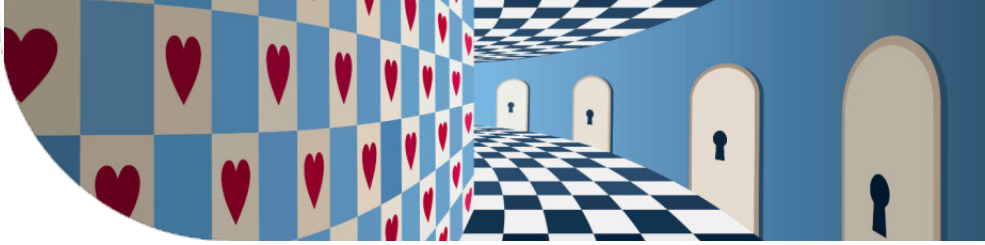

Planning Enforcement: Explaining Adventures in Development

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'I could tell you my adventures - beginning from this morning,' said Alice a little timidly: 'but it's no use going back to yesterday, because I was a different person then.'
'Explain all that,' said the Mock Turtle.
'No, no! The adventures first,' said the Gryphon in an impatient tone: 'explanations take such a dreadful time.'
Alice's Adventures in Wonderland

Very often, trying to unravel and advise the client who has gone on adventures in planning may often disclose the difficulties of going back to yesterday, not least because *explanations do take such a dreadful time*. Two recent cases indicate some of the legal considerations relevant to reliance upon "actual use", "purpose", and intention in planning enforcement appeals.

Lesley Anne Hedges v Secretary of State for Housing, Communities and Local Government and Cornwall Council (2023)

In October 2019, Cornwall Council issued an enforcement notice in respect of a field in St Austell, owned by the appellant, Ms Hedges and her husband. The breach of planning control on the land alleged was, without planning permission, the material change of use of the land from a field used for agricultural purposes to holiday use for the stationing of caravans and tents.

The notice required the cessation of the use of the land for the stationing of caravans and tents for holiday purposes and the removal of all caravans and tents and all associated infrastructure within two months.

The appellant appealed against the enforcement notice. It was contended that the change of use had begun in July 2009 and that the Council's notice had been issued later than the 10-year period after which no enforcement action may be taken. Because of the 28-day temporary permitted development use rights for camping, the Inspector said that the appellant had to show, in addition to the use commencing prior to the relevant date, that the land was used for tent camping purposes for a period in excess of the permitted development rights in 2009, or that it was used for a sustained period for tent and caravan camping.

On 26 February 2021, a planning inspector dismissed the appeal, and the appellant appealed against that decision to the Planning Court. Mrs Hedges' argument was that the Inspector had made a mistake in requiring evidence of actual use of the land as a campsite in order to give rise to a material change of use, whether for the purposes of proving more than 28 days or otherwise, and failed to take into account factors other than actual use, such as the presence of mobile toilet and shower facilities on the land, signs, advertisements and bookings, which point to the land being used as a campsite from July 2009, or at least by October 2009.

The court held that the Inspector was entitled to conclude that, without actual use, the mobile facilities could be characterised as being stored and that, in any event, the presence of the mobile facilities on the land without actual use would have only a "*de minimis*" impact on the use of the land as agricultural. Accordingly, the Inspector's decision was upheld.

Appellants should take note: circumstantial evidence of the preparation of or the carrying out of activities on land to facilitate a material change of use may be accepted by an Inspector as a helpful indication of the time of that material change of use, but deficiencies in the quality of the evidence to demonstrate the actual use of the land may present difficulties in demonstrating the time at which a material change of use took place, particularly when the circumstantial evidence by its self cannot meet the threshold of materiality.

Barry Devine v Secretary of State for Levelling Up, Housing and Communities Cheshire West and Chester Council [2023]

At a planning enforcement notice appeal inquiry, it is not infrequent for the appellant to give an indication of what actual use is intended of a development. However, inspectors are entitled to give such statements very little weight if there is contrary evidence tending to indicate a quite different purpose for the physical and design features of the development subject to planning enforcement action.

In *Devine*, the Court of Appeal had to decide if it was open to a planning inspector to find that the repair of a roof already in situ meant that the building was not already substantially completed more than four years before the service of the enforcement notice.

Mr Devine is a builder; he had bought Dones View Farm in the North Cheshire Green Belt some 23 years before the Court of Appeal heard his case.

