

Understanding and Defining Material Change of Use

Friday 5 December 2003

Vivien Green

Trevor Roberts Associates

MATERIAL CHANGE OF USE

- a complex area of planning
- substantial body of planning case law
- tools that are used
- tests that Officers/Planning Inspectors apply

BRIEFING OBJECTIVE

- to help you to understand the concept and its application

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DEFINITION OF DEVELOPMENT

- Found in S55
- Explanation of terms in S336

Lord Denning - Master of the Rolls observed about the definition of development that:

"The first half "operations" comprises activities which result in some physical alteration to the land which has some degree of permanence to the land itself, whereas the second half "uses" comprises activities which are done in, alongside or on the land but do not interfere with the actual physical characteristics of the land."

Parke v Secretary of State for the Environment
1979

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DEVELOPMENT

S55(1) Town and Country Planning Act 1990

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.

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TIME LIMITS FOR ENFORCEMENT ACTION

s171B(1) - 4 year rule:

Where a breach consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action after 4 years beginning with the date on which the operations were substantially completed.

s171B(2) Where the breach consists of the change of use of any building to use as a single dwellinghouse, no enforcement action after 4 years, beginning with the date of the breach.

s171B(3) - 10 year rule

In the case of any other breach, no enforcement action may be taken after 10 years, beginning with the date of the breach.

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"SUBSTANTIALLY COMPLETE"

Advice in Circular 10/97 para 2.80 held to be wrong in law by Court of Appeal until House of Lords judgement in -

Sage (Respondent) v Secretary of State for the Environment, Transport and the Regions & others (Appellants). [2003] UKHL22.

Important ruling on how building operations should be interpreted when considering the time limit for enforcement action. Respondent argued that operations complete when activities requiring planning permission were complete even if other "works" remained. Argument accepted by High Court and Court of Appeal.

House of Lords said the judgement was at odds with "the simplicity and clarity that revisions of planning control were trying to achieve". Where an application was made for a permission for a single operation it was made in respect of the whole (full details) of that building operation. The same holistic approach is implicit in decisions on what an enforcement notice relating to a single operation may require.

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DWELLINGHOUSE

- no definition in S336(1) (GPDO definition?)
- key case *Gravesham BC v SSE 1983*
JPL 307 McCulloch:
"In using a word in common usage and leaving it undefined, Parliament realistically expected that, in the overwhelming majority of cases, there would be no difficulty at all in deciding whether a particular building was or was not a dwellinghouse"
- concept of DESIGN and USE - whatever the physical division of the building it must still be a house for dwelling in
- *Gravesham*: the common features of all dwellinghouses is that they ordinarily afford the facilities for day to day private domestic existence (not hotels, hostels, residential schools, barracks)
- *Moore v SSE and New Forest DC 1988*
JPL 877 (Court of Appeal)

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TOWN AND COUNTRY PLANNING (USE CLASSES) ORDER 1987

- 11 CLASSES of development
- not an exhaustive definition of uses
- some uses specifically excluded - SUI GENERIS
- purpose to define what is NOT development - changes of use within a class
- relates only to LAWFUL, PRIMARY USES that have been implemented
- does NOT define what is a material change of use

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"The Minister is advised that in considering whether a change is a material change, comparison with the previous use of the land or building in question is the governing factor and the effect of the proposal on a surrounding neighbourhood is not relevant to the issue"

MHLG Circular 67/1949

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What makes a Change of Use "Material"

The Courts regard "material" as being a matter of fact and degree for the LPA (S of S) to determine

Certain limits and tools of analysis have emerged from case law:

- Distinction should be drawn between "primary" and "ancillary" uses
- A material change need not be to a different kind of use, changes in "character" may suffice
- A material change "may" occur where a use has intensified, if it can be shown it has undergone a change in character
- The concept of the planning unit as a tool for determining the precise area of land to assess for materiality of change

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EXISTING PRIMARY USE (USE 1)

USE 1 + de minimis use

USE 1 + an incidental use (use 2)

USE 1 + ancillary use (use 2)

THRESHOLD AT WHICH MATERIAL CHANGE IN CHARACTER OF USE 1 OCCURS

NEW PRIMARY USE (USE 2)

NEW COMPOSITE USES USES 1 + 2

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TESTS TO DETERMINE "MATERIALITY"

- What is the primary use of the land?
- What is the scope of that use?
- What is the extent of any lawful ancillary use?
- What is the planning unit?
- Is the use lawful or unlawful?
- Is the change to a new use a material change in the use of the planning unit?
- Could a material change of use be "excluded" by the Act or Use Classes Order?
- Could a material change of use be "included".....?
- If it is not excluded, does planning permission exist?

