Is Planning Law Wholly the Creature of Statute?

By Sir Iain Glidewell

Lord Scarman in one of his great speeches on planning law said "Planning control is the creature of statute". The purpose of this paper is to consider whether this is wholly correct in practice by examining a number of concepts which have been developed which are not, or at first were not, to be found in the planning legislation.

Ancillary and incidental uses

I begin with a fundamental point. Section 55(1) of the Town and Country Planning Act 1990 defines development as including "the making of any material change in the use of any buildings or other land". This at once raises the question, what is the use permitted or established of the building or land? The answer is of course the range of activities which are carried on in the building or on the land. Use as a dwelling-house includes a range of activities which are common to every (or almost every) occupier but there are other activities which many or some people will wish to carry on in their homes and the question is, do those activities fall within the permitted use as a dwelling-house?

The legislation answers part of this question expressly in relation to dwelling-houses. Section 55(2)(d) of the Act of 1990 provides that "the use of any buildings on other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such" is not to be taken to involve development of the land. This provision stems from section 12(2) of the Act of 1947 and has formed part of every intermediate Act. The legislation does not use the word ancillary but from the start there has been ministerial guidance on this subject in relation to dwelling-houses. One of the earliest ministerial circulars after the passing of the 1947 Act, Circular 67 of 1949, said that "he (the minister) would not for instance regard as constituting a material change of use the use by a professional man—say a doctor or dentist—of one or two rooms in his private dwelling for the purposes of consultation with his patients so long as this use remained ancillary to the main residential use (though the use of the same house to provide suites for consulting rooms or a dental clinic would be another matter)".

But what is the position with regard to other activities which many house owners will wish to carry on? Car repairs for instance? A repair workshop for household repairs? A photographic studio? Clearly the use of part of a house for such activities comes within the description "incidental". But if the householder starts servicing or repairing other peoples' cars in his garage then the use is no longer incidental to his own use of his dwelling-house.[1]

The ancillary activities referred to in the Circular are more in the nature of sensible ministerial recognition of how people actually use their homes—a study, a physiotherapist's treatment room, a doctor's consulting room, are all ancillary to his or her occupation of the house as a home. But the use of a room or rooms for such a purpose would usually cease to be ancillary and constitute development if others are involved—if the consulting room expands into a series of rooms for several doctors.

Although there is no statutory provision for incidental uses in premises other than dwelling-houses the "ancillary" principle has been extended by the Department and the courts to other types of activity. So a factory will normally have a canteen which is ancillary to the industrial activity carried on in the factory.

[1] *Peake v. Secretary of State for Wales* (1971) 70 L.G.R. 98.

But if the standard of its food were such that the canteen opened its doors to the public then it would cease to be ancillary or incidental to the industrial activity. So too the retail sale of farm produce from a farm may properly be considered ancillary but not if the produce is brought in for resale.[2] This is particularly relevant to garden centres many of which have developed from plant nurseries which grew and sold their own produce but now buy all or most of the produce they sell and thus require specific permission.

Decisions in this field of minister-made law are essentially matters of fact and degree for the local planning authority or for the Secretary of State for the Environment and the courts generally will not interfere unless the evidence does not justify the conclusion at all.[3] The development of the concept is a sensible reaction to the multiplicity of differing activities which may comprise a "use" of a building or land obviating the need for and cost of applications for permission while keeping extended activities within reasonable bounds.

Intensification of use

So far as I can see this concept is wholly minister-made and judge approved. The problem first arose in relation to caravan sites. Until the Caravan Sites, etc., Act 1960 introduced the licensing of caravan sites under which the number of caravans on a site may be limited by conditions on the licence, the only statutory regime which could possibly control an increase in the number was the Planning Act. There were therefore a series of cases in which it was suggested that where land had an existing use as a caravan site a considerable increase in the number of caravans on the site could be an intensification of use so great as to amount to a material change of use. This proposition was accepted as correct by members of the Court of Appeal in 1959,[4] but in later cases before the Caravan Sites Act rendered the question irrelevant in relation to caravans other members of the Court disagreed.[5] The concept however has sometimes been applied to other types of use. The slightly cynical note in the *Encyclopedia* that the doctrine is applied where there is no convenient or distinctive term to distinguish an earlier from a later use except that of scale has been approved by the Court.[6] A fairly recent decision of Sir Graham Eyre Q.C. in the High Court epitomises the matter neatly. He held that a change from use of a 12 acre lake for private fishing by the owner and his friends to recreational fishing by the members of a club could be and was a material change of use.[7]

