whether works form part of a MCU:
  - If works are integral to the MCU then notice can require removal even if (i) otherwise immune (***Murfitt***) or (ii) not development in itself ***(Somak Travel***) BUT it may not be possible if the works were undertaken prior to the MCU for a different lawful use (***Bowring***)
  - See ***Kestrel Hydro v SSCLG*** [2016] EWCA Civ 784

Example

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- Farmyard being used for a plant hire and haulage business for five years prior to notice.
- Hardstanding has been laid and a portacabin office sited.
- Owner contends that hardstanding was laid two years ago, but that portacabin was originally brought on site five years ago with the unrealised intention of using it for the farm business.

- NB Operational Development time limit = 4 years; Material Change of Use (non dwellinghouse) = 10 years.

Approach

- Portacabin cannot be enforced against as standalone OD
- Is it part and parcel/integral to the MCU?
- What about the hardstanding? Is it really part of the change?
- If hardstanding not required to be removed then will there be under-enforcement?

2. Dealing with alternative/fallback developments

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- Landowners and their agents will often seek to negotiate an alternative development – either as a way to agree a settlement or to bolster ground (a) appeal (via a classic fallback argument).

- One option for them is to apply for permission – see Issue 3.

- If not, how can alternative schemes be considered on an appeal?

Inspector's powers on appeal

- Inspector has power to grant permission for the development enforced against or any "part" of it: s.177(1). This sits alongside his power to vary the enforcement notice: s.176.

- Ground (a) raises argument that permission should be granted for the matters alleged in the EN

- Ground (f) raises argument that the steps required exceed what is required to remedy either breach of control or harm to amenity.

Does the alternative scheme form “part of” the development enforced against?

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- In ***Ahmed v SSCLG*** [2014] EWCA Civ 566 CoA held that an Inspector had erred in failing to consider whether a smaller three storey scheme could be permitted where a four storey scheme was enforced against. The Appellant had put that argument in terms of ground (f) (which was not possible) but Inspector failed to consider an “obvious” alternative which was partial grant of permission.

- Availability of that route depends on “alternative” being “part of” what has been done. That’s a matter of planning judgment.

Limits of ground (f)

- If alternative goes beyond what has been enforced against, or does not form part of it, then it cannot be granted permission under ground (a)/s.177(1), or under ground (f): ***SSCLG v Ioannou*** [2015] 1 P&CR 10

- Further, ground (f) (on its own) can only be used to argue for survival of part of the development enforced against if the requirement which is said to be excessive is solely to remedy an injury to amenity: ***Miaris v SSCLG*** [2016] EWCA Civ 75.

- It follows limited bases for alternative schemes to be considered outside of ground (a) appeals.

3. Declining to consider further applications (s.70C)

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- If permission is granted can give rise to a fallback position, or a defence under s.180.
- LPA has a power to decline to consider in s.70C TCPA 1990:

"(1) A local planning authority may decline to determine an application for planning permission or permission in principle for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.

(2) For the purposes of the operation of this section in relation to any particular application for planning permission or permission in principle, a "*pre-existing enforcement notice*" is an enforcement notice issued before the application was received by the local planning authority."

Relevant principles

- Underlying purpose is to prevent retrospective applications being used to delay enforcement action: ***Wingrove v Stratford-on-Avon*** [2015] EWHC 287 (Admin)

- Potentially engaged if any overlap between whole or any part of land covered by EN and application and will apply if the application seeks permission for any part of the matters specified in the EN – not limited to cases involving minor changes: ***R (Chesterton Commercial) v Wokingham BC*** [2018] EWHC 1795

- BUT should not be used to prevent consideration of new matters: so application for retention of a building for use different from that alleged in EN could not be declined: ***R(Banghard) v Bedford*** [2017] EHWC 2391

- NB interrelation with scope of what can be considered on the enforcement appeal.

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Thank you for listening

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