PLANNING ISSUES
FOR PROPERTY LITIGATORS

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James Burton
Thirty Nine Essex Street Chambers

James Burton is a barrister practising from Thirty Nine Essex Street Chambers. He specialises in planning, environmental and related work.

James is ranked in Chambers and Partners as a leading junior in Planning Law and Environmental Law and ranked 3rd amongst junior planning barristers under 35 nationwide in the Planning Magazine Guide to Planning Lawyers 2012-13.

THIRTY NINE
ESSEX STREET CHAMBERS

39 Essex Street
London WC2R 3AT

Tel: 020 7832 1111
Fax: 020 7353 3978
Email: james.burton@39essex.com

Introduction

1. This paper aims to achieve three things:
   (1) sketch an introduction to planning law for the relative novice;
   (2) offer insight into certain discrete areas of planning law of particular relevance to property litigators; and
   (3) where appropriate, update regarding recent (relevant) developments.
2. It is hoped that the paper will encourage discussion at the seminar session itself.

Planning: a creature of statute

3. Planning law has always been a creature of statute, and as an area of law is still a relative newcomer. Our familiar system of comprehensive town and country planning, in which land may not be lawfully "developed" without planning permission, with control over development policed by local planning authorities ("LPAs"), made its entrance with the post-war Town and Country Planning Act 1947. The earlier piecemeal planning statutes the 1947 Act swept aside themselves dated back only to the earlier 20th century (notably the predecessor 1932 Act).
4. The present suite of primary legislation includes:
   (1) the Town and Country Planning Act 1990 (as amended) ("the TCPA 1990");
   (2) the Planning and Compulsory Purchase Act 2004 ("the PCPA 2004"); and
   (3) the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act").
5. Of these, the TCPA 1990 remains very much the "principal Act" (as it is frequently called), whilst the regime governing listed buildings and conservation areas is in some respects a particular subset of planning, in others an entirely different beast altogether.
6. There is also a raft of subordinate legislation. For our purposes, the two most important are the Town and Country Planning (General Permitted Development) Order 1995 ("the GPDO"),[1] and the Town and Country Planning (Use Classes Order) 1987 ("the Use Classes Order").[2]
7. We can leave to one side the complex scheme governing plan-making, presently found in a combination of the PCPA 2004 and the Town and Country Planning (Local Planning) (England) Regulations 2012 ("2012 Regulations").

[1]
[2] SI 1995/418.
SI 1987/764.

8. Likewise, we can also leave aside the nationally significant infrastructure projects regime introduced by the Planning Act 2008, with its separate system of development consent (not to be confused with a grant of planning permission), now administered by a special unit within the Planning Inspectorate.

9. The GPDO, by Art.3, grants planning permission for those classes of development set out within its Sch.2, covering both operational development and change of use, subject to certain limited exceptions concerned with such as EIA development and the Habitats Directive.

10. The Use Classes Order provides a classification of uses. Changes within the individual use classes are not development, whilst changes between certain of the use classes are permitted by Part 3 of the GPDO. That is generally on the basis of a "ratchet", allowing changes *away* from activities with greater amenity impacts towards those with lesser amenity impacts, and not vice versa.

11. So, planning is a self-contained statutory code barely, 60 years old, most of which is to be found within a handful of statutes and SIs. In theory, then, it should be possible to understand it by reference to the statutes, SIs, and little else. If only. If ever a statutory vessel has found itself laden with case law, the weight of its unwieldy attachment often threatening to capsize the entire ship, it is planning.

12. We will come to a little of the case law below. We begin, though, with what is meant by development.

Concept of development the key

13. The cornerstone of all town and country planning is the concept of "development", being that thing for which *planning permission* is required and if done without is unlawful and liable to enforcement action against it. All as found within Part III of the TCPA 1990.

14. Section 55 of the TCPA 1990 provides the definition of development (see Annexe for the full text). Section 70 onwards provides LPAs with powers to grant permission for development, and to do so subject to conditions (certain of which, pertaining to the time by which development must be commenced, are imposed by statute even if the permission itself is silent). The Secretary of State has the power to "call in" an application for his own determination, so remove it from the jurisdiction of the LPA, both in relation to applications under the TCPA 1990 (s.77) and applications for listed building consent (s.11) under the Listed Buildings Act.

15. There are two types of development:

    (1) "operational" development, so physical works done by "building, engineering, mining or other operations" in, on, over or under the land; and

    (2) change of use by "a material change in the use" of any buildings or other land.

16. Note that by s.336 TCPA 1990 (interpretation), "building" includes "any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building" (s.336(1)).

17. There is overlap between the two forms of development, and the working rule is that operational development ordinarily used for a particular purpose is, indeed, used for that purpose, so bringing about a change of use along with the operational development. To take the most basic example, a house granted planning permission on formerly agricultural land brings with it a change of use to (lawful) residential use of that land.

18. However, many works or changes that we might think would be development are expressly declared not. For instance, "the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used" is not development (s.55(2)(e)).

19. There is an important difference between works or changes that *do not constitute development* and those that do, but for which permission is granted by development order (chiefly, the GPDO). The former are outside the system of development control altogether (such as changes *within* the individual use classes in the Use Classes Order). The latter may be subject to procedural and substantive restrictions that may at times mean that the automatic grant of permission they enjoy counts for relatively little.

20. Whether development has occurred, either operational works amounting to development or development through material change of use, and so is liable to be enforced against if done without permission, is always a matter of fact and degree. However, whilst that may sound a simple test, in practice its application has been anything but, particularly as regards change of use. There, if one is to identify the primary use, and any lawful ancillary uses, it is first necessary to identify the area of land to which that primary use applies. For this, it is necessary to grapple with an entirely judge-made concept, that of the "planning unit".

21. Before that, though, we need to understand the enforcement mechanisms that hold the development control system together.

Enforcement and immunity

22. Like any restrictive system, planning needs a stick. That stick is the enforcement provisions within Part VII of the TCPA 1990, which, by s.171A, makes it an enforceable breach of planning control to:

    (1) carry out development without the required planning permission; and

    (2) fail to comply with a condition or limitation to a planning permission.

23. In the case of the former, the enforcement mechanism is the *issue* of an "enforcement notice" under s.172. In the case of the latter, the enforcement mechanism is *either* issue of an enforcement notice issued under s.172 or *service* of a "breach of condition notice" under s.187A.

24. The two types of enforcement action are both backed up by ancillary powers, such as the right to serve a stop notice or seek injunctive relief through the courts. However, they are quite distinct, not least in that in order to take enforcement action via an enforcement notice the LPA need only *issue* the enforcement notice, whereas it is necessary to *serve* a breach of condition notice in order to do so.

25. The difference is because whilst failure to comply with either form of notice is an offence, the recipient of an enforcement notice may appeal to the Secretary of State on any of the grounds within s.174, and include within his appeal an application for retrospective planning permission, during which period the notice is suspended and of no effect. By contrast, in the case of a breach of planning condition there is no right of appeal and matters progress immediately to a straightforward choice between compliance or an offence (s.187A(9)) subject to limited defences.