In relation to the various categories of residential use the problem has partly been solved by the legislation. Thus the division of a building previously used as a single dwelling-house into two or more is by section 55(3)(a) of the 1990 Act declared to be a material change of use and this has been the case ever since the 1947 Act; and the increasingly common phenomenon of a number of people not members of one family sharing a house or flat is now dealt with by Class C3 of the Use Classes Order. Despite the other parts of Class C (hotels and hostels and residential institutions) the courts have frequently been faced with decisions on the various gradations of multiple occupation of residential use. In general the courts have supported decisions by the DoE that a change from one type of residential use to another, *e.g.* from lodgings to a guest house, is a material change.

So far as I know there has not as yet been a decision that, although two activities fall within the same use class in the Use Classes Order, nevertheless a change from one to the other is material because the

[2] *Wood v. Secretary of State for the Environment* [1973] 1 W.L.R. 707 at 709.
[3] *International Society for Krishna Consciousness v. Secretary of State for the Environment* [1992] J.P.L. 962 (High Court—upheld by CA—unrep.).
[4] *Guildford RDC v. Fortescue* [1959] 2 Q.B. 112.
[5] *Glamorgan C.C. v. Carter* [1963] 1 W.L.R. 1, *James v. Minister of Housing and Local Government* [1966] 1 W.L.R. 135; *Esdell Caravans v. Hemel Hempstead RDC* [1966] 1 Q.B. 896.
[6] *Blum v. Secretary of State for the Environment* [1987] J.P.L. 278 at 280, *per* Simon Brown J.
[7] *Turner v. Secretary of State for the Environment and Macclesfield D.C.* [1991] J.P.L. 547 Sir Graham Eyre Q.C.

second activity produces a much more intensive use of the land, though a half sentence in a judgment of the Court of Appeal does suggest this as a possibility.[8]

The planning unit

The problem which led to the invention of this concept (which is not to be found in the Act) arose from enforcement notices relating to changes of use. There is a breach of planning control and an Enforcement Notice may be served if there has been a material change of use of any building without the grant of planning permission required for that change. Suppose that the owners and occupiers of a factory (within Use Classes B1 or B2) have within the curtilage of the factory a separate building in which their delivery vehicles are garages and serviced. The factory owners decide to contract out delivery of their products and have no further need for the garage. They change its use to that of a staff canteen without obtaining planning permission. Can the LPA properly serve an enforcement notice? On a narrow reading of the Act they can—there has been a material change of use of the building without permission. The concept of the planning unit was created partly to meet this problem.

Put broadly the concept is that in considering whether there has been a material change of use it is necessary first to consider what is the planning unit under consideration—is it the single building or the whole site occupied by the factory owners? Normally the answer is "the whole site" and so in my example since the new activity is ancillary to the principal industrial use there will have been no material change of use of the site. In *Trentham v. Gloucestershire C.C.*[9] Diplock L.J. said "What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a 'material change in the use of any buildings or other land'? As I suggested in the course of the argument I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose".

Now change the facts of my example. The factory owners wish to contract out delivery of their products. They grant a lease of the garage premises to another company which then stores and services its vehicles there and contracts with the factory owners to deliver their products as well as those of other people. Can the LPA serve an enforcement notice alleging a material change of use of the garage building? These are more or less the facts of *Trentham* but the position was made even clearer in *Burdle v. Secretary of State for the Environment*.[10] In his judgment in that case in the Divisional Court, Bridge J. as he then was set out what he considered the "appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use". These were:

(i) "Whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary the whole unit of occupation should be considered".

(ii) "It may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time but the different activities are not confined within separate and physically distinct areas of land".

