Immunity from Planning Enforcement

1. Introduction

Development is unauthorised when it has taken place in the absence of planning permission. A local planning authority (LPA) has the power to issue an Enforcement Notice (EN) where it considers that unauthorised development has occurred. However, it may not do so where such development has become immune. The basis for immunity is provided by section 171B of the Town and Country Planning Act 1990.

In short, where development consists of unauthorised built development, no enforcement action may be taken after a period of four years of the date when the development was substantially completed. The four-year rule also applies to a material change of use of any building for use as a dwelling house.

In all other cases, typically an unauthorised change of use, the immunity period is 10 years.

2. Where immunity arises

The question of immunity commonly arises where a LPA becomes aware of unauthorised development and issues an EN. There are specified grounds of appeal against an EN set out in section 174 of the 1990 Act. The ground set out under section 174(2)(d) is:

"that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters".

In other words, the breach of planning control has become immune from planning enforcement action through the passage of time.

The other way in which the question of immunity commonly arises is where a landowner wishes to regularise the position by seeking a Certificate of Lawfulness of Existing Use or Development (CLEUD) under section 191 of the 1990 Act. Once a CLEUD is obtained, the use or development in question is definitively declared to be lawful and is put beyond any possible enforcement action by the LPA.

An important distinction between the immunity defence to an EN and an application for a CLEUD is that the decision-maker is different. In the case of a CLEUD application, it is the LPA itself that must decide whether it is satisfied that the use or development in question has been in existence for the relevant period.

In the case of an appeal under section 174(2)(d), the decision-maker is the Planning Inspectorate (PINS) and ultimately the civil courts.

A more crucial distinction lies in the fact that whereas CLEUD application is a matter of planning administration which may either go for or against the applicant, enforcement action has the potential to carry criminal sanction. A person not complying with an EN within the period specified within that notice is guilty of an offence (1990 Act, section 179) and liable to a fine not exceeding £20,000. In addition, in determining the amount of any fine to be imposed on a convicted person, the court must have regard to any financial benefit which has accrued or is likely to accrue to that person in consequence of the offence.

The consequences of a failure to demonstrate immunity are therefore significantly more serious in cases where enforcement proceedings have been instituted by the LPA.

3. Exceptions to the immunity time period

There are, however, exceptions to the above general rule. This is where:

(1) Development has been concealed, in which case the provisions of section 171BA apply which permit the Local Planning Authority (LPA) to issue a Planning Enforcement Order, outwith the 4 year and 10-year period.

The most notorious example of this was the case of the appropriately named farmer, Robert Fidler, who built a mock Tudor castle on his property and kept it hidden by hay bales for over four years. He was ordered to demolish it on pain of imprisonment once the LPA got wind of it and instituted proceedings in the High Court.

(2) The development in question has previously been the subject of an EN in which case the provisions of sections 181 and 191(2)(b) come into play to prevent the immunity period from running. The requirements of an enforcement notice automatically revive if the unauthorised development resumes. This applied even in cases where the EN has been complied with.

The application of sections 181 and 191 is without limit of time. It could also apply unauthorised use which, although not absolutely identical to the development addressed by the original EN, still fits within its description. For example, if a mobile home is placed on land for residential use and is then removed following the service of an EN, the prohibition could still potentially catch any subsequent such use, such as by the placing of a static caravan on the same land at a future date.

Equally, it is not possible to apply for a CLEUD where the use or development in question has been the subject of an EN at any time within the relevant immunity period. The only exceptions would be where the EN had been quashed on appeal or withdrawn by the LPA, or where a planning permission had been granted inconsistent with the terms of the EN prior to the application for the certificate.

The overall principles were summarised in in the case of *Secretary of State for the Environment v Thurrock BC*[1] as follows:

> "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 the immunity. It was for the land owner to show that at any time during the relevant period enforcement action could have been taken."

[1] [2002] EWCA Civ 226.

It follows from the above that where there has been an open and potentially enforceable unauthorised development, it is for the LPA to act in order to prevent immunity from enforcement from occurring. However, such use must be continuous. If there have been breaks in the unauthorised use whereby the LPA would not have been able to enforce because the unauthorised use was not occurring during that time, the immunity period will be broken and will only recommence when the unauthorised development resumes.

4. Establishing immunity

Whether it is an application for a CLEUD or a defence under ground (d) of section 174 of the 1990 Act, the onus is on the landowner to demonstrate the facts necessary to establish immunity: see advice in Planning Practice Guidance (PPG). The landowner must establish that the use or development has occurred on the balance of probabilities, the civil standard. There is no need for corroboration, but the more evidence that demonstrates the change of use or the development in question, the better.

In the case of built development, relevant evidence might consist of:

- Invoices for materials used in the development or in respect of the use now claimed leading to substantial completion prior to the relevant immunity date
- Contemporaneous photographs
- Complaint letters to the LPA complaining of the use or development in question prior to the relevant immunity period
- Other contemporaneous correspondence tending to show the use or development had been substantially completed prior to the start of the immunity period.

In cases where the development asserted is the change of use of any building to a dwelling house, other considerations may apply. Whilst there is no statutory definition of dwelling house in the 1990 Act, it has however been established in case law that: “a

distinctive characteristic of a dwelling-house was its ability to afford to those who used it the facilities required for day-to-day private domestic existence"[2]

Accordingly, all of the above items listed for built development would also be of assistance in demonstrating change of use and in addition, the following:

- Evidence of payment of Council Tax
- Entry on the Electoral Roll with the relevant address
- Utility bills or connection confirmation for gas, electricity and water supply and/or sewage
- Confirmation of a postal address from Royal Mail
- Any other official documentation from the NHS, Passport Office or similar
- The existence of the necessary incidents of domestic dwelling such as furniture, ornaments, electrical equipment (computer, TV set, radio, stereo) or similar.

The lifestyle of likely occupants of such ad hoc dwelling might be such as to render the above evidence very hard or impossible to obtain. Individual cases may however throw up other possible sources of evidence to provide the necessary facts.

The above article is a summary for information only and is not intended to be comprehensive or to provide legal advice. Further information about services provided by the author in the sphere of Planning Law may be obtained from the author's clerk: m.byrne@33bedfordrow.co.uk (tel: 020 7242 6065).

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[2] *Gravesham BC v Secretary of State for the Environment* (1984) 47 P&CR 142 approved by the Court of Appeal in *Moore v Secretary of State for the Environment* (1999) 77 P&CR 114 and applied in the PINS appeal case of *Wyken Field, Warwick*, APP/T3725/X/16/3147317.