



Landmark Chambers

Understanding the High Court's Ruling on Asylum Accommodation: Wider Implications for the Planning System

Thursday 27 November



Your speakers for today:



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The anatomy of planning enforcement and injunctions



Jenny Wigley KC



Anatomy of Enforcement and Injunctions

- A reminder of what is being enforced against as matter of law
- Duties and options for a local planning authority
- The Court's role on an injunction application and the effect of the judgment in *Epping* (references to paragraph numbers [xx] are to paras in the judgment of Mould J at [2025] EWHC 2937 (KB))
- How should an LPA decide what to do and how can an owner, operator or developer defend against action being taken



A reminder of basic principles:

- Planning permission is required for the carrying out of any development of land (s. 57(1) Town and Country Planning Act 1990 (TCPA))
- Subject to some exceptions, 'development' is defined as the carrying out of building, engineering, mining or other operations in, on, over or under land, (operational development) or the making of any material change in the use of any buildings or other land (s.55 (1) TCPA)
- Carrying out development without required planning permission or failing to comply with any condition or limitation on a planning permission constitutes a **breach of planning control** (s.171A TCPA)
- By implication a breach of planning control is not lawful if enforcement action can be taken in respect of it or if it is in contravention of an existing enforcement notice (s.191(2) TCPA)
- Breach of planning control is not itself a criminal offence (unless and until in contravention of an enforcement notice or stop notice –see e.g s.179 TCPA)



Material change of use (1)

- In the case of buildings or land which are used for a purpose of any class [in the Use Classes Order], use for any other purpose of the same class not to be taken to involve development of the land (s.55(2)(f) TCPA and Article 3(1A) Use Classes Order)
- Class C1 of Schedule 1 of Use Classes Order

“Use as a hotel or as a boarding or guest house where, in each case, no significant element of care is provided.”

- No class specified in Schedule 1 includes ‘use as a hostel’ (Article 3(6)(i))
- Effect of UCO provisions permissive, not restrictive – change of use within a class is not development but this does not necessarily mean that change to use outside a class is development [37]



Material change of use (2)

- Whether there has been a change of use and, if so, whether that change of use is material in planning terms is a matter of fact and degree, to be answered on the basis of evidence in the given case [35]
- What is to be considered is the 'character of the use of the building or land, rather than the particular purpose of a particular occupier' [36]
- It is relevant to consider both the on-site and off-site effects of the character of the use of the land [36]
- In the case of buildings or land which are used for a purpose of any class [in the Use Classes Order], use for any other purpose of the same class not to be taken to involve development of the land (s.55(2)(f) TCPA and Article 3(1A) Use Classes Order)



Enforcement Options

- Enforcement Notice (s.172 TCPA) – the ‘normal method’ [41]
where appears to LPA...
 - that there has been a breach of planning control
 - that it is expedient to issue the notice, having regard to provisions of the development plan and any other material considerations (i.e no duty to enforce [42] and [294])
- Crucially there is right of appeal, particularly grounds (a), (b), (c), (d), (g) under s.174
- On an appeal, Secretary of State may uphold the notice but may decide to grant planning permission or quash the notice on other grounds (s.177)
- Whilst appeal ongoing, EN does not come into effect and use can continue with no undermining of the system (s.175(4)) [48] and [294]



Enforcement Options (2)

- Stop Notice (s. 183) – parasitic on EN and can have almost immediate effect
- But Stop Notice cannot prohibit the carrying out of any activity if that activity has been carried out (whether continuously or not) for a period of more than four years ending with the service of the stop notice (s.183(5))
- Also note owner or occupier is entitled to compensation from LPA for loss directly attributable for loss directly attributable to the prohibition in the notice if EN (on which SN is based) is ultimately quashed on grounds other than ground (a)
- Temporary Stop Notice (s.171E) – can only last for up to 56 days and subject to the same four year restriction above for general stop notices and subject to right to compensation (in circumstances where pp already in place or where s.191 certificate of lawfulness is granted)
- Injunction (s.187B)