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EXCEPTIONS TO TIME LIMITS

- where an enforcement notice is already in effect, no restriction on service of BCN
- where enforcement action has been taken within the previous 4 years, even if there was an error or defect in the notice, another enforcement notice may be served, so long as the purpose of the second notice is the same as the original (Jarman v SSETR [2000] JPL1063)
- where incidental operations are an integral part of an unauthorised material change of use, the 10 year rule applies (Murfitt v SSE [1980] JPL598)

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STATUTORY INCLUSION IN THE DEFINITION OF DEVELOPMENT

- 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 each part of it which is so used s55(3)(a)
- 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 s55(3)(b)

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STATUTORY INCLUSIONS (continued)

- 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 s55(5)
- In Greater London use as temporary sleeping accommodation (less than 90 days), which is provided for a consideration by way of trade for money, or in kind, or by reason of employment, of any residential premises and each part thereof so used
Greater London (General Powers) Act 1973 (amended 1983)
- dwellinghouse to time sharing scheme
Greater London (General Powers) Act 1984

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STATUTORY EXCLUSIONS FROM THE DEFINITION OF DEVELOPMENT

- the use of any buildings or other land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of the dwelling house as such s55(2)(d)
- 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 s55(2)(e)
- 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, 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 s55(2)(f)

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CURTILAGE

- a concept that relates to a building not ownership - no statutory definition, relies on case law
- Sinclair-Lockhart's Trustees v Central Land Board 1951
"Ground which is used for the comfortable enjoyment of a house or other building may be regarded in law as being within the curtilage of that house or building and thereby as an integral part of the same, although it has not been marked off or enclosed in any way. It is enough that it serves the purposes of the house or building in some necessary and reasonably useful way."
- concept applies to houses and other buildings

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CURTILAGE - CASE LAW

- Dyer v Dorset County Council 1988 Court of Appeal
Parliament would have defined the term if it was not commonly understood. Nourse L.J. referred to the Oxford English Dictionary
 - a small area forming part or parcel with the house or building which it contained or to which it was attached(Skerritts of Nottingham v SSETR & Harrow LBC[2000] JPL789 - small is relative)
- McAlpine v SSE 1995 Court of Appeal
after a review of case law identified 3 main characteristics of a curtilage:-
 - 1 Confined to a small area about a building
 - 2 Intimate relationship between the land and building (serves it in some useful way)
 - 3 Not necessarily physically enclosed, but is regarded as part of one enclosure with the building

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CHANGES OF USE PERMITTED BY PART 3
- TOWN AND COUNTRY PLANNING
(GENERAL PERMITTED DEVELOPMENT)

ORDER 1995

One Way Changes

From	To
A1 Shops	A1/Single Flat
A2 Financial/Prof	A2/Single Flat
A2 (display window)	A1 Shop or A1/Single Flat
A3 Food and drink	A1 Shop or A2
B1 Business	B8 Storage (235 sq m)
B2 General Industry	B1 Business or B8 (235 sq m)
B8 Storage	B1 Business (235 sq m)
Sale of motor vehicles	A1 Shop

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Identifying the Planning Unit

- Clear tests for analysing planning unit problems in *Burdle v the Secretary of State for the Environment 1972*. As a working rule:
- “it should be assumed that the main unit of occupation is the appropriate planning unit, unless or until some smaller unit can be recognised at the site of activities which amount in substance to a separate use both physically and functionally”

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LAWFUL USES

A use of land is lawful if:

- Change of use is made with the benefit of express or deemed planning permission
- Commenced before 1st July 1948 and has continued without abandonment
- Temporary or occasional use at 1st July 1948, normal use resumed before 6th December 1968
- A lawful use resumed after expiry of a time limited permission or GDO limitation
- A lawful use resumed following enforcement action
- No enforcement action can any longer be taken
- A certificate of lawful use is in force

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EROSION OR DEVELOPMENT OF THE CONCEPT OF MATERIAL CHANGE OF USE?

Cases referred to:-

- *Devon County Council v Allen's Caravans (Estates) Ltd [1963] JPL 47*
- *Blum (Lilo) v Secretary of State for the Environment and London Borough of Richmond-upon-Thames [1987] JPL 278*
- *Panayi v Secretary of State for the Environment [1985] JPL 783*
- *Westminster City Council v Great Portland Estates plc [1985] JPL 108*
- *Thames Helicopter plc v Tower Hamlets London Borough Council [1997] JPL 445*

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EROSION OR DEVELOPMENT (cont)

- *Richmond-upon-Thames LBC v SSETR and Richmond-upon-Thames Church Housing Trust [2001] JPL84*
- *Harrods Ltd v SSETR and RLB Kensington and Chelsea [2002] JPL1258*

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THE NEW FORMALISM IN PLANNING

“Planning is concerned with balancing the interest of the community with the interest of the landowner”

- end of estoppel
- should a material change of use be subject to consideration in the public interest?

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