26. Accordingly, whilst an enforcement notice must be served on both the owner and occupier of the land to which it relates, along with "any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice" (s.172(2)), a breach of condition notice may only be served on "any person who is carrying out or has carried out the development" (s.187A(2)(a)), or "any person having control of the land" (s. 187A(2)(b)).

27. Despite a certain superficial attraction in the blunt instrument of a breach of condition notice, that form of enforcement action carries a host of problems.

    (1) Whilst there is no right of appeal, a person may apply for a "varied" (albeit new) planning permission, stripped of the condition or conditions in issue, pursuant to s.73 of the TCPA 1990. If the LPA refuse that application, there is a right of appeal to the Secretary of State.

(2) The remedy for a person served with a breach of condition notice they consider unlawful is judicial review.[3] Given that service of a breach of condition notice will often involve nice questions of law, including the date that any development has commenced, such challenges often pose LPAs real problems. In either case, the problem of overlapping jurisdiction with the criminal courts is obvious and a strong deterrent to any LPA not sure of its ground.

(3) Because there is no statutory appeal available, inadequacies in a breach of condition notice sufficient to render it a nullity will afford a defence to prosecution, along the lines explained by the Court of Appeal in *Miller-Mead v Minister for Housing and Local Government* [1963] 2 QB 196. Contrast an enforcement notice, where the courts have little time for defences based on alleged unlawfulness in a notice that has not been appealed, as these are points that may be taken before an Inspector.

28. As a result, LPAs as a whole tend to prefer the enforcement notice mechanism, even in circumstances in which a breach of condition notice could lawfully be served and might provide a swifter result.

29. When faced with an enforcement notice, the initial questions are obvious; has the breach of planning control alleged occurred? is it continuing? is it something that the client wishes to continue, so worth fighting for?

30. Assuming yes to all, attention will then inevitably turn first to whether the development has in fact acquired immunity from enforcement through passage of time, before moving to a possible "Ground A" appeal (seeking planning permission for the offending development) or efforts to cut down the notice.

31. Section 171B to the TCPA 1990 is the key provision governing immunity from enforcement action through elapse of time:

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 dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(2A) There is no restriction on when enforcement action may be taken in relation to a breach of planning control in respect of relevant demolition (within the meaning of section 196D).

[3] *Trim v North Dorset DC* [2010] EWCA Civ 1446.

(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.

…

32. So, by s.171B:

- operational development or the change of use of any building to a dwelling house acquire immunity from enforcement after four years;
- all other breaches of development control (including breach of conditions to a planning permission), bar certain acts of demolition, become immune from enforcement after ten years;
- there is no immunity from enforcement against demolition of an unlisted building in a conservation area (s.171B(2A)).

33. This is all subject to a substantial, and recent, proviso; if the development has been achieved through full or partial deliberate concealment then the old certainties regarding immunity fall by the wayside, courtesy of ss.171BA-171BC. Of which more below.

34. Note that the *time* when a development is begun, which is often highly relevant in enforcement cases, is governed by s.56(2)-(5) TCPA 1990. Case law has now reached the settled view that the test is an objective one, not governed by the subjective intention of the person doing the relevant works.

35. Section 171B throws up several potential headaches.

4 or 10 years when operational development carried out following a grant of planning permission but not in accordance with the permission?

36. The issue here is whether on those facts the development has been entirely carried out without planning permission, such that any conditions to the planning permission do not apply. The problem is a vexed one on which the authorities are not entirely clear. However, in my view the position is that if development does not comply with planning permission in a material aspect or to a material extent then it is entirely without planning permission such that no conditions to any permission will apply.[4] In which case, the operational development will acquire immunity after four years (subject to any concealment issues).

4 or 10 years where the use of land is changed to use as a dwelling house?

[4] *Handoll v Warner Goodman & Street* (1994) 70 P&CR 627 (CA); *Sage v Secretary of State* [2003] UKHL 22; [2003] 1 WLR 983, 990 para. 23 *per* Lord Hobhouse, *Welwyn Hatfield v Secretary of State* [201] EWCA Civ 26; [2010] 2 P&CR 10 (CA), para.25 *per* Richards LJ, confirmed by the Supreme Court [2011] UKSC 15 per Lord Mance at para.11).

37. 10 years. Change of use of mere land to use as dwelling house does not fall within s.171B(2); there must be a change of use of an *existing* building.

Even if that means the dwelling house itself might be immune under s.171B(1) (four years) but its use would not be?

38. Yes. This is one of the many anomalies thrown up by the planning system. It has recently been confirmed as such by the Supreme Court in *Welwyn Hatfield v Secretary of State* [2011] UKSC 15; [2011] 2 AC 304, *per* Lord Mance at para.17 (in which the Court also suggested the possible administrative-law solution to the problem).[5] In practice, it is difficult to conceive of a situation in which a LPA would decide to enforce against the *use* of a building that had acquired *operational* (4 year) immunity, so guaranteeing an empty shell.

4 or 10 years where the use of an existing building has changed to use as a dwelling house in breach of planning condition?

39. Four years; *Arun DC v First Secretary of State* [2006] EWCA Civ 1172; [2007] 1 WLR 523).

40. We will return to the question of concealment later.

Material change of use and the "planning unit"

41. The concept of the planning unit evolved as a means of determining the most appropriate physical area against which to assess the materiality of change, so to decide whether or not in any particular case there has been a breach of planning control consisting of a "material change in the use of any buildings or other land". The classic statement is the obiter dicta of Lord Bridge (Bridge J as he then was) in *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 (*"Burdle"*), at p.1212-1213:

> "First, that whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered …
>
> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities

[5] …The building attracts a four-year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten-year period for enforcement under subsection (3). I say in theory because there is a potential answer to this apparent anomaly, one which would apply as much to a dwelling house as to any other building. It is that, once a planning authority has allowed the four-year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless.

> fluctuate in their intensity from time to time but the different activities are not confined within separate and physically distinct areas of land.
>
> Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.
>
> …It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally"

42. That final obiter dicta, which as Lord Bridge said at the time was a "useful working rule", not an absolute, has stood the test of time. It remains the starting point for any reversioner faced with a complaint from the LPA that their tenants' have brought about an (unlawful) change of use.

