“The Home at the Bottom of the Garden” - Immunity from Enforcement Issues in Planning.

There is a perennial problem of the “dwelling at the bottom of the garden”. Obviously, the situation is not really so locationally restricted, but every Local Authority will have seen their fair share of attempts to obtain a new dwelling out of a garage; a shed; a stable; an outhouse; a summerhouse or something similar. The issues that arise out of this common scenario are by no means new, but, working regularly in enforcement reveals that similar situations arise time and time again, and they never fail to cause confusion. It appears that the law in this area is not well understood, and this paper therefore attempts to deal with a situation that most Local Authorities will encounter on a regular basis

Sometimes, Councils will identify a building that is being used unlawfully as a single dwellinghouse, and will want to enforce against the use of that building. The unlawful use may be denied, and the Council will need to be clear about their evidence of the use. On other occasions, an applicant will present the council with an application for a CLEUD, claiming that the use of a building has unlawfully been as a single dwellinghouse, and that the use has acquired immunity from enforcement.

In either scenario, the Council has to decide whether the building in question has been in unlawful use as a single dwellinghouse for at least four years, and whether any enforcement action should be taken, or whether a CLEUD should be granted.

Immunity Time Limits.

The Planning and Compensation Act 1991 implemented the recommendations of the Carnwath Report and amended the Town and Country Planning Act 1990 by introducing s171B (immunity from enforcement time limits) and s191 (Certificates of lawfulness).

"**171B Time limits.**

(1)Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2)Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(3)In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4)The preceding subsections do not prevent—

(a)the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or

(b)taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.[1]

There was confusion for a time as to whether a change of use to a single dwellinghouse, which arose out of a breach of condition preventing such a use, attracted a four year time limit or a ten year time limit. Immunity from a breach of condition usually takes ten years to accrue, not four.

The Court of Appeal clarified the situation in ***First Secretary of State v Arun District Council –v- Karen Brown [2006] EWCA Civ 1172*** .

Karen Brown received planning permission for a house extension, on the condition that it would not be used or sold as separate accommodation. She breached this condition, and used the extension as a separate dwellinghouse. The Court of Appeal ultimately dealt with the argument that the enforcement notice was out of time, as it should have been served within four years, not ten years. The Court of Appeal confirmed that the time limit for enforcement action in respect of the change of use of any building to use as a single dwelling house is four years under the Town and Country Planning Act 1990 s.171B(2), whether the breach of planning control consisted of development without permission or breach of a condition of planning permission.

Having established that changing to a single dwellinghouse attracts the four year rule, no matter how it occurs, is a good start. But then there is the difficulty of defining precisely what is a "single dwellinghouse".

"Dwellinghouse" is a definition based on use. It is not a description of operational development, as such.

There is no definition of 'dwelling house' in the 1990 Act, although the Use Classes Order contains a Dwelling houses Class C3.

The term 'dwelling house', as para. 69 of Circular 03/2005 specifically used to advise (pre-NPPG), is not defined in the Use Classes Order:

> " 69. The term 'dwelling house' is not defined in the Use Classes Order. Nor is its definition limited, as in the GPDO 1995, so as to exclude flats. The question of whether a particular building is a dwelling house is therefore one of fact."

Para 70 of the Circular used to state that the one common characteristic of a dwelling house is that it will have the facilities required for day-to-day private domestic existence.

Para 71 added that the manner of the use and the physical condition of the premises are factors in determining whether premises are used as a dwelling. This came from he classic case of:

Gravesham Borough Council v Secretary of State for Environment (1982) 47 P&CR 142.

It may therefore be meaningless to say, as applicants or appellants often do, that a building that they have constructed was "built as a dwellinghouse". The categorisation or label of "dwellinghouse" would depend entirely upon the use to which the building was put upon completion. It cannot be built, definitively, once and for all, as a "dwellinghouse". Buildings that look like dwellinghouses may be used for something entirely different, and buildings that look nothing like dwellinghouses, and were never designed to be such can be used for precisely that purpose. Use is all.

