

Planning Enforcement – No place to hide?

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The facts of two recent cases concerning planning enforcement in England provide a cautionary tale and an illustration of the broad interpretation of planning law that may be adopted by the Courts.

The case of *Fidler v Secretary of State for Communities & Local Government and another [2010] EWHC 143 (Admin)* concerned a decision of the High Court on proceedings brought by Mr Fidler to challenge an enforcement notice served by the local authority requiring the demolition of a dwellinghouse which he had constructed on his farm without planning permission.

The dwellinghouse was completed in June 2002 and concealed behind a structure of straw bales and plastic sheeting. Mr Fidler and his family moved into the house (to an outlook of straw bales) and resided there for over four years. After the elapse of four years Mr Fidler removed the bales and plastic sheeting and was subsequently served with an enforcement notice in respect of a breach of planning control.

In his argument Mr Fidler sought to rely upon the fact that the enforcement notice had been served more than four years after his building operations were substantially completed. This assertion was rejected by the Planning Inspector who heard the appeal in the first instance who stated, "It was never Mr Fidler's intention to build a house which remained encased within walls of straw covered in sheeting. It was always his intention to remove the straw walls thus revealing his edifice once he thought that sufficient time had passed for the lawfulness of the construction to be secured."

It was held that the removal of the bales and plastic sheeting formed an intrinsic part of his overall building operations, and that the building operations were not substantially completed until the bales were removed. The High Court judge agreed with the Inspector and dismissed Mr Fidler's appeal. Whilst the judge categorised the removal of the straw bales and tarpaulins as "ancillary activities" he held as a matter of fact and degree they were nonetheless part of the overall building operations.

Shortly before the Fidler case was decided, the case of *Welwyn and Hatfield Council v The Secretary of State for Communities & Local Government [2010] EWCA Civ 26* was concerned with similar issues although a contrasting judgment was issued.

In December 2001, Mr Beesley was granted planning permission by Welwyn Hatfield Council for the erection of a hay barn. The permission contained a specific condition that the building to be erected should only be used for "*the storage of hay, straw or other agricultural products and shall not be used for any commercial or non-agricultural storage purposes*". In breach of this permission, Mr Beesley then erected a dwelling and from early August 2002 he and his wife lived in it. The building was constructed with the external appearance of a barn, but adapted internally as a dwelling.

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In 2006, Mr Beesley applied for a certificate of lawfulness of existing use of the building as a dwelling. This application was subsequently granted after inquiry by the Planning Inspector. This decision was appealed by the local authority to the High Court where the decision of the Planning Inspector was overturned on the basis that the sole use of the 'barn' since construction was as a dwellinghouse and as such there had been no change of use and consequently, the four year time limit for the certificate of lawfulness of existing use was not applicable.

The present case concerned the appeal of the decision of the High Court to the Court of Appeal. In this instance, the Court of Appeal held that Mr Beesley was indeed entitled to a Certificate, effectively restoring the decision of the Planning Inspector. Despite the fact that Mr Beesley openly admitted that he had deliberately intended to deceive the local authority when he applied for the original planning permission.

In issuing its decision the Court of Appeal stressed that despite the public perception that the judgment may be unsatisfactory it was not for the court *"to adopt a strained construction"* of the relevant legislation *"in reaction to the deliberate deceit practised by Mr Beesley or out of concern for the difficulties that such conduct creates for local planning authorities in enforcing planning control"*. The court held that it's interpretation of the law should be conducted on an objective basis commenting that *"if it is considered that there should be a different outcome in a case of dishonesty or deliberate concealment, it is for Parliament to amend the legislation accordingly"*.

It remains to be seen whether there will be a change in the law to prevent a certificate of lawfulness being issued where there has been a deliberate concealment. It is likely that future cases will seek to limit the *Welwyn* decision to its facts.

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