43. A few examples illustrate its application.

44. In *Johnston v Secretary of State* (1974) 28 P& CR 424 the Court of Appeal considered a case in which a number of garages, once in single ownership and use for a taxi business, came to be leased by separate individuals and, in some cases, put to use for vehicle repairs rather than simply garaging. The LPA enforced against those not being used for garaging, against the individual units rather than the site containing all the garages as a whole. The appellants asserted that the notice should have been served against the whole site (which would, naturally, have better suited their purpose, a finding that a material change of use had occurred being less likely). The Inspector on appeal rejected the appellants' arguments and upheld the notices. Statutory appeals were rejected and the case came before the Court of Appeal, which dismissed the appeal, citing *Burdle* with approval and noting that determination of the planning unit was a matter of fact and degree. In the course of his (sole) judgment Lord Widgery CJ said this, having quoted the passage from *Burdle* above:

> The important phrase there is the suggestion that one should start with the "unit of occupation." in other words, that prima facie the planning unit is the area occupied as a single holding by a single occupier. I would not for a moment wish to suggest that that is an absolute rule admitting of no exceptions, but that it may be the first step in
> the approach to this problem I think is clearly right,...
> …
> In the course of argument today the premises in question were likened to a purpose-built block of flats, and Mr. Hames was asked for his submissions as to whether in the case of a purpose-built block of flats the individual flats should not be regarded as separate planning units by virtue of their separate occupation. I understood him to say that in his submission the block of flats should be regarded as a single planning unit, but if that was his answer I find it quite

> impossible to reach that conclusion. I would have thought that in almost every case of a block of flats, the flats being let to separate and different tenants, the planning unit would be the flat in question. This gives me reassurance for supporting the view which the Secretary of State has taken in this case.

45. Whilst the latter paragraph was obiter dicta, it is in my view an impeccable statement of the law.

46. As the courts have stressed, though, the rule is not absolute. In *Gregory v Secretary of State and Reigate and Banstead BC; Rawlins v Secretary of State and Tandridge DC* (1990) 60 P&CR 413 (*"Rawlins"*) enforcement notices had been issued against large plots in the Surrey green belt occupied by showmen and their families. The large plots were subdivided into smaller plots for individual caravans, and the showmen in both cases argued that the notices were invalid as they were in respect of the large plots, rather than the small caravan plots. In both cases Inspectors on appeal had found the proper planning unit against which to assess change of use the large plot, and their decisions had been upheld by the High Court.

47. The Court of Appeal in *Rawlins* noted (once more) that the concept of the planning unit is judge made and a matter of fact and degree. Whilst acknowledging that notices issued against the wider area rather than the individual unit of occupation might risk injustice to individual owners and occupiers whose special circumstances might be overlooked, the Court of Appeal insisted that the "unusual if not exceptional features and characteristics" at play justified departure from the usual practice of issuing and serving enforcement notices on the unit of occupation.

48. The result of the "usual" rule is that there may be separate planning units within a single building. For instance, such as the individual retail units within the Metro Centre, Gateshead; *Church Commissioners v Secretary of State for the Environment* (1995) 71 P. & C.R. 73; [1995] 2 P.L.R. 99 (Mr RMK Gray Q.C., sitting as Deputy Judge).

49. The Metro Centre had been constructed within an enterprise zone and without express planning permission. The issue was whether planning permission would be required to change the use of a single (Class A1) retail unit within the Centre to use as a restaurant (Class A3). Such a change would, of course, be to move against the Use Classes Order "ratchet". The question was whether the planning unit was the entire Metro Centre, being an area of land in the occupation of one landlord and comprising a single building, or whether each of the 300-odd units was itself a separate planning unit (as the LPA argued). The court upheld the approach adopted by the Secretary of State, namely that whilst for certain purposes the landlord was indeed in occupation of the whole of the Metro

Centre, for the purposes of planning control it was appropriate to identify the individual shop unit as the planning unit.

Defining the primary use

50. Given the importance of the permission granted by the GPDO for certain changes of use defined by reference to the Use Classes Order, many disputes turn on whether the primary use of the planning unit falls within a certain class. Fine distinctions are an inevitability here. *London Residuary Body v Secretary of State for the Environment* [1988] J.P.L. 637 (HC); ([1989] 3 P.L.R. 105 (CA) was a case in point.

51. There, both the Secretary of State and then the High Court and Court of Appeal rejected the LRB's arguments that County Hall (the former GLC headquarters) was simply an "office", such that any use for that purpose would not constitute a material change of use requiring planning permission. The planning inspector, whose view was accepted by the Secretary of State, was satisfied that the past primary use of County Hall had been one of "London governmental use," not ordinary office use, and that whilst the majority of the accommodation had been in office/administrative use that had been ancillary to the primary use. As Stocker LJ put it in the Court of Appeal: *"Without the local government functions the offices had no purpose to fulfil"*.

52. The LRB's inability to offer lawful office use to any prospective purchaser had obvious implications for disposal of the building.

Particular instances of development/non-development within s.55 itself

53. Section 55 expressly identifies certain items that are and are not development, albeit many of these remain subject to a test of fact and degree. I have already mentioned a change of use to agricultural use as a paradigm case of non-development, but within the section are a couple of instances that may be of particular interest for the property lawyer, due to their capacity to cause a headache for the reversioner.

54. First, that *operational* works which either (i) affect only the interior of a building (save for the provision of additional space underground) or (ii) "do not materially affect the external appearance of the building" do not amount to development (though either may, of course, fall foul of the listed buildings regime) (s.55(2)(a)).

55. Second, that the *use* as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used (s.55(3)(a)).

When is an alteration to a building's external appearance "material"?

56. As regards non-material alterations to the external appearance of a building under s.55(2)(a), this is a matter of fact and degree, and the leading case remains one involving a firm of solicitors; the comprehensive judgment of Mr Richard Southwell QC (sitting as Deputy Judge of the High Court) in *Burroughs Day v Bristol City Council* [1996] 1 PLR 78.

57. *Burroughs Day v Bristol* concerned proposed alterations to a Grade II listed Georgian townhouse in Bristol, occupied by the plaintiff firm. In particular, alterations to the roof were proposed, involving a flat roof for a lift shaft and a lower area of flat roof between the lift shaft roof and the gutter of the property's valley roof. The judge set out the relevant principles at what are pages 87 to 89 of the PLR report. In summary:

    (1) what must be affected is "the external appearance" of the building, not merely its "exterior";

    (2) as such, the alteration must be one which affects the way in which the exterior of the building is or can be seen by an observer outside the building;

    (3) as regards roof alterations such as the proposals at issue in the case, those which can be seen from any vantage point on the ground or in or on any neighbouring building or buildings would be capable of affecting the "external appearance" of the building in question (the Judge expressly left undecided the position if a roof alteration were visible only from the air);

    (4) the external appearance must be "materially" affected;

    (5) the "materiality" test involves a judgment as to the degree to which the particular alteration affects the external appearance. The effect must be more than de minimis;

    (6) whether the effect of an alteration is "material" or not must depend in part on the degree of visibility;

    (7) whether the external appearance of a building is "materially affected" is likely to depend on both the nature of the building and the nature of the alteration;

    (8) the effect on the external appearance must be judged for its materiality in relation to the building as a whole, and not by reference to a part of the building taken in isolation.

58. The concept of "materiality" is fundamental to planning, spanning not only the concept of "development" but also the decision-making process, challenges to which are frequently brought on the basis that the decision-maker has failed to have regard to a material factor. There is also now statutory provision for

applications to vary existing planning permissions through “non-material amendments”, pursuant to s.96A of the TCPA 1990.

