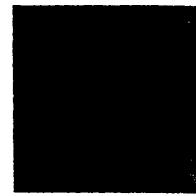


CRIMINAL DEFENCES &
10 YEAR RULE

Richard Ground



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Richard Ground M.A. (Cantab.)

Richard Ground is a barrister, at 2-3 Gray's Inn Square, London WC1R 5JH. He is a member of the Planning Environment Bar Association. He has recently been instructed in the following planning cases.

- Clarke v Secretary of State for Transport and Regions and Tunbridge Wells Borough Council Times 19 November 2001.
- Berkeley v Secretary of State Environment Transport and Regions ex parte Berkeley Homes Limited [2001] 3 CMLR 11. (Court of Appeal) [2001] JPL 661 High Court.
- Anne v Test Valley Borough Council [2001] 48 EG 27.

He has appeared at several substantial planning inquiries and local plan inquiries including the following.

- Appearing for several different authorities including LPA in joint TWA compulsory purchase and planning Inquiry to build a 200 ha rail freight terminal and 2 10,000 m sq of warehouses.
- Conducted all the advocacy for Slough Borough Council at the recent local plan inquiry
- Wokingham District New Settlement Housing Inquiries. He appeared for a major party in the joined Wokingham Local Plan Inquiry and 3 called-in housing applications for 2,500 houses. His clients were against all 3 proposals, the inspector has recommended against all 3.
- He has appeared for large developers including Berkeley Homes and Bovis Homes.

Head of Chambers: Anthony Porten QC

The 10 Year Rule.

LECTURE NOTES.

1 INTRODUCTION

- 1.1 Everyone has dealt with certificates of lawful existing use applications and enforcement cases where there are a variety of usually unpleasant uses going on sites that are in terrible conditions and which are usually protected by fierce dogs. I attended such a pleasant site visit only yesterday.
- 1.2 It is these sites that always throw up impossible questions of planning law.

2 10 YEAR RULE 4 YEAR RULE THE BASICS.

- 2.1 Everyone is familiar with the 4 year rule for OD and the 10 year rule for all other breaches. It is however instructive to just look at the section where this comes from.
- 2.2 The relevant section of the Statute is section 17 1B of the Town and Country Planning Act 1990. This was inserted following the Camwarth report.

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 dwellinghouse, no

enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(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.

(4) The preceding subsections do not prevent -

(a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or

(b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.]

2.3 This is the origin of the 4 year and 10 year rules.

- (i) The four year rule. Ie for operational development no enforcement action can be taken after 4 years from the breach. For new buildings and engineering works the authority have only 4 years to take enforcement action from the date of substantial completion.

Subsection 1.

- (ii) There is also a four year rule for breaches that consist of change of use to using a building as a single dwellinghouse. Subsection 2. It was a moot point whether subdivisions were covered by this. The court of appeal has resolved this and said that subdivisions were

see Van Dyk v SSE [1993] 1PLR 124

- (iii) All other breaches are covered by the 10 year rule so that includes most importantly

Breaches of condition

Changes of use

- (iv) If out of time but have already have purported to take enforcement action one can have another 4 to issue it. See subsection 4.

2.4 It is worth noting of course that if a use can not be enforced against it is legal

See section 19 1(2) Town and Country Planning Act 1990

3 DORMANT USES.

- 3.1 The section is clear that if in the case of a change of use 10 years has elapsed since the breach of planning control then the use cannot be enforced against but becomes lawful.
- 3.2 But what happens if there was a material change of use 10 years ago but since then the use has become dormant or such that it would be very difficult for the authority to spot it. Can that nevertheless be lawful.
- 3.3 This has been authoritatively looked at in a recent case decided by the Court of Appeal called *Thurrock v SSE and Terry Holding* [2001] EWCA Civ 226. Schiemann gave the leading judgment.

Facts

- 3.4 The facts of the case were that the authority were alleging a material change of use from agriculture to use as an airfield. The inspector found the use was existing in 1983 and that subsequent to that there was not abandonment and therefore he allowed the ground appeal that it had been going on for more than 10 years.
- 3.5 High Court. It went to the High Court and Mr Justice Newman. He held that the inspector had made an error of law by looking at whether there had been abandonment that would be the position once there had been accrued rights but not before. What needed to be shown to accrue the rights is 10 years of the usage where the authority could take enforcement action.
- 3.6 Court of Appeal. The Court of appeal came to the view that the High Court was right.

Abandonment Relevant once acquired rights

- 3.7 Firstly and importantly the question of abandonment is relevant but only when uses have become lawful ie when 10 years have accrued.

*26. The concept of abandonment, which was central to the Inspector's reasoning, is one which has been evolved in circumstances where a landowner has a right under **planning** law to use his land in a particular way but then either does not use it actively at **all** or starts to use it in a **different** way. Can the landowner thereafter resume without a further planning permission what undoubtedly had been a lawful use on an earlier date? This sort of situation can undoubtedly pose problems. It was that sort of situation with which **Panton** was concerned.*

Test of being able to enforce for 10 years.

- 3.8 It is relevant to ask whether enforcement action could have been taken throughout the 10 year period.

He did not ask himself whether enforcement action could have been taken throughout the period 1981- 1991 or any other clearly defined 10 year period. That is a question which should in my judgment have been addressed by him and should be addressed by the Secretary of State if this appeal is dismissed and the case is remitted to him.

- 3.9 The court did not answer the question of fact of how long a use would have to stop for to mean that enforcement action could not longer be taken they gave a couple of examples like a factory summer holiday or a week end. When it ceased for these periods clearly the use carries on so that an enforcement notice could nevertheless be served.

*28. I accept **Mr Corner's** point that an enforcement notice can lawfully be issued notwithstanding that at the moment of issue the activity objected to is not going on - because it is the week-end or the factory's summer holiday, for instance. The land would still be properly described as being used for the objectionable activity. However, I would reject **Mr Hockman's** submission that enforcement action can be taken once the new activity which resulted from the material change in the use of*

land has permanently ceased. I accept that there will be borderline cases when it is not clear whether the land is being used for the objectionable activity These are matters of judgment for others.

3.10 It is a favourable test for authorities.

The Future

3.11 The test of having to be able to take enforcement action for the whole 10 year period is a slight gloss on the statute which provides for a use being immune if there has not been a material change of use in 10 years. Whether Thurrock is the last word on this topic remains to be seen. It remains to be seen how receptive factual decision makers will be to upholding enforcement notice appeals where the authority are relying on a relatively short period of dormancy as defeating a claim for 10 years use.

4 ABANDONMENT & LOSING RIGHTS

4.1 The most common way of losing rights is by either:

- i) Material change of use.
- ii) Abandonment.

Abandonment

4.2 This concept is relevant where a lawful use has built up eg they can show 10 years use for a scrap yard 1985-1995 and thereafter nothing has occurred or an express permission. It is not the test during the build up of the 10 year period but only after the use has become lawful.

4.3 Test for abandonment. *Hughes v Secretary of State for the Environment Transport and the Regions* [2000] JPL 83 & CA 826 That was a case that

concerned a derelict house. There are 4 factors that should be taken into account:

- i) Physical condition of building (could be site as well)
- ii) The period of non use
- iii) Whether there had been any other use
- iv) Evidence regarding owners intentions

4.4 Critical matter was that it was an objective test the subjective intentions of the owner were not determinative.

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