Sometimes, applicants build something that is supposed to be an ancillary building to the main dwelling – perhaps a garage, or a summerhouse, or a studio or suchlike. It might have planning permission, or it might be permitted development. The applicant may say that, although it was constructed to look like a garage or summerhouse, their intention from the outset was never to use it in that way, and that they always intended to use it as a single dwellinghouse, in breach of planning control. They may produce witnesses, or other evidence to show what their intentions were. Intention is by no means definitive. A building will very often be physically capable of a number of uses.

Where a planning permission is involved, the lawful use of the building will be as set out in the planning permission. Where the building is not built, inside and outside, in accordance with its planning permission, then it will be unlawful operational

development[2] . Unlawful operational development will have no lawful use. In an enforcement scenario, the enforcement notice would probably seek steps to make the unlawful structure comply with its permission. In a more extreme situation, it might be expedient to require it to be demolished.

Continuity.

The next stage in the conundrum is to establish how long the building has been in unlawful use as a single dwellinghouse. Very often, applicants or appellants will demonstrate the first point at which the use as dwellinghouse began, and then demonstrate that the use is ongoing at the time of the application for a CLEUD. This is insufficient.

There is a clear distinction in planning law between the type of use that establishes a lawful use over the statutory four year or ten year period, and the kind of use that is required to maintain an already established legal use.

An established legal use may arise by way of formal permission, or by historical long term usage, or by the four year/ten year exemption from enforcement. Once established as lawful, it is very difficult to lose that lawful use. It is at this point that concepts such as "cessation of use", "dormancy" and "abandonment" come in to play.

The position is very different when the lawful use is not yet established, but is on its way to being established by the passage of time to acquire immunity from enforcement.

If the use as dwelling house is established, that is to say, lawful, then the occupier need not be in constant, nor even regular, occupation to continue that use. By contrast, where that established, lawful use is not yet in place, the occupier *must* be in constant

[2] Sage v Secretary of State for the Environment, Transport and the Regions (2003) UKHL 22; (2003) 1 WLR 983 (HL)

or continuous occupation to found that use in the first place. The only exceptions are "de minimis" absences. That is a question of fact and judgment.

The starting point for the Council will be to establish whether the use as single dwellinghouse is ongoing at the time of receiving an application for a CLEUD. (It will, of course, be ongoing if the Council are contemplating enforcement action against the use.) The period of four years to establish immunity will be counted back from the date of the application. It is possible for the applicant or appellant to argue that the use established an immunity from enforcement by virtue of a period of four years that elapsed at some time earlier than the CLEUD application. This is a sustainable argument if the applicant can prove that the four years in question were in continuous use as a dwellinghouse, and the use was not thereafter changed or abandoned. What usually happens, however, is that applicants and appellants will confuse the different principles that apply to the four year period where the immunity from enforcement is accruing, and any period that falls after that date.

Where there is a change of use to a single dwellinghouse which is unlawful, that unlawful use must be maintained continuously throughout the immunity period (the four years). The reason for this is the very rationale behind immunity periods in the Act in the first place. Continuity of use rights accrue precisely when LPAs are unable to exercise enforcement action due to the expiry of time. The reason is that they have had their chance, and they have missed it. It is important, therefore, that throughout the whole of the period of four years, the LPA could at any time have enforced, but did not. Any period within that time frame when they could not, in fact have enforced, because nothing unlawful was going on, will interrupt the passage of the exemption period, and prevent the accrual of the four years. In other words, the clock will stop, and start again.

A good test to apply in cases of doubt would be to ask what would have occurred if an enforcement officer had turned up at the address at any given point in time during the four year period. If on any occasion the building was not occupied; not being used as

a single dwellinghouse and not vacated purely for de minimis periods, then there would be nothing to enforce against, and the immunity period stops there.

Thurrock Borough Council v (1) Secretary of State for the Environment, Transport & The Regions (2) Terry Holding [2001] EWCA Civ 226, Court of Appeal

and

Swale Borough Council v (1) First Secretary of State (2) R Lee [2005] EWHC 290 (Admin)

are regarded as the definitive authorities on the meaning of continuity of use during the accrual period.

Thurrock –v- Secretary of State & Terry Holding

This case concerned the use of an airfield.