(iii) "However, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated

[8] *Brooks and Burton v. Secretary of State for the Environment* [1977] 1 W.L.R. 1294 at 1306D.
[9] [1966] 1 W.L.R. 506, CA.
[10] *Burdle v. Secretary of State for the Environment* [1972] 1 W.L.R. 1207, DC.

> purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit".

In my second example the new transport company might claim that the proper planning unit was the whole factory, that the building was still being used as a garage for the purposes of the industrial business and thus that there was no material change of use. This issue would be a question of fact but because I have built in to my example the carrying on of the business to transport the goods of others I doubt whether the argument would succeed. Nevertheless the answer to the question is not always easy.

On somewhat similar facts where the proprietor of a taxi-cab business had owned 44 garages in which he kept his cabs but later let some of the garages to tenants who used them as car repair workshops the High Court upheld a decision of the Secretary of State for the Environment that each small group of garages so used was an appropriate separate planning unit for the service of an enforcement notice.[11]

Applying Bridge J.'s test the High Court has upheld decisions of the Secretary of State that a change of use from a Class A1 shop to a Class A3 food shop of a unit in the Gateshead Metro Centre was development constituting a breach of planning control. The argument that the whole centre was the proper planning unit, failed.[12] On the other hand as I have already made clear several separate buildings in one occupation may constitute one planning unit and this can be so if they are adjacent even though not within the same curtilage.[13] However, the extent of the physical separation may be crucial. Thus premises used as a hostel for staff working at an hotel 150 yards away were held not to be within the same unit as the hotel building itself.[14]

Abandonment of a use

This is the prime example of a concept conceived by the DoE, or to be precise by its predecessor, the Ministry of Housing and Local Government. It is (as I shall say later) now confined to the abandonment of an existing use, *i.e.* a use which commenced before July 1, 1948 or which for other reasons is immune from enforcement action.

At first attempts by Planning Authorities to rely on this concept, failed. Thus land which was being used for storage on July 1, 1948 ceased to be so used in 1949 and was left vacant until 1956 when the storage use resumed. The Divisional Court upheld a decision of magistrates (who then heard appeals against enforcement notices) that the cessation of the storage in 1949 did not amount to an abandonment of the use and thus that its resumption did not constitute development.[15] So too arguments that when a use was seasonal its resumption each year constituted development were also rejected.[16]

But these were decisions on their facts, not as to whether there was such a concept as abandonment in planning law. The argument that there was no such concept was raised in *Hartley v. Minister of Housing and Local Government*.[17] In that case a site was used until 1961 both as a petrol filling station and for the display and sale of cars. The proprietor of the business then died and his widow and son carried on the petrol sales business but virtually ceased the sale of cars so that the land formerly occupied by the cars remained vacant. They later sold the site and the new occupier not merely carried on the petrol station business, but resumed selling cars in a much bigger way than before. The LPA served an enforcement notice alleging that the resumption of the car sales was development which required planning

[11] *Johnston v. Secretary of State for the Environment* (1974) 28 P. & C.R. 424.
[12] *Church Commissioners v. Secretary of State for the Environment* (1995) 71 P. & C.R. 73.
[13] *Vickers-Armstrong v. CLB* (1957) 9 P. & C.R. 33.
[14] *Duffy v. Secretary of State for the Environment* [1981] J.P.L. 811.
[15] *Fyson v. Bucks C.C.* [1958] 1 W.L.R. 634, DC.
[16] *Hawes v. Thornton Cleveleys UDC* (1965) 17 P. & C.R. 22, DC, *Webber v. Minister of Housing and Local Government* [1968] 1 W.L.R. 29, CA.
[17] *Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413.

permission. The argument which was advanced was that the car sales use had been abandoned when the first proprietor died or shortly afterwards and thus its resumption constituted a material change of use.