Use as two or more separate dwelling houses – enforcement conundrums

59. As regards the *use* as two or more separate dwelling houses of any building previously used as a single dwelling house involving a material change in the use of the building and of each part of it which is so used (s.55(3)(a)), *Doncaster BC v Secretary of State; Van Dyck v Secretary of State* (1995) 66 P&CR 62 (*"Van Dyck"*) established conclusively that what is now s.171B(2) covers the change of use of a building or part of a building, such as the Property, to use as number of separate dwellings, just as much as it concerns the change of use of a building or part of a building as a single dwelling house. Though *Van Dyck* concerned the predecessor section to s.171B(2), s.172(4)(c) of the 1990 Act prior to amendment by the Planning and Compensation Act 1991, the earlier provision was in materially identical terms as the present s.171B(2).

60. *Van Dyck* concerned two appeals, one a planning appeal, another an enforcement appeal.

61. The eponymous case of *Van Dyck v Secretary of State* concerned the sub-division of a building into two flats without planning permission. The appellants (Van Dyck) had acquired a long leasehold in one of the flats, ignorant of the lack of planning permission, and, on discovering the reality more than four years after the sub-division, sought retrospective consent. That being refused by the LPA, then the Inspector, then the Deputy Judge on a s.288 appeal, the case came before the Court of Appeal.

62. The other case (that of *Doncaster v Secretary of State*) saw a Mr Dunnill sub-divide a two-storey house into two flats, which he proceeded to let, mostly to young couples, for more than four years. The LPA issued and served an enforcement notice on Mr Dunnill, against the whole of the property, alleging a material change of use (to use "for multiple occupation"). Whilst Mr Dunnill succeeded before the Inspector the LPA succeeded on a s.289 challenge before Webster J, following which the case came before the Court of Appeal. Hence both appellants in *Van Dyck* (so in *Van Dyck* and *Doncaster*) sought to argue that they enjoyed immunity under the predecessor to s.171B(2).

63. It is helpful to understand the crux of the appellants' submissions. These are summarised by Lord Brown (Simon Brown LJ as he then was) giving the sole judgment (with which both Dillon and Farquharson LLJ agreed) at p.64:

> "The appellants' argument focuses particularly on sections 55(3)(a), 172(4)(c) and 336(1) and essentially amounts to this: when a single dwelling-house is subdivided, say into two flats, there is a breach of planning control consisting of a material change of use to each part of it – section 55(3)(a) so states. Having regard to section 336(1) (the interpretation section) section 172(4)(c) can and should be read as stating: "the making without planning permission of a change of use of any building *or any part of a building* (my italics) to use as a single dwelling-house" may be issued only within four years of the breach. "Building" is plainly apt to include that part which becomes a flat following subdivision, and

> the flat itself becomes a separate and accordingly "single" dwelling-house. Even assuming that it is theoretically possible to the address the enforcement notice to the whole house as well as to each flat following its subdivision, the planning authority cannot thereby deprive the occupiers of the individual flats of the ground of appeal otherwise available to them under sections 172(4)(c) and 174(2)(d)."

64. The respondents' arguments were summarised rather more shortly: "the occupiers only acquire immunity…when each part of the building converted was itself properly to be regarded as a distinct planning unit before the development took place".

65. It was noted that the concept of the planning unit afforded no assistance to either side, given that the purpose of the concept was to decide whether or not there had been a material change of use, but on the facts before the Court the statute itself provided that there had been, by s.55(3)(a) (p.69). It was "inappropriate" therefore, to rely upon the doctrine to "illuminate the nature of the breach of planning control in question or to determine the appropriate target for enforcement" (p.69).

66. As regards the point raised regarding practicality of enforcement, Simon Brown LJ recognised that there would be problems of enforcement, but said this:

> "Of course I recognise that there are individual interests involved and equally obviously that there will often be acute problems of enforcement. Take a case where the owner has divided his house into two self-contained flats (or, indeed, two separate vertical freeholds) and sold each to a different buyer. But even were the four year rule to apply in such circumstances, the planning authority would still be entitled to enforce within that period and problems would still arise."

67. Hence whilst problems regarding enforcement might arise this would not, for instance, render the notice a nullity. Instead, Simon Brown LJ found that he predecessor to s.171B(2) (s.172(4(c)), construed in the context of ss.55(3)(a) and 336(1), was capable of encompassing subdivision as:

> "If a whole house is divided into two flats, then it is perfectly possible to find within the terms of the section in respect of each new flat a change of use of part of the building (the original whole house) to use as a single-dwelling house. That, as stated, is the central thrust of the appellants' arguments" and
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> (s.172(4)(c)) was "capable of being construed and applied so as to benefit all new separate residences after four years", and that being so, having regard to the broad policy which he conceived to underlie the provision
>
> "it should thus be construed and applied" (pp.72-73)

68. What *Van Dyck* did not answer, though, was the appellants' argument (see p.71) that "in the case of subdivision, enforcement action can only be taken against the subdivided parts and no against the original whole…". In my view, whilst a LPA would have to justify a decision to proceed against the whole building in public law terms, given the potential difficulties with enforcement, provided it could do

so then s.55(3)(a) is clear that the change of use affects the whole, not merely its individual parts.

69. It is precisely because a change of use has occurred in respect of the whole as well as parts of the building (as s.55(3)(a) makes quite clear), hence it cannot be wrong to issue a notice against the whole as well as the individual flats, that the reversioner is faced with a particular problem when it comes to compliance with the notice. Failure to do so is criminal offence, and the issue of a notice on the whole only may pose real difficulty, as recognised in *Van Dyck*. The difficulty is particularly acute for the freeholder who has let the flats, as it may or may not be that the terms on which the flats are let mean that he cannot raise the letting as a defence to prosecution.

70. It is conceivable a court would be interested in a challenge to an enforcement notice on the basis the LPA had failed to apply its mind to the problems surrounding enforcement before issuing the notice. As that is a point that falls outside the s.174 grounds, it would properly be a matter for judicial review.

Ways around potential enforcement

71. Once an enforcement notice has been issued then most LPAs will be reluctant to withdraw it and it will generally be necessary to appeal in order to have it removed. The best time to move is before the notice is issued.

72. As to that, essentially the same mechanism available for an application for a "fresh" permission through the variation of an existing permission to remove certain conditions (pursuant to s.73) may also be used in relation to development already carried out (pursuant to s.73A). This kind of pre-emptive strike can persuade an LPA to hold off.

73. Equally, it may be that the owner wishes to pursue an entirely different development, in which case there is no to prevent an application for permission for that, even after an enforcement notice has been issued and an appeal lodged.

74. Short of an application for planning permission, reversioners may be interested in the possibilities afforded by an application for a "certificate of lawful existing use of development", or "CLEUD" or "CLD" as they are sometimes known, pursuant to s.191 TCPA 1990. A CLD application can be particularly useful where LPA officers are obviously considering their enforcement options but entertain a doubt regarding immunity due to passage of time. Whilst a CLD application is no bar to the issue of an enforcement notice, LPAs will often wait for the CLD to run its course, sometimes even to the conclusion of any appeal against a refusal of a certificate.