Without first obtaining planning permission, Mr Devine carried out works to a late 19th-century barn. Those works included the building of a new wing and were part of works that he considered to be the repair and improvement of the building, including the removal of bricks from the inner wall to replace parts of the outer wall and the erection of blockwork inside. In 2018 he made five applications for planning permission, proposing various works of conversion to the building and its change of use to use as a single dwelling.

In the planning code, the distinction between rebuilding and maintenance or improvement is important. Section 55 of the Town and Country Planning Act 1990 provides that building operations, including the "demolition of

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buildings", "rebuilding", and "structural alterations of or additions to buildings", are development, whereas building operations are not to be taken to involve development if they are for the maintenance, improvement or other alteration of any building of works which (i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building.

Section 171B(1) of the Town and Country Planning Act 1990 provides that enforcement action against unauthorised development may not be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

On 18 March 2019, the local planning authority Cheshire West and Chester Council ("the LPA") served a planning enforcement notice on Mr Devine. It alleged a breach of planning control by the erection of a new building and the erection of a boundary wall and fence without planning permission.

At the inquiry into the planning enforcement notice issued by the Council, Mr Devine's argument was that the repair of the roof, the replacement of concrete lintels with metal, the levelling of the floor and the moving of openings were all works of repair to the original building, not its reconstruction. The importance of this lay in Mr Devine's replacement of the "entire roof structure" during 2016 and 2017. Those works took place after 18 March 2015, which was the relevant date for the four-year immunity period for unauthorised development. The Inspector should have seen that this was "not a finished dwelling" because it was "a finished non-dwelling". The Inspector had erroneously failed to appreciate that the replacement of the roof in 2015- 2017 was an operation of "repair" to a barn, not the continuation of works of development to build a new dwelling.

Arguments to quash the Inspector's decision were rejected at first instance, and the arguments were refined and renewed before the Court of Appeal.

Mr Devine argued that the inspector had made two significant errors. First, it was alleged the inspector had taken into account an immaterial consideration: Mr Devine's subjective "intention" in carrying out the works and not simply the "purpose" of the building. Secondly, it was said the inspector made the mistake of regarding the building as a dwelling house and asking himself whether its construction as a dwelling house had been "substantially completed".

The allegation in the enforcement notice was not the creation of a "dwelling house". It referred only to a "new building". The argument was made that the inspector had judged the building against the standard of a completed residential building rather than what it was – a barn. Even if there was a "new building", it was the building formed by the barn Mr Devine had acquired in 2000 and the east wing he went on to build. It was still a barn, a new barn, and its construction had been "substantially completed" by the "relevant date" of 18 March 2015.

The Court of Appeal rejected these points and held:

- There was nothing unlawful in the inspector's consideration of the purpose of the building Mr Devine had

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constructed. That purpose was plain in the physical layout and appearance of the structure he saw on the site. He was in no doubt that this was a building designed for residential use, not agricultural; it was a dwelling house, not a barn. Mr Devine's "intentions" when carrying out the works were reflected in the physical and design features of the structure itself.

- If an inspector is satisfied that the structure in question has the physical and design features of a dwelling house, one would not normally expect him to conclude that it is, nevertheless, an agricultural building merely because the developer has stated his intention to use it as such or has already begun to do so. Evidence of a developer's intention which contradicts the objective reality of what he has, in fact, built, will not, generally at least, negate that objective reality.

- If a developer has, in fact, erected a structure with the physical and design features of a dwelling house and there is also evidence that he truly intended to do just that – if, for example, he has proposed such development in an application for planning permission – it must be open to the inspector to treat that evidence as consistent with the conclusion that a dwelling house has indeed been constructed.

The Court found that the inspector had reached the “legally impregnable” conclusion that the building operations that had resulted in a "new building" coming into existence had not been "substantially completed" before the "relevant date". Secondly, those building operations had brought about structural changes necessary for the residential occupation of the "new building", though the project to create a new dwelling house on the site was still unfinished. As a result, the decision of the inspector was upheld, as was the requirement to demolish the new building.

These recent cases are helpful reminders that whatever evidence is presented by an appellant to resist a planning enforcement appeal, a planning inspector is afforded a great deal of latitude by the courts to apply their judgement to draw inferences from the facts on the ground that depart from the stated intentions of the developer, or paraphernalia that might just as well be associated with one use of land as another.

Need advice?

Lester Aldridge’s Planning & Environment team advises national and regional developers on all legal aspects of planning. Contact the team at online.enquiries@LA-law.com.

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