Injunction under s.187B

“(1) Where a local planning authority **consider it necessary or expedient** for any **actual or apprehended** breach of planning control to be restrained by injunction, they may apply to the court for an injunction, **whether or not they have exercised or are proposing to exercise any of their powers under this Part.**

(2) On an application under subsection (1) the court may grant such an injunction as the court **thinks appropriate** for the purpose of restraining the breach”

leading case on principles to be applied – Supreme Court in *South Bucks District Council v. Porter*
[2003] 2 AC 558



s.187B – Main Principles (1)

- Jurisdiction of the Court is original, not supervisory [67]
- Local authority's decision to apply for the injunction is clearly relevant and a defendant in resisting the grant of an injunction can seek to impugn it on any of the conventional grounds which may be relied on to found an application for judicial review [67]
- Extent to which local authority has considered material considerations is particularly relevant [161]
- Cannot be 'appropriate' unless 'just and convenient' [73]
- Needs to be due regard to purposes of the power to permit abuses to be curbed and urgent solutions to be provided where they are called for [69]



s.187B – Main Principles (2)

- Centrality of the ‘degree and flagrancy’ of the breach [206(1)]
- Factors relevant to urgency of preventing anticipatory breach may be different [206 (2), (3)]
- Court not to turn itself into a tribunal to review the merits of the planning decisions that the authority, or the Secretary of State, has taken
- But Court should come to a broad view as to the degree of environmental damage resulting from the [alleged] breach [206(4)]
- Legitimate aim of preserving the environment does not always outweigh countervailing rights (or factors) [206(5)]
- Needs to be ‘commensurate’ and task is to strike the balance between competing interests weighing one against the other. [206(6)]



The Factors influencing the outcome in the Epping Case

- Defendant open and transparent in actions and communications with Council [224]
- Submission that Defendant acted in flagrant breach of planning control was 'unhesitatingly rejected' [226]
- Conventional enforcement methods not been taken over a number of years use [295]
- Doubt as to basis for delegated decision maker's conclusions as to breach of planning control [185] - [187] but respect given to overall local authority's view in form of planning officer – a reasonable basis for allegation and assertion as to breach [186], [285], [295]
- Broad view taken of degree of environmental harm and urgency – lack of Council's consideration of appropriate ameliorating factors re visual impact and loss of hotel facility, lack of evidence re: impact on local services, consideration of fear of crime and protests [227] - [270]
- Overall degree of planning and environmental harm from current use – limited [295]



The Factors influencing the outcome in the Epping case (2)

- Countervailing factors [273] - - impact on Home Office's ability to fulfil statutory duties to asylum seekers and possible financial impact on the Defendant
- Real concerns about propriety of the Council's decision making, breach of procedural requirements and serious prejudice to Defendant [284]
- Not a commensurate remedy and not just and convenient [283] – [296]
- No declaratory relief – importance of where functions lie in the statutory scheme of the 1990 Act [297] – [300]



Tips for LPAs and Defendants in deciding what to do

- Crucial importance of Council's decision making – thread throughout the judgment
- At the very least need to ensure decision is within delegated powers and that appropriate reasoning is given and records are made – constitution and Article 7
- Important in terms of ascertaining breach of planning control and degree of urgency / environmental harm
- And in terms of which enforcement option to take, and consideration of policy
- If breach is reasonably disputed unlikely to be 'flagrant' and will likely be defensible
- Other options more likely to be appropriate
- Injunction / High Court declaration proceedings not to be used to resolve reasonable dispute as to what does or does not constitute a breach of planning control
- Importance of Defendant acting reasonably and openly



Q&A

Please feel free to send any questions you may have via the Q&A section, which can be found along the top or bottom of your screen.

Fear of crime & public protest:

When is it a planning law problem?



Katharine Elliot



Fear of Crime: Avoiding generalisations (1)

- Fear of crime arising from use of land capable of being a material consideration in planning terms: *West Mids Probation Committee* (1998) P&CR 589 (CoA).
- CoA: a material consideration on the basis of a pattern of conduct/behaviour over a period of time which was innately bound up with use of land as probation/bail hostel.
- Endorsed in *Smith v First Secretary of State* [2005] EWCA Civ 859: (i) does the fear of crime have a reasonable basis?; (ii) does the criminal behaviour relate to the use of the land, rather than the behaviour of some occupants?
- Again, emphasis on pattern of behaviour.
- Clear that the fact that the use is associated with a particular type of person is not enough in the absence of evidence.