Action points in a "standard" enforcement case

75. Standing back from all of the above, we might usefully identify a number of "action points" in a "standard" enforcement case:

(1) Has enforcement action actually been taken yet, or is the LPA merely investigating/considering?

(2) If no enforcement action has been taken, seek to dissuade the LPA from enforcement whilst steps are taken to investigate/regulate the position. Consider an application for retrospective planning permission (s.73A TCPA 1990) or a CLD application (s.191 TCPA 1990).

(3) If the notice has been issued, and assuming an enforcement notice rather than a breach of condition notice, what form of development does the LPA allege; operational, change of use, or both?

(4) If operational, has the development alleged occurred? Is it in fact development? If so, is it permitted by development order such as the GPDO?

(5) If material change of use is alleged, understand the planning unit.

(6) What was the lawful primary use before the change? Has a material change of use occurred, if so what and when?

(7) In the case of either development, has immunity from enforcement accrued?

(8) Are the steps required by the notice reasonable?

(9) Would the development merit planning permission in any event?

(10) Decide upon any appeal pursuant to s.174 TCPA, and the grounds. Include Ground A (application for planning permission)?

76. These are simply a starter for 10.

Cases of "concealment"

77. Until recently, the commonly held view was that if the four year/ten year periods under s.171B had passed, then the development was immune and free from enforcement action, no matter that this had been achieved by concealing the facts from the enforcing authority. However, that wishful thinking has been shattered by a combination of case law and amendments to the TCPA 1990 arising from certain notorious attempts to game the planning system, in particular two cases; *Fidler* and, most importantly, *Welwyn Hatfield v Secretary of State* [2011] UKSC 15; [2011] 2 AC 304) involving the building of dwelling houses concealed in agricultural structures.

78. Mr Fidler's concealment of a mock castle behind hay bales earned him reams of newspaper column inches and a touch of cult status. What it did not earn him was immunity from enforcement when he pulled the hay bales away, believing the requisite time had passed. Similarly, Mr Beesley's construction of what externally appeared to be the agricultural barn for which he had planning permission, but internally was a dwelling house. *Welwyn Hatfield* saw the Supreme Court hold that in such a case of deliberate and serious deception the developer had no entitlement to immunity under s.171B.

79. As Lord Brown put it (at [84]):

> Recognising the unattractiveness of Mr Beesley's position and the persuasive public policy arguments against his succeeding in his application for a lawful development certificate, the Secretary of State in December 2010 published the Localism Bill which, if enacted, will by section 104 amend the 1990 Act by inserting three new sections (171BA, 171BB, and 171BC) expressly to deal with issues of concealment. Without wishing to comment on the details of these provisions, I would observe only, first, that their proposed inclusion in the legislation surely indicates that the legislative scheme as a whole can hardly be thought incompatible with some application of the *Connor* principle; secondly that, pending the proposed statutory amendments, only truly egregious cases such as this very one (and perhaps *Fidler* too) should be regarded as subject to the Connor principle. I simply do not accept that amending legislation is required before this salutary principle of public policy can ever be invoked. I do recognise, however, that, as matters presently stand, it should only be invoked in highly exceptional circumstances.

80. The new ss.171BA-171BC of the TCPA 1990 now provide a rather lower threshold of concealment by which the enforcing LPA may be permitted to extend time. The full provisions are within the Annexe.

81. The following set out the legal framework:

(1) as regards "concealment" in cases prior to s.171BA-171BC of the Act, it will only be in very exceptional circumstances, such as those in the *Welwyn Hatfield* or *Fidler* cases, that a person's deception of their local planning authority has been sufficiently deliberate and serious that public policy demands they be deprived of the benefit of any s.171B immunity accrued;

(2) as regards s.171BA-171BC, those sections only bite where immunity has not been acquired before the coming into force of those sections in April 2012;

(3) in a s.171BA-171BC case, a local planning authority may apply to the local magistrates' court for a planning enforcement notice within six months of their knowledge of evidence of a "deliberately" concealed breach of planning control, and the magistrates may only grant the notice where they consider that there has been full or partial deliberate concealment of the breach. The local authority then have a further year in which to bring enforcement action.

82. We await the first authoritative decision on the scope of "deliberately" within s.171BA.

Test for planning permission: conformity with the development plan?

83. It is a common misconception that if a proposal conforms to the statutory development plan (that suite of policies in documents that have now, once more, been restyled "Locals Plans") then it will be approved, and if it does not it will not. The system is plan-led, but the plan is not determinative. Any decision is always a balancing exercise. Other material considerations may tip the balance against the development plan, not least national planning policy.

84. The statutory test within s.38(6) PCPA 2004 reflects this. By s. 38(6), the determination of an application for planning permission:

> "must be made in accordance with the plan unless material considerations indicate otherwise."

Planning policy: All about localism?

85. Not quite. The present Government abolished the Regional Strategies (formerly known as Regional Spatial Strategies) beloved of the previous administration. It did so through the Localism Act 2011, making their abolition and the creation of neighbourhood plans the centrepiece of its localism agenda whilst at almost the same time replacing the reams of national planning guidance with a single, pithy document; the National Planning Policy Framework ("the NPPF"), published at the end of March 2012. The reality, though, has arguably been a more centralised approach to planning, because:

    (1) By Annexe 1 of the NPPF, within 12 months of the its publication, all local policies would carry weight only accordance to the extent of their conformity, as follows:

> 211. For the purposes of decision-taking, the policies in the Local Plan (and the London Plan) should not be considered out‑of‑date simply because they were adopted prior to the publication of this Framework.
>
> 212. However, the policies contained in this Framework are material considerations which local planning authorities should take into account from the day of its publication. The Framework must also be taken into account in the preparation of plans.
>
> 213. Plans may, therefore, need to be revised to take into account the policies in this Framework. This should be progressed as quickly as possible, either through a partial review or by preparing a new plan.
>
> 214. For 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 200439 even if there is a limited degree of conflict with this Framework.
>
> 215. In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).

    (2) With many LPAs still struggling to put in place their first "new style" local development framework, let alone stay up to date, the result has been the NPPF trumping local policy up and down the country, particularly in relation to housing supply;

    (3) As to which, whilst the abolition of RSs relieved local authorities of the need to meet the targets, chief among them housing targets, set by the RS, the NPPF requires them to demonstrate a five-year housing supply. This, combined with the effect of NPPF, Annexe 1, has led to what many LPAs have described as a housing free-for-all.

86. In the meantime, the number of neighbourhood plans that have been adopted remains a disappointment for the champions of localism.

The NPPF: a carte blanche for developers?

87. No. Whilst it did seem from earlier drafts that the NPPF would strip away protective designations left right and centre, the final version was a considerably more nuanced document.

88. At the heart of the NPPF is a presumption in favour of "sustainable development" (defined at §7 as having three "dimensions": economic, social and environmental), which should be seen as a "golden thread" running through plan-making and decision-taking, §14. Sustainability itself can be argued in any number of ways. As regards specifics, the NPPF is just as protective of such as green belt as the national policies it replaced.

