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# What Covid-19 means for Enforcement

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# Introduction



- Context: statutory enforcement powers; covid-19 restrictions.
- Harriet Townsend
  - **Time limits** on taking enforcement action – and how to judge whether a cessation of use is a break in continuity of use;
  - The powers available to enforcement officers to obtain **information** and how they may be used during the coronavirus restrictions.
  - Maintaining enforcement **registers** and local enforcement plans
- Jack Parker
  - The decision to take enforcement action – **lawful authority**
  - Issues raised by coronavirus for **enforcement notices**, **appeals**, injunctions, and other enforcement issues related to the implementation of planning permissions.
- Questions.

# Legal context and Gov Guidance



- **Coronavirus Regs:**
  - no one may leave home without a reasonable excuse [Reg6 SI 2020/350 England; Reg8 SI 2020/353 Wales].
  - No gathering of more than two people unless essential for work purposes [Reg7 England; Reg 8 Wales]
- **Robert Jenrick**, WMS13 March 2020: Do not “undertake planning enforcement action which would result in unnecessarily restricting deliveries of food and other essential deliveries”
- **Steve Quartermain’s** final letter as Chief Planner at MHCLG:  
*Local planning authorities should also use their discretion on the enforcement of [other] planning conditions which hinder the effective response to COVID-19*

# Legal context and Gov Guidance



- No amendment of statutory framework: enforcement powers remain as they were.
- No change to NPPF or NPPG – guidance remains as it was – subject to the limited point about avoiding interference with the covid-19 response.
- The **Local Enforcement Plan** is – and remains – an important guide to the exercise of the LPA's enforcement powers.
- Opinion: LPAs should **avoid fettering the discretion** to enforce by across-the board decisions about what approach they will take to the exercise of their enforcement powers.
- Those affected by a use carried on in breach of planning control may suffer more – or less if its impact is reduced by lockdown.
- The decision to enforce should depend upon the **expediency** of enforcement action: environmental harm is always relevant.

# Time limits



- Statutory provisions s191, s171B, s174(2)d) – development is lawful if no enforcement action may be taken against them because ... the time for taking enforcement action has expired.
- Onus on Applicant/Appellant (A) to demonstrate lawful
  - Standard of proof: balance of probabilities
  - Requires evidence that breach took place >4 or >10 yrs ago and **continued throughout the relevant period**. *Thurrock* CA 2002.
- In 2011 SC in *Welwyn Hatfield* endorsed the approach of Donaldson LJ in *Impey* saying
  - “Too much stress has been placed on the need for actual use”

# Time limits and continuity



- So A must prove continuous use but ?need not prove actual use?  
Yes. This tension is a familiar part of enforcement work.
- What quality of use is sufficient to continue a given use?
  - The **character of the use** will itself determine whether any particular break prevents the acquisition of immunity – see eg. *Cordani*
  - Donaldson LJ in *Impey* considered as an eg. a flat on the market for letting but not occupied. He said this was clearly in residential use – and said maybe the test is whether it was **usable** for residential purposes.
  - Newman J in *Thurrock* (upheld in CA) described the rationale for immunity as follows “the **LPA, although having the opportunity to take enforcement action, has failed to do so ....**”

# Time Limits and continuity



## Does covid-induced inactivity = a break in continuity?

- A question of fact and degree:-
  - The character of the use which constitutes the breach of planning control (is it intermittent?);
  - The length of any interruption in the use;
  - Whether the land remains suitable/available for the use during the period of interruption – such that **the LPA could have enforced against the use throughout the relevant period.**

**The character  
of the use**

**The length of  
any  
interruption**

**Could the LPA  
have  
enforced  
throughout  
the relevant  
period?**

# Time limits and continuity



What is / is not relevant?

- If asking “could the LPA have enforced throughout the relevant period?” difficulties faced by the LPA in enforcing during lockdown are **not** relevant.
- Fluctuations in intensity are **not** relevant unless they are such as to change the character of the use and thereby amount to a material change of use.
- If use ceases during the lockdown, the fact that it is for reasons outside the control of the individual is **unlikely to be relevant**. See for eg the approach of the Inspector in *Miles* in which a motocross use ceased for 18 months due to foot and mouth restrictions on access to the countryside.



