

Into the breach

In the third of a series of articles on planning law, **Linda Russell** looks at breaches of planning control, enforcement, and lawful development

Development (operational development or a material change of use) of land without planning permission, or the failure to comply with a condition that has been imposed on a planning permission, constitute a breach of planning control.

A breach of planning control is not a criminal offence; it is merely a breach of planning control. The role of the local planning authority (LPA) is to remedy breaches, not punish those who have carried them out. Accordingly, the LPA will always seek to have the breach remedied without recourse to formal action if possible. A breach only becomes a criminal offence when the LPA has issued an enforcement notice to remedy the breach, and that notice has not been complied with.

ENFORCEMENT NOTICES

Assuming the breach has not been remedied informally, the LPA can issue and serve a planning enforcement notice. This includes an allegation of the breach, steps that must be taken to remedy the breach, and the period within which those steps must be taken.

Failure to comply with the notice within the requisite period constitutes a serious criminal offence. It is an 'either way' offence. On summary conviction, a defendant is liable to a fine of up to £20,000. On indictment, he is liable to an unlimited fine. In practice, fines are often fairly low, unless the defendant is a professional developer or repeat offender.

A criminal conviction is something your client will, of course, wish to avoid.

APPEALING A NOTICE

Following service, an enforcement notice cannot take effect for 28 days. This period gives the recipient the opportunity to appeal against it to the secretary of state, so that the notice is held in abeyance until the outcome of the appeal.

There are various grounds of appeal, including: ground a, that planning permission should be granted; and ground d, that the development has become lawful (see 'Lawful development', opposite).

An inspector will be appointed to consider the appeal. An appeal can take three different forms: a written representation; a hearing; or an inquiry. The rules have recently changed so that the Planning Inspectorate, rather than the appellant, decides on the form.

The September 2010 edition of *Property in Practice* will feature an article by my planning colleague, Sharon Smith, on the new expedited householder appeals.

Whichever grounds are appealed, if the enforcement notice is

upheld, it will take effect and must be complied with.

The decision of the inspector may only be challenged in the High Court on a point of law – for example, if he had not taken into account a material planning consideration or if his decision were perverse in some way.

BREACH OF CONDITION NOTICES

Where the breach concerned is a breach of a planning condition rather than development without permission, the LPA can issue either an enforcement notice or a breach of condition notice.

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The latter can only be used for enforcing simple and unambiguous breaches of conditions – for example, where a restaurant is granted planning permission subject to a condition that it closes at midnight, but the LPA has evidence that it sometimes (or always) remains open later. If the condition itself is properly and concisely worded, a breach of condition notice is the appropriate tool to use. A breach of condition notice cannot be appealed – a failure to comply with it constitutes a criminal offence, for which the recipient can be prosecuted in the magistrates' court, as it is a summary offence only.

Therefore, if the condition is not precisely worded and is ambiguous in some way, the LPA cannot reasonably use such a notice, but should issue an enforcement notice. These can be appealed, and the inspector can determine the meaning of the condition. Indeed, the condition may be so badly worded that the inspector finds it to be invalid, and strikes it from the permission. In such cases, the appellant may be successful in seeking a costs award against the LPA. If your client is served with a breach of condition notice seeking to enforce a condition that is inadequate, it may be worth considering making a legal challenge against the LPA in the High Court for judicial review, as the LPA may be straying beyond its powers.

STOP NOTICES

Where a breach of planning control is considered so serious that it must be remedied without delay, the LPA can issue either a permanent stop notice, or as more recently introduced, a temporary stop notice.

The main difference is that a stop notice can only be issued on the back of an enforcement notice, whereas a temporary stop notice is a standalone notice, lasting for 28 days from the date it is displayed. Both can require an immediate cessation of the breach of planning control; it is a criminal offence to fail to comply. The penalties are the same as for failing to comply with an enforcement notice.

A client in breach of planning control should seek advice from a specialist planning lawyer.

LAWFUL DEVELOPMENT

Lawful development is a breach of planning control that cannot be enforced against, because it is lawful, usually because it has been in existence for a specific number of years, as follows:

- operational development – four years;
- material change of use – 10 years (except if the change is from a building to residential, in which case, four years); and
- breach of condition – 10 years (except if the condition relates to residential development).

OPERATIONAL DEVELOPMENT

If a building has been “substantially completed” for four years, it is lawful. “Substantial completion” is a matter of fact and degree, but basically means that the roof is on and it is habitable or otherwise usable for the purpose it was erected. The totality of the development must be considered.

This was illustrated by the now famous ‘hay bales’ case in Surrey (*Fidler v Secretary of State for Communities and Local Government* [2010] EWHC 143 Admin), in which a person erected a large house behind hay bales covered in tarpaulin. After the house itself had been finished for four years, he sought to argue that it had become lawful. The LPA, with the inspector, and then the court, held that the four years could not begin to run until the hay bales had been removed; the totality of the development, including the intentions of the developer, were considered when determining when “substantial completion” had occurred.

MATERIAL CHANGE OF USE

The change of use must have been continuous and at a similar level. The 10-year period starts when the change first occurred and must still exist at the present time.

BREACH OF CONDITION

The breach must have been continuous for the 10-year period.

LAWFUL DEVELOPMENT CERTIFICATES

There is no legal requirement for your client to obtain any sort of certificate confirming the lawfulness of his development. However, if his buyer’s solicitor questions the lawfulness of, say, an extension erected without planning permission, you will need to regularise such development.

You have two options. You can seek retrospective planning permission. That may be easier said than done. The application will have to be determined on its planning merits, and may be refused, or granted subject to unacceptable conditions. That it has already been erected is not, in itself, a planning consideration. The LPA must determine it as though it had not already been erected. However, the very seeking of planning permission will alert the LPA to the breach of planning control,



which could result in enforcement action.

Alternatively, if you can prove that the breach has been in existence for long enough to have met the conditions for lawful development (see above), you can seek a certificate of lawful development (CLD). The benefit is that a CLD is determined on fact and law. There are no planning considerations. If the LPA is satisfied, on a balance of probabilities, that the development is lawful, it must grant the certificate.

An appeal can be made against a refusal to grant a certificate, or against a partial granting. If the refusal of partial granting is unjustified, costs can be sought against the LPA. It has no power to impose conditions, either – conditions can only be imposed on planning permissions, and a CLD is not a planning permission.

Evidence should be submitted with any CLD application. The extent of evidence required should not be underestimated. It could include statutory declarations, such as council tax receipts, telephone and other utility bills (if the CLD relates to a dwelling); the copy register of voters for the period of use; receipts for materials purchased if maintenance works have been carried out or if the building was a new construction; photographs showing use or works over a period of time; aerial photographs; and letters of support. Unlike a planning permission, which is decided on the planning merits of the development, a CLD is decided on the facts and evidence; the burden of proof falls upon the applicant.

CONCLUSION

If your client’s activities constitute a breach of planning control, if that breach has become lawful, it is in his interest to regularise it with a CLD. If it has not become lawful, he will be required to cease the breach, unless it can be argued that it accords with planning policy and, therefore, should be granted planning permission. ■

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