89. It is only in relation to house that the NPPF has driven truly marked change.

90. Section 6 of the NPPF deals with housing under the heading "Delivering a wide choice of high quality homes". It explains that the aim is to "boost significantly the supply of housing" and insists on a five-year supply of deliverable housing sites, along with a suitable contingency buffer (§47). At §49 the NPPF explains the approach to be taken if the five-year supply cannot be demonstrated:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

91. The evidence base against which housing need is to be assessed is crucial to assessment of the five-year supply. Any number of LPAs have found their attempts to rely on an outdated or overly conservative estimate of housing need rejected by Inspectors on appeal. It is frequently the case that the evidence base that informed the now-revoked RSs and their housing targets remains the best evidence as to present and future housing need.

Planning policy: whose interpretation?

92. It is no longer the case that LPAs enjoy near-total impunity when it comes to interpretation of their own policies. It is now recognised that the meaning of policy is a matter of law for the court. See *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13, [2012] 2 P&CR 9. Before *Tesco*, there were suggestions that the interpretation of policies, in the planning field at least, was a question of judgment or evaluation for the LPA, reviewable only on rationality grounds. Lord Reed [17]-[22] distinguished the correct interpretation of a policy from the exercise of judgment pursuant to the policy so interpreted:

> "Policy statements should be interpreted objectively in accordance with the language used" [18]

93. The fact that, in the planning context, policies may require the exercise of judgment by the LPA, and that different policies in a development plan may arguably be in tension with each other, does not diminish that principle:

> "[19] That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

94. *Tesco* concerned the application of a policy which provided (see [5]) that proposals for retail development outside the City and District Centres: "will only be acceptable where it can be established that: no suitable site is available, in the first instance, within and thereafter on the edge of the City Centre or District Centre…"

95. The question whether a site was "suitable" was one for the LPA's judgment. But the question - suitable for what? - was a "logically prior question as to the issue to which planning judgment requires to be directed" ([21]), and that was a question of construction for the court.

96. The UKSC held, having regard to the language, context and purpose of the policy, that "suitable" meant "suitable for the development proposed by the applicant", not "suitable for meeting identified deficiencies in retail provision": [24]-[27].

The NPPF means the Government has got rid of that mountain of national planning guidance and simplified things, doesn't it?

97. Yes and no. The NPPF has, generally, been a breath of fresh air. And the bonfire of the vast mountain of national planning guidance that had accumulated over the years was long overdue. But already the Government has shown itself unable to resist the temptation of issuing fresh guidance, the volume of which is steadily rising. It sometimes seems that the go-to policy response to a particular

political issue of the day is to issue some planning guidance that serves as a vehicle for Government policy when any more direct statement might be unpalatable.

98. At the start of March 2014, the Government published its "National Planning Practice Guidance" ("NPPG") on the Planning Portal. If reduced to a single PDF the NPPG runs to 651 pages. Whilst that is rather less than the 20-plus years of national policy and guidance the NPPF replaced, it is an awful lot more than the bold-new stripped-down rhetoric led the industry to expect. Out with the old PPSs and their Companion Guides, in with the NPPF, the national plans dealing with such as energy or minerals, and the NPPG. Plus ca change.

Conversion of offices to residential

99. From 30.05.2013, Class J to Part 3 (changes of use) of the GPDO made new time-limited provision granting permission for conversion of office buildings to residential in certain circumstances and subject to prior approval, courtesy of the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013.[6]

100. The change was opposed by many LPAs, in particular several central London boroughs, a number of which unsuccessfully sought to have the Secretary of State's refusal to grant them exemption quashed through judicial review.[7] That certain LBCs (Islington LBC) sought to evade the application of Class J by seeking to make Art.4 directions removing the entirety of their area from the application of the new Class J has provoked much ire within DCLG and led the Government to state that it will exercise its powers to revoke the offending Art.4 directions.

101. GPDO Class J provides as follows:

> J. Permitted development
>
> Development consisting of a change of use of a building and any land within its curtilage to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order from a use falling within Class B1(a) (offices) of that Schedule.

102. The key here is that it is only those buildings that fall within Class B1(a) of the Use Class Order that are eligible, not Class B1 as a whole. Class B1 is as follows:

> Class B1. Business
>
> Use for all or any of the following purposes—

[6] SI 2011/1101.

[7] *Islington LBC, Lambeth LBC & Camden LBC v Secretary of State for Communities and Local Government* [2013] EWHC 4009 (Admin), Collins J.

(a) as an office other than a use within class A2 (financial and professional services),

(b) for research and development of products or processes, or

(c) for any industrial process,

being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

103. Not included are offices blocks that form part of listed building and the like:

J.1.— Development not permitted

Development is not permitted by Class J where—

(a) the building is on article 1(6A) land;

(b) the building was not used for a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order immediately before 30th May 2013 or, if the building was not in use immediately before that date, when it was last in use;

(c) the use of the building falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order was begun after 30th May 2016;

(d) the site is or forms part of a safety hazard area;

(e) the site is or forms part of a military explosives storage area;

(f) the building is a listed building or a scheduled monument.

104. Equally, procedural conditions limit the flexibility of the automatic permission:

J.2.— Conditions

Class J development is permitted subject to the condition that before beginning the development, the developer shall apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to —

(a) transport and highways impacts of the development;

(b) contamination risks on the site; and

(c) flooding risks on the site,

and the provisions of paragraph N shall apply in relation to any such application.

105. The “prior approval” procedure within Section N of Part 3 to the GPDO is a pared-down version of the procedure followed for regular planning applications. See Annexe for the detail.

106. Given that a Class J permission means an LPA loses all opportunity to extract planning obligations pursuant to s.106 TCPA 1990, most are determined to derail these applications wherever possible.

Permissions – still vulnerable to challenge months later?

107. For decades, there has been an obvious disconnect between the strict six-week time limit permitted for statutory challenges from such as the Secretary of State's decision on appeal and the loose weave timeframe for judicial review of a grant of permission by the LPA. Despite numerous judicial utterings that the time for judicial review of a planning decision should align with the six weeks for a statutory challenge, in practice claims were allowed up to and often beyond three months.

108. That has now changed, with an equally strict six-week period imposed for judicial review of grants of planning permission by new provisions within CPR Part 54.

109. Note that the old time period for bringing a claim, "three-months and in any event promptly", still applies to challenges to policy documents.

Section 106

110. It may be that your client finds himself faced with an LPA calling for payment of a s.106 contribution that runs with the land, of which he was only dimly aware of when he purchased. Either way, it is always worth checking s.106, in particular s.106(9), to establish whether the statutory requirements for a planning obligation are met.

111. If the obligation is not within the categories listed by s.106(1), or if the deed does not fulfil the requirements of s.106(9), then whatever contractual force the document may have it will not be a planning obligation that runs with the land.

Listed buildings and conservation areas

112. Finally, a word about this niche, but frequently troublesome corner of planning law.

113. In truth, the protective legal framework that safeguards listed buildings and conservation areas is a mixture of preservation and planning. See Annexe for salient extracts from the Listed Buildings Act.