Schiemann LJ:

"The rationale of the immunity is that throughout the relevant period of unlawful use, the LPA, although having the opportunity to take enforcement action, has failed to take any action and consequently it would be unfair and/or could be regarded as unnecessary to permit enforcement. If at any time during the relevant period the LPA would not have been able to take enforcement proceedings in respect of a breach (for example, because no breach was taking place), then any such period cannot count towards the rolling period of years which gives rise to immunity. It was for the land owner to show that at anytime during the relevant period enforcement action could have been taken."

"I accept Mr Corner's point that an enforcement notice can lawfully be issued notwithstanding that at a moment of issue the activity objected to is not going on – because it is the weekend or the factory's summer holiday for instance. The land would still be properly described as being used for the objectionable activity. However, I would reject the ….submission that enforcement action can be taken once

a new activity which resulted from the material change in the use of land has permanently ceased. I accept that there will be borderline cases when it is not clear whether the land is being used for the objectionable activity. These are matters of judgment for others".

The meaning of "continuous" was further examined in the authority of :
Swale Borough Council v First Secretary of State & Roger Lee [2005] EWCA Civ 1568

This was an appeal concerned with the lawful use of a building in residential use.
A barn was originally used for agricultural storage, in Kent. Works were done to it over the years, including the incorporation into it of two mobile homes, and there were a number of other buildings on site as well.

Residential use of the barn had been begun during the occupation by a Mr Colby between March 1995, and February 1996 when he ceased to own the property. It was then in full-time residential occupation from the year 2000 onwards. The intervening period, particularly March 1997 – March 2001, was unaccounted for. It was intermittently occupied at best.

Mr Lee bought the barn in 1996 but did not move in straightaway He visited regularly to do improvement works. He lived on site, but not in the barn, from early 1997. He lived there in 1999 – sometimes in the barn, and sometimes in a mobile home on site.

Mr Lee applied for a s.191 CLEUD in March 2001 for residential use. The application was refused by the LPA who then served an enforcement notice. Mr Lee appealed against both.

The Inspector granted a CLEUD and allowed the enforcement appeal on the grounds of planning merits (ie: the barn had a lawful residential use).

The Inspector in the original inquiry in ***Swale*** had found:

" In the period 1997 to 1999, the evidence indicates substantial work on the barn to complete its conversion for residential purposes, as well as on the remainder of the site. The appellant and several other people were involved in this work and frequently slept in the barn for substantial periods I am aware of no evidence of any intention to abandon the residential use of the barn. Indeed, the main intention appears to have been to improve it to allow for full-time occupation as the appellant's home."

"There is no substantial evidence that since Mr Colby's occupation the barn was used for any purpose other than residential, except from time to time for minor storage connected with the use of the site as a whole."

"Failure to occupy a building for a period with no other reason being introduced does not often mean that residential use has ceased. I conclude that on the balanced of probability that residential use of the barn as a single dwelling house began more than four years prior to the date of submission of the LBC application and has continue since then without significant break".

The Inspector therefore found that the residential use of the building had continued without a break for the four year period, including during the period 1997 – 1999,and that immunity had accrued.

In the Court of Appeal:

Per Keene LJ:

"There is no dispute that, as a matter of law, Mr Lee (the owner) had to show not only that the change of use to residential use had occurred four years or more before 6th March 2001, but also that residential use had continued throughout that four year period ***Thurrock***."

It was emphasised on appeal to the Court of Appeal what ***Thurrock*** had determined about abandonment being a concept relevant only to already established use rights, and not to whether there had been continuity of use throughout ten years. In other words, it was only possible to lose established use rights by abandonment (or change of use).

Keene LJ:

" The legally correct question for the Inspector here to have asked was whether this building had been used as a single dwelling throughout the whole of the four years preceding March 2001, so that the planning authority could at any time during that period

have taken the enforcement action.

That is a quite different question from whether a use has been abandoned, (…in the context of abandoning established use rights)."

