Planning breaches: no more leniency

Planning Record fines are being handed out for enforcement breaches, and criminal prosecutions and confiscations will be the norm, say Alex Ground and Nicola O’Connor

Many landowners are not aware that breaching planning controls could lead to a criminal prosecution. A breach of planning control is generally not in itself a criminal matter; however, if an enforcement notice is validly served and not complied with, then a defendant faces the possibility of a conviction for a criminal offence.

A number of consequences flow from any conviction. Where the landowner is a company there may be implications for directors under the corporate liability regime, reputation issues and future funding difficulties. For individuals there could be difficulties travelling overseas as a result of having a criminal record, and the potential embarrassment of having to declare the conviction to a professional body or employer.

Life as it was

Typically, if a local planning authority (LPA) became aware of a breach of planning control and decided it was expedient to enforce, there would usually be repeated attempts to persuade offenders to remedy the breach before actually serving an enforcement notice.

Once served, attempts were then usually again made to ensure compliance; a criminal prosecution was a rare last resort. Reasons for this may have included lack of awareness and knowledge by enforcement officers, costs and time involved compared to the likelihood of achieving compliance with the original enforcement notice.

Also, fines imposed in a magistrates’ court on conviction can only be up to £20,000 plus the cost of remedying the breach. This is a relatively small amount for a commercial business operating an unlawful planning use.

Consequently, landowners would typically drag matters out by appealing enforcement notices and repeatedly submitting revised applications, even if the prospects of success were slight – all the while, in some cases, taking income from the unlawful development. Therefore, the value of any delay achieved often outweighed the fine, even if a criminal conviction was eventually imposed. Non-compliance was regarded as simply an overhead and a routine business risk.

A new dawn

The Proceeds of Crime Act 2002 (the 2002 Act) brought in a new regime; until relatively recently, however, LPAs have been slow to utilise their powers.

Proceedings can be brought only following a conviction for breaching a planning enforcement notice. Often, whilst proceedings are ongoing the defendant will be served a restraint order preventing them from selling property and accessing bank accounts so that assets are not dissipated before the confiscation order is made.

Confiscation proceedings are a lengthy and intrusive process where the defendant is required to provide detailed information about their finances. These orders can be made only in the crown court, which is a much more intimidating environment than a magistrates’ court.

One of the first notable cases where the 2002 Act was used successfully by an LPA was R v Del Basso and another [2010] EWCA Crim 1119. The defendants ran a car park that did not have the requisite planning permission to run a park-and-ride scheme for Stanstead Airport on a permanent basis. They continued to operate the park and ride whilst enforcement action was taken by the local authority, even after each of them was fined £20,000.

A further prosecution was mounted and the LPA also pursued confiscation proceedings under the 2002 Act. The judge held that £1.8m in revenue had been earned from the illegal park-and-ride scheme and that £760,000 of that was available by way of realisable asset.

Accordingly, a confiscation order was made in that amount in relation to one of the defendants. The other had, in the meantime, been declared bankrupt.

Since this case, there have been a number of successful prosecutions where, in addition to the standard fines, a confiscation order has been made in large sums. It is noteworthy that, even in cases where the 2002 Act is not used, a trend is emerging of the prosecution trying to have the case remitted up to the Crown Court where fines are unlimited and prison sentences can be imposed. Possible reasons for this include better sharing of knowledge between enforcement officers across LPAs and the realisation that a significant proportion of successful prosecutions under the Act (37.5%) will go to the LPA.

Defendants should also be aware that if they fail to pay the sum ordered within the requisite period of time they could face significant prison sentences. When they emerge from prison those monies are still owed. This is draconian legislation.

Confiscation proceedings are now being threatened in a number of planning prosecutions when defendants have flouted enforcement notices.

LPAs are sending a clear message to change the perception that planning regulations can be flouted with minor consequences.

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