114. First, the restriction on unauthorised works to a listed building is draconian. They must not in "any manner" affect "its character as a building of special architectural or historic interest" (s.7).

115. Second, the test for listed building consent bears no relation to the test for planning permission, elevating the desirability of preserving the building or its setting or relevant features to the primary consideration:

> (2) In considering whether to grant listed building consent for any works the local planning authority or the Secretary of State shall have special regard to the

desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

116. This "preservation" aspect continues to the regime governing enforcement and appeal against enforcement.

117. By contrast, the general duties regarding listed buildings or conservation areas in the exercise of planning functions, ss.66 and 72, are pure planning. It is trite law that "preserving" in both sections means "doing no harm".[8] That is not the same as the more onerous "positively preserving", however as Lord Bridge explained in *South Lakeland DC v Secretary of State for the Environment*:[9]

> There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria.

118. Lord Bridge's "strong presumption" has been very recently explaining by the Court of Appeal, in a case where the development in question was a wind farm within the setting of numerous heritage assets.[10] As Sullivan LJ put it:

> 23…There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight."
>
> …
>
> 29… Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise.

119. In short, when conducting the balancing exercise involved in any determination of an application for planning permission, the desirability of preserving the heritage asset (be it listed building or conservation area), its features or setting will always be of great weight, and any decision-maker that fails to approach it as such will err.

James Burton
Thirty Nine Essex Street, WC2R 3AT

[8] *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, per Lord Bridge at p. 150
[9] Ibid. At p.146E-G.
[10] *Barnwell Manor v East Northamptonshire & ors* [2014] EWCA Civ 137.

ANNEXE

Definition of development, s.55 TCPA 1990[11]

55.— Meaning of "development" and "new development".

(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

(1A) For the purposes of this Act "building operations" includes—

(a) demolition of buildings;

(b) rebuilding;

(c) structural alterations of or additions to buildings; and

(d) other operations normally undertaken by a person carrying on business as a builder.

(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—

(a) the carrying out 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,

and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground;

(b) the carrying out on land within the boundaries of a road by a highway authority of any works required for the maintenance or improvement of the road but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment;

(c) the carrying out by a local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose;

(d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such;

(e) the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used;

(f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class.

[11] Note that this is the version in force in England. The version in force in Wales is very slightly different.

(g) the demolition of any description of building specified in a direction given by the Secretary of State to local planning authorities generally or to a particular local planning authority.

(2A) The Secretary of State may in a development order specify any circumstances or description of circumstances in which subsection (2) does not apply to operations mentioned in paragraph (a) of that subsection which have the effect of increasing the gross floor space of the building by such amount or percentage amount as is so specified.

(2B) The development order may make different provision for different purposes.

(3) For the avoidance of doubt it is hereby declared that for the purposes of this section —

(a) the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used;

(b) the deposit of refuse or waste materials on land involves a material change in its use, notwithstanding that the land is comprised in a site already used for that purpose, if—

(i) the superficial area of the deposit is extended, or

(ii) the height of the deposit is extended and exceeds the level of the land adjoining the site.

(4) For the purposes of this Act mining operations include—

(a) the removal of material of any description—

(i) from a mineral-working deposit;

(ii) from a deposit of pulverised fuel ash or other furnace ash or clinker; or

(iii) from a deposit of iron, steel or other metallic slags; and

(b) the extraction of minerals from a disused railway embankment.

(4A) Where the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there would not, apart from this subsection, involve development of the land below, this Act shall have effect as if the tank resulted from carrying out engineering operations over that land; and in this subsection—

"fish farming" means the breeding, rearing or keeping of fish or shellfish (which includes any kind of crustacean and mollusc);

"inland waters" means waters which do not form part of the sea or of any creek, bay or estuary or of any river as far as the tide flows; and

"tank" includes any cage and any other structure for use in fish farming.

(5) Without prejudice to any regulations made under the provisions of this Act relating to the control of advertisements, the use for the display of advertisements of any external part of a building which is not normally used for that purpose shall be treated for the purposes of this section as involving a material change in the use of that part of the building.

Sections 171BA

171BA Time limits in cases involving concealment

(1) Where it appears to the local planning authority that there may have been a breach of planning control in respect of any land in England, the authority may apply to a magistrates' court for an order under this subsection (a “planning enforcement order”) in relation to that apparent breach of planning control.

(2) If a magistrates' court makes a planning enforcement order in relation to an apparent breach of planning control, the local planning authority may take enforcement action in respect of—

(a) the apparent breach, or

(b) any of the matters constituting the apparent breach,

at any time in the enforcement year.

(3) “The enforcement year” for a planning enforcement order is the year that begins at the end of 22 days beginning with the day on which the court's decision to make the order is given, but this is subject to subsection (4).

(4) If an application under section 111(1) of the Magistrates' Courts Act 1980 (statement of case for opinion of High Court) is made in respect of a planning enforcement order, the enforcement year for the order is the year beginning with the day on which the proceedings arising from that application are finally determined or withdrawn.

(5) Subsection (2)—

(a) applies whether or not the time limits under section 171B have expired, and

(b) does not prevent the taking of enforcement action after the end of the enforcement year but within those time limits.

174.— Appeal against enforcement notice.

(1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him.

(2) An appeal may be brought on any of the following grounds—

(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

(b) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control;

(d) 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;

(e) that copies of the enforcement notice were not served as required by section 172;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.

(2A) An appeal may not be brought on the ground specified in subsection (2)(a) if—

(a) the land to which the enforcement notice relates is in England, and

(b) the enforcement notice was issued at a time—

(i) after the making of a related application for planning permission, but

(ii) before the end of the period applicable under section 78(2) in the case of that application.

(2B) An application for planning permission for the development of any land is, for the purposes of subsection (2A), related to an enforcement notice if granting planning permission for the development would involve granting planning permission in respect of the matters specified in the enforcement notice as constituting a breach of planning control.

(2C) Where any breach of planning control constituted by the matters stated in the notice relates to relevant demolition (within the meaning of section 196D), an appeal may also be brought on the grounds that—

(a) the relevant demolition was urgently necessary in the interests of safety or health;

(b) it was not practicable to secure safety or health by works of repair or works for affording temporary support or shelter; and

(c) the relevant demolition was the minimum measure necessary.

…

(6) In this section “relevant occupier” means a person who—

(a) on the date on which the enforcement notice is issued occupies the land to which the notice relates by virtue of a licence; and

(b) continues so to occupy the land when the appeal is brought

GPDO, Part 3, Class N prior approval procedure

N.— Procedure for applications for prior approval under Part 3

(1) The following provisions apply where under this Part a developer is required to make an application to a local planning authority for a determination as to whether the prior approval of the authority will be required.

(2) The application shall be accompanied by—

(a) a written description of the proposed development;

(b) a plan indicating the site and showing the proposed development;

(c) the developer's contact address; and

(d) the developer's email address if the developer is content to receive communications electronically;

together with any fee required to be paid.