Fear of Crime: Avoiding generalisations (2)

- High Court in Epping held that fear of crime did have a reasonable basis because of three incidents of criminality: [250]
- However, LPA failed to establish that fear of crime related to the use of the Hotel as asylum accommodation [255] because:
 - No evidence provided in support of assertion that asylum seekers had a greater propensity to anti-social or criminal behaviour than the settled UK population: [248].
 - The actions of three individuals was not enough to amount to a pattern of criminal/anti-social behaviour making it a characteristic of use of the Hotel as asylum accommodation: [254].
- *Key takeaway.* if you are going to establish fear of crime as a material planning consideration, you need the evidence to back it up!



Public Protest: Attendance or substance?

- Not subject of previous case law!
- Public protest (plus disorder) triggered LPA injunction application and was relied upon as planning harm in support of grant of relief: [203].
- High Court held that:
 - The fact of public protest is not a material planning consideration: [261], [266].
 - Planning decision-makers can and should take into account substance of objections where they amount to material consideration (e.g., fear of crime if evidenced) via ordinary process for expression within the planning regime.
 - Planning decisions are led by planning judgement, not public opinion: [266].
- Endorsed CoA's concerns in interim injunction litigation that to do otherwise would incentivise protest: [269].
- Appropriate tool for public protest crossing the line into criminality = appropriate bespoke regime (e.g., Public Order Act 1986): [270].



Q&A

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The future of asylum accommodation and planning



Jacqueline Lean



- **Mould J did not make a determination as to whether the use of the Bell Hotel to accommodate asylum seekers constituted a material change of use:**
 - Reiterated that the distinction between hotel and hostel use is “a fine one” (para 172);
 - Cited at length Holgate J’s “authoritative analysis” in *Ipswich BC v Fairview Hotels (Ipswich) Limited* [2022] EWHC 2868 (KB) (paras 172 – 175);
 - Stressed that the Court should not “trespass too far into the forbidden territory of planning judgment” (para. 186);
 - But, considering the evidence of C’s planning enforcement officer, and parallels with factors identified in *Ipswich*, proceeded to assess the application on the basis that the Council had “at least a reasonable basis for alleging and asserting” that the current use of the hotel was in breach of planning control (para 187)



- **The current position:**

- As yet, no determination – either by courts or a Planning Inspector – as to whether use of hotels to accommodate asylum seekers constitutes a material change of use
- Best guidance remains that in *Ipswich*



- **What does this mean going forward?**
 - Clear (if implicit) message that if a determination is to be made on this point, the decision should first be made through the planning system – subject to review on usual principles by the courts (paras 296, 297-9)
 - Consideration will need to be given to what the use is – if no longer use as a hotel.
 - Is hostel the right comparator?
 - What about other uses in Class C1?



- **Will these issues be overtaken by events?**
 - Government has been clear about desire to end use of hotels to accommodate asylum seekers
 - But: might similar questions arise in context of use of hotels to meet local authority homelessness obligations)
 - Alternatives not necessarily unproblematic:
 - *R (Parkes) v Dorset Council* [2024] EWHC 1253 (Admin)
 - *R (Clarke-Holland) v Secretary of State for the Home Department* [2023] EWHC 3140 (Admin)
 - *TG v Secretary of State for the Home Department* [2025] EWHC 596 (Admin)



- **PD rights?**
 - GPDO Sch 2 Part 19 Class Q
- **SDOs**
 - TCPA 1990 s.59 & 60
 - Town and Country Planning (Former RAF Airfield Wethersfield) Special Development Order 2025/37
 - Town and Country Planning (Former RAF Scampton) (Accommodation for Asylum-Seekers etc.) Special Development Order 2024/412



Q&A

We will now answer as many questions as possible.

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Thank you!

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