# Powers – to obtain information



## The power to survey - s.324 TCPA 1990

- Where there is a proposal to serve an enforcement notice – an officer authorised by the LPA may enter to “survey” the land (eg to check its condition);
- Although lawful under coronavirus legislation, site visits are less easy;
- This may be a good time to **make fuller use of the information gathering powers in s171C and 330.**

# Powers – to obtain information



## The Planning Contravention Notice - s171C

- Where it **appears to LPA** there may have been a breach of planning control the LPA may serve PCN (note the broader power in s330 where this is not met)
- **Service** in either case must accord with s329. Email not prohibited but not sufficient to effect service – see s329(3B) (unless, arguably, you can prove that it successfully delivered the notice to the person served). Safer not to rely on email.
- Response: often sent by **post** to the LPA ... in my view an email response can be requested and may be preferred but there is no power to require it.
- NB for all concerned to be aware – notices and responses to them may arrive by post/in hard copy.

# Duties – to record information



## The Enforcement Register - s188

- Statutory duty to keep a register containing the info prescribed by Art 43 of the GDPO 2015.
- Requirement that the register is **available for inspection**. Note too the positive duty within **the EIR** to make environmental information available [Reg 4].
- Current practice – in the main the register is kept at Council offices for inspection in person.
- Publication on the Council's website would be helpful to most during lockdown (and I would recommend), but it is not sufficient to meet the statutory obligation. In my view someone needs to keep the register up to date and ensure it can be inspected by members of the public.



## ••• Key points for enforcement notices and ••• injunctions

# Enforcement notices – authority for decision-making



- Issues of authority may arise as a result of officer and/or member sickness/absence/unavailability
- Who within LPA has authority to issue ENs and other enforcement actions?
- Functions may be discharged by “committee, a sub-committee or an officer of the authority”: **s.101 Local Government Act 1972**
- Will depend on Council’s constitution

# EN decision-making – delegated decisions



- Officer to whom powers are delegated cannot “sub-delegate” power: s101 LGA 1972
- But scheme, read as a whole, may delegate powers to group of officers, including named officer holder and other nominated/approved officers : Pemberton International
- Is the nomination or approval required to be in writing? By whom?
- Constitution may provide for powers to revert to a superior officer
- What pre-emptive steps are needed for range of officers have authority to take action?
- No requirement for ENs to be signed by authorising officer: Beg v Luton

# EN decision-making – committee decisions



- Committee/sub-committee can lawfully sub-delegate powers: s101 LGA 1972.
- Is there scope for delegation of committee powers to officers?
- If not, committee meetings may be held remotely: *The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020*
- Standing orders required in respect of remote attendance, including (1) voting (2) access to documents (3) remote access by public/press

# What if EN is issued without proper authority?



- If EN issued without authority, likely that JR needed to challenge decision
- Lack of authority to issue EN is no defence to a prosecution for breach of it: Beg v Luton
- Lack of authority not a ground of appeal against EN in s.174 and Inspector has no jurisdiction to determine whether EN complies with s.172  
TCPA 1990: see Koumis v SSCLG

# Variation of existing ENs



- S.173A TCPA 1990: Power to withdraw EN & waive/relax requirements
- Broad power, but which includes extending time for compliance and extending time for EN to take effect (**Maistry v Hillingdon**)
- Variation may be effected before or after EN takes effect
- Those subject to ENs should contact LPAs at the earliest opportunity
- If varied, notice must be given to those served with EN or who would be served if notice were reissued
- Challenge to a decision to vary EN (or a decision not to vary EN) by way of judicial review: **Maistry**

# Enforcement notice appeals



- Appeal must be made before EN takes effect. No power to extend time for appeal
- But LPA may extend time for notice to take effect so as to give time for appeal (see **Maistry**)
- Ground (g) appeal: period specified in EN falls short of what should reasonably be allowed. Inspectors are currently extending time
- Ground (d) appeals – suitable for remote inquiries? Is there another way? Third-party mediator to reach mutually agreeable solution & EN noticed varied (+S106?)