Keene LJ then sited with approval Chadwick LJ in the case of ***Panton and Farmer v Secretary of State for the Environment [1999]JPL 461.***

Panton v Farmer demonstrates what happens once the lawful use has accrued over the immunity period, then it becomes harder to lose that use. Once the lawful use right is established, then it behaves like any other lawful right over land, whether acquired by way of formal permission or otherwise. It is at this point that concepts such as 'abandonment' come into play.

Keene LJ:

"It is important to keep in mind that an enforcement notice must specify the steps which the local planning authority required to be taken 'or the activities which the authority require to cease' for the purposes of remedying the breach…see section 173(3) of the 1990 Act. [If there is any suggestion] that the notional continuation of a use which had ceased to be an active use before any accrued planning right had arise could be sufficient to establish its own lawfulness, 'this would mean that a local planning authority might have to issue an enforcement notice to require the sleeping use to stop. This would surely be a nonsense.' The 'nonsense' can be avoided by recognizing that there was no suggestion in the ***Panton*** case that there was any need

to serve an enforcement notice in respect of the use which had ceased to be an active use before any accrued planning right had accrued."

Keene LJ then went on to study the approach of the Inspector in the inquiry of the ***Swale*** case:

"It appears that the Inspector found also that there were periods of time during 1997 to the end of 1999 when this building was not occupied for residential purposes. …. Nowhere… does he suggest, and nor did the evidence.. that the non-occupation periods were *de minimis*. Nor does he ever clearly deal with what the use was or what was happening in the building in March 1997, when the four year period began. That was the crucial date."

Keene LJ rejected the Inspector's consideration of "the absence of evidence of an intention to abandon the residential use". He also rejected the Inspector's test of there being no substantial evidence that during the critical period 'the barn was used for any purpose other than residential'. That, he said categorically, was not the test either:

Keene LJ:

"A building may not be being used at certain times for any purpose at all. The fact that it is not put to some alternative use does not demonstrate that it was in residential use, which is the real issue".

Keene LJ then went on to reject as 'irrelevant' the Inspector's third test, which was that the building 'appears to have been fitted and available for residential use'.

He said:

"the decision makers are required to consider not the building's availability or suitability for residential use, but whether it was actually put to such use."

" ..a building may well not be in continuous use for residential purposes and yet the owner fully intends to resume occupation for such purposes at a future date. The existence of such an intention would not by itself entitle the planning authority to

serve an enforcement notice when the building is not being residentially used. The concept of abandoning the use is, in my judgement, best confined to the topic of established use right where it is a well recognized concept (Hartley)."

Swale is the key authority for the principle that abandonment belongs to established use, and an accruing use must be continuous.

This analysis is confirmed by:
North Devon District Council v Sec of State for Environment & D Rottenbury [1998] EWHC Admin 458.
This case also confirms that, in the case of breach of condition, the occupancy must not only be continuous, but continuously in breach of the condition in order to found the immunity period.
[On conditions, see also: ***Ellis v Secretary of State and Chiltern District Council (2009)*** and ***Basingstoke & Deane Borough Council v Secretary of State for Communities & Local Government, [2009] EWHC 1012 (Admin***)]

It can be seen therefore that it is crucial to know precisely how much time the individual occupants have spent the alleged dwelling house, even down to the number of days and weeks, within the ten year period. If there are gaps in occupation that amount to something more than *de minimis*, then the requisite continuity will not be established.

Applicants and appellants will often say, where there are breaks in occupancy of the alleged dwelling house that, throughout the absences, the 'dwelling' was 'maintained', or 'available'; that furnishings were not removed, and it was possible to move back in at any time. These are not the definitive factors. The correct test is whether an enforcement officer could have enforced against occupancy as a single dwelling on any occasion that they attended throughout that period. If there was a time when they could not have done so, then there was no breach and the immunity period will break.

When it comes to deciding what periods are *de minimis*, this is really fact and degree. Recent Planning Inquiry decisions have found that breaks in continuity for periods such as seven months; and forty-eight days was more than *de minimis,* but it really will depend upon the case in question.

So, it can be seen that this is a knotty issue of planning law, and one that is regularly misinterpreted. Since it is also one which regularly presents itself, however, it is well study the application of the principles with care in each new case.

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