(3) Where the application relates to prior approval as to transport and highways impacts of the development, on receipt of the application, where in the opinion of the local planning authority the development is likely to result in a material increase or a material change in the character of traffic in the vicinity of the site, the local planning authority shall consult—

(a) the Secretary of State for Transport, where the increase or change relates to traffic entering or leaving a trunk road;

(b) the local highway authority, where the increase or change relates to traffic entering or leaving a classified road or proposed highway, except where the local planning authority is the local highway authority; and

(c) the operator of the network which includes or consists of the railway in question, and the Secretary of State for Transport, where the increase or change relates to traffic using a level crossing over a railway.

(4) Where the application relates to prior approval as to the flooding risks on the site, on receipt of the application, the local planning authority shall consult the Environment Agency where the development is—

(a) in an area within Flood Zone 2 or Flood Zone 3; or

(b) in an area within Flood Zone 1 which has critical drainage problems and which has been notified to the local planning authority by the Environment Agency for the purpose of paragraph (ze)(ii) in the Table in Schedule 5 to the 2010 Order.

(5) The local planning authority shall notify the consultees referred to in paragraphs (3) and (4) specifying the date by which they must respond (being not less than 21 days from the date the notice is given).

(6) The local planning authority shall give notice of the proposed development—

(a) by site display in at least one place on or near the land to which the application relates for not less than 21 days of a notice which—

(i) describes the proposed development;

(ii) provides the address of the proposed development;

(iii) specifies the date by which representations are to be received by the local planning authority; or

(b) by serving a notice in that form on any adjoining owner or occupier.

(7) The local planning authority may require the developer to submit such information regarding the impacts and risks referred to in paragraph J.2, K.2(b) or M.3(b), as the case may be, as the local planning authority may reasonably require in order to determine the application, which may include—

(a) assessments of impacts or risks;

(b) statements setting out how impacts or risks are to be mitigated.

(8) The local planning authority shall, when determining an application—

(a) take into account any representations made to them as a result of any consultation under paragraphs (3) or (4) and any notice given under paragraph (6);

(b) have regard to the National Planning Policy Framework issued by the Department for Communities and Local Government in March 2012 as if the application were a planning application; and

(c) in relation to the contamination risks on the site—

(i) determine whether, as a result of the proposed change of use, taking into account any proposed mitigation, the site will be contaminated land as described in Part 2A of the Environmental Protection Act 1992, and in doing so have regard to the Contaminated Land Statutory Guidance issued by Secretary of State for the Environment, Food and Rural Affairs in April 2012, and

(ii) if they determine that the site will be contaminated land, refuse to give prior approval.

(9) The development shall not be begun before the occurrence of one of the following—

(a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or

(c) the expiry of 56 days following the date on which the application was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused.

(10) The development shall be carried out—

(a) where prior approval is required, in accordance with the details approved by the local planning authority;

(b) where prior approval is not required, or where paragraph (9)(c) applies, in accordance with the details provided in the application referred to in paragraph (1), unless the local planning authority and the developer agree otherwise in writing.

Planning (Listed Buildings and Conservation Areas) Act 1990

7. Restriction on works affecting listed buildings.

(1) Subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised under section 8.

…

9.— Offences.

(1) If a person contravenes section 7 he shall be guilty of an offence.

(2) Without prejudice to subsection (1), if a person executing or causing to be executed any works in relation to a listed building under a listed building consent fails to comply with any condition attached to the consent, he shall be guilty of an offence.

(3) In proceedings for an offence under this section it shall be a defence to prove the following matters—

(a) that works to the building were urgently necessary in the interests of safety or health or for the preservation of the building;

(b) that it was not practicable to secure safety or health or, as the case may be, the preservation of the building by works of repair or works for affording temporary support or shelter;

(c) that the works carried out were limited to the minimum measures immediately necessary; and

(d) that notice in writing justifying in detail the carrying out of the works was given to the local planning authority as soon as reasonably practicable.

…

16.— Decision on application.

(1) Subject to the previous provisions of this Part, the local planning authority or, as the case may be, the Secretary of State may grant or refuse an application for listed building consent and, if they grant consent, may grant it subject to conditions.

(2) In considering whether to grant listed building consent for any works the local planning authority or the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

…

39.— Appeal against listed building enforcement notice.

(1) A person having an interest in the building to which a listed building enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice on any of the following grounds—

(a) that the building is not of special architectural or historic interest;

(b) that the matters alleged to constitute a contravention of section 9(1) or (2) have not occurred;

(c) that those matters (if they occurred) do not constitute such a contravention.

(d) that works to the building were urgently necessary in the interests of safety or health or for the preservation of the building, that it was not practicable to secure safety or health or, as the case may be, the preservation of the building by works of repair or works for affording temporary support or shelter, and that the works carried out were limited to the minimum measures immediately necessary;

(e) that listed building consent ought to be granted for the works, or that any relevant condition of such consent which has been granted ought to be discharged, or different conditions substituted;

(f) that copies of the notice were not served as required by section 38(4);

(g) except in relation to such a requirement as is mentioned in section 38(2)(b) or (c), that the requirements of the notice exceed what is necessary for restoring the building to its condition before the works were carried out;

(h) that the period specified in the notice as the period within which any step required by the notice is to be taken falls short of what should reasonably be allowed;

(i) that the steps required by the notice for the purpose of restoring the character of the building to its former state would not serve that purpose;

(j) that steps required to be taken by virtue of section 38(2)(b) exceed what is necessary to alleviate the effect of the works executed to the building;

(k) that steps required to be taken by virtue of section 38(2)(c) exceed what is necessary to bring the building to the state in which it would have been if the terms and conditions of the listed building consent had been complied with.

…

(7) In this section "relevant occupier" means a person who—

(a) on the date on which the listed building enforcement notice is issued occupies the building to which the notice relates by virtue of a licence; and

(b) continues so to occupy the building when the appeal is brought.

66.— General duty as respects listed buildings in exercise of planning functions.

(1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

(2) Without prejudice to section 72, in the exercise of the powers of appropriation, disposal and development (including redevelopment) conferred by the provisions of sections 232, 233 and 235(1) of the principal Act, a local authority shall have regard to the desirability of preserving features of special architectural or historic interest, and in particular, listed buildings.

(3) The reference in subsection (2) to a local authority includes a reference to a joint planning board.

(4) Nothing in this section applies in relation to neighbourhood development orders.

72.— General duty as respects conservation areas in exercise of planning functions.

(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.

(2) The provisions referred to in subsection (1) are the planning Acts and Part I of the Historic Buildings and Ancient Monuments Act 1953 and sections 70 and 73 of the Leasehold Reform, Housing and Urban Development Act 1993.

(3) In subsection (2), references to provisions of the Leasehold Reform, Housing and Urban Development Act 1993 include references to those provisions as they have effect by virtue of section 118(1) of the Housing Act 1996.

(4) Nothing in this section applies in relation to neighbourhood development orders.