# Enforcement – urgent cases



- Injunctions still available as remedy in both High Court or County Court for urgent enforcement matters
- [Admin Court Guide on Covid-19](#)
  - “Immediates”: where it is contended that irreversible action will take place if the Court does not act
  - Application must be made by email: [administrativecourtoffice.immediates@hmcts.x.gsi.gov.uk](mailto:administrativecourtoffice.immediates@hmcts.x.gsi.gov.uk)
  - Electronic bundle required
- Evidence should set out why the matter requires urgent attention from the Court by comparison with other methods of enforcement
- Hearing will be held remotely unless impossible to do so – see [guidance](#) from LCJ
- [Protocol](#) issued by HMCTS for telephone/video hearings
- [Top tips](#) from Mr Justice Holgate for remote hearings
- Practice Direction 51Y permits Court to direct that hearing held in private (to facilitate remote hearings not accessible to public). Hearing will be recorded

# Implementation of planning permissions



- Two issues:
  - (1) Expiry of permission if works of implementation not carried out before deadline
  - (2) Failure to discharge “conditions precedent” prior to implementation means permission not lawfully commenced
- Problems posed by restrictions on construction work, preparation of material required for discharge of conditions, commercial considerations among others
- Various solutions being debated but nothing (yet) from government

# Implementation - issues



- Time limit for permission cannot be extended by way of s.73 TCPA 1990
- LPA cannot agree by informal means that requirements of conditions can be relaxed/waived or time for compliance extended: Henry Boot Homes (and beware the decision in *Agecrest*)

# Implementation - solutions



- Minimal work required for implementation – s.56 TCPA 1990
- Submit application to discharge conditions before deadline and then supplement with additional material (Note: if application to discharge condition made before deadline but only approved afterwards, work done before deadline in accordance with permission will amount to lawful commencement Whitley v SSW).
- Last resort, which is not without risk. Do everything that you possibly can falling short of compliance with conditions. If issue of EN would be abuse of power & unlawful, works relied upon will be effective to commence development: R (Hammerton) v London Underground Ltd

# Section 106 obligations



- Section 106 obligations can be renegotiated but limited scope if parties not in agreement
- Section 106A modification application process unlikely to be helpful

# Community Infrastructure Levy



- Lack of flexibility in CIL Regs 2010 for non or delayed payment of CIL has the potential to cause financial difficulty and stymie development
- Late payment interest must be applied and is non-discretionary (Reg 87(1)). NB late payment surcharge discretionary (Reg 85)
- Competing interests
- Waiting for gvt proposals. See work by East Suffolk Council
- Revised demand notices?
- Bespoke instalment plans?

# Key points to take away



- (1) Check scheme of delegation for authority to take actions. For LPAs, ensure authorisations in place in case of absence.
- (2) S.173A variation power to address difficulties for compliance with existing ENs - make contact early!
- (3) EN appeals must be made before EN takes effect. Scope for mediated solution to EN disputes. Ground (g) important.
- (4) Injunctions available for urgent cases but particular protocols apply & evidence is required to substantiate relative urgency
- (5) Implementation of permissions pose specific problems but solutions are available

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- *SoSE v Thurrock* [2002] EWCA Civ 226
- *SSCLG v Welwyn Hatfield Borough Council and Alan Beesley* [2011] UKSC 15
- *Impey v SoSE* (1984) 47 P&CR 157
- *Westminster City Council v Cordani* [2013] EWHC 23 (Admin)
- *Miles v National Assembly of Wales and Caerphilly County Borough Council* [2007] EWHC 10 (Admin)

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- *SoSE v Thurrock* [2002] EWCA Civ 226
- *Pemberton International v LB Lambeth* [2014] EWHC 1998
- *Beg v Luton BC* [2017] EWHC 3435
- *Koumis v SSCLG* [2014] EWCA Civ 1723
- *R (Maistry) v LB Hillingdon* [2013] EWHC 4122
- *Henry Boot Homes Ltd v Bassetlaw DC* [2003] 1 P&CR 23
- *Agecrest v Gwynedd County Council* [1998] JPL 32
- *FG Whitley & Sons v SSW* [1992] 63 P& CR 296
- *R (Hammerton) v London Underground Ltd* [2002] EWHC 2307 (Admin)



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