Both the Divisional Court presided over by Lord Widgery C.J. and the Court of Appeal presided over by Lord Denning held that there was such a concept as abandonment of the use and that on the facts the Minister of Housing and Local Government was entitled to conclude as he had. In the course of his judgment Lord Widgery said "It has been suggested in the Courts before and it seems to me that it is now time to reach a view upon it that it is perfectly feasible in this context to describe a use as having been abandoned when one means that it has not merely been suspended for a short and determined period that has ceased with no intention to resume it at any particular time. It is perfectly true as (counsel) says that the word 'abandonment' does not appear in the legislation. We are not concerned however with the legislation at this stage but merely with the fact of the matter. I cannot think of a better word than 'abandonment' to describe the situation in which the landowner has stopped the activities constituting the use not merely for a temporary period but with no view to their being resumed. If this has happened then as a matter of fact the use has ceased".

So on this high authority the concept of abandonment was established. One moral of this story is that by tackling the concept head-on counsel was over-ambitious. I have always thought and continue unrepentently to think that the concept has never been necessary and has no proper place in planning law. In *Hartley* itself the same decision could have been reached on the basis that the volume of car sales carried on by the new occupier was so much greater than had been the case earlier that there was a material change of use by intensification.

Whether the concept of abandonment is much relied on now by LPAs I do not know, and I should be interested to be told. The most recent reported case I have found on this issue was decided in 1989 (*White v. Secretary of State for the Environment and Congleton B.C.*[18]

Abandonment of rights granted by a planning permission

The decision that as a matter of law an existing use can be abandoned led inevitably to the argument that a right to carry out development granted by an express planning permission can also be abandoned if the development is partially carried out but then ceases for a time. This issue was the battle ground in *Pioneer Aggregates v. Secretary of State for the Environment.*[19] Not surprisingly, this was a decision relating to mineral working. A change of use occurs at a given time—when one activity ceases and another takes its place. When work starts on the construction of a building it normally continues steadily until the building is complete—and if it does not the LPA may serve a completion notice under section 94 of the Act of 1990. Moreover permission for both these types of development has been subject to statutory time limits since the Act of 1968 came into force so the concept of abandonment of rights granted by a permission for such development will now rarely if ever arise.

But by its nature mineral working is different. Once begun, the winning of limestone from a large quarry or coal from a new mine may continue for many decades before the stone or the seam is exhausted. The question can thus arise whether if there is a prolonged pause in the operation of the quarry or mine, the right to resume operations can be said to have been abandoned. In *Pioneer Aggregates* the House of Lords answered the question "No".

In his speech in that case Lord Scarman said roundly "There is no principle in the planning law that a valid permission capable of being implemented according to its terms can be abandoned."

[18] *White v. Secretary of State for the Environment and Congleton B.C.* (1989) 58 P. & C.R. 281.
[19] *Pioneer Aggregates v. Secretary of State for the Environment* [1985] A.C. 132.

In relation to mineral working the concept of abandonment has also been subsumed in the provisions of the Environment Act 1995 which provides that if there had been no working on site between February 1982 and June 1995 working can only be recommenced subject to conditions to be approved by the Minerals Planning Authority.

Extinguishment of rights granted by a planning permission

Strictly, this is a case of statutory interpretation rather than invention of a concept but it was an interpretation which made new law where the statute might be said not to provide the answer.

The problem arose starkly in *Pilkington v. Secretary of State for the Environment*.[20] In that case in 1953 planning permission (permission A) was given for the erection of a house on a plot of land, the balance of the plot to be used as a smallholding. No house was then built. Later another permission (permission B) was given for the erection of a house on another part of the same plot subject to a condition that it should be the only house on the plot. That house was built in the position indicated in the plan with permission B.

The landowner then started to build a second house in accordance with the earlier permission A. An enforcement notice was served. The argument for the LPA (which was upheld by the Divisional Court) was that by carrying out the development under permission B the land owner had put it out of his power to implement permission A.

The decision in *Pilkington* was approved in *Pioneer Aggregates*. In his speech in that case Lord Scarman said "The *Pilkington* problem is not dealt with in the planning legislation. It was therefore necessary for the Courts to formulate a rule which would strengthen and support the planning control imposed by the legislation".

Whether the carrying out of one permitted development *will* make it impossible to implement another permission in respect of the same land is a question of fact which is not always easy to answer.[21]

Resumption of an earlier lawful use after service of an enforcement notice

Section 57(4) of the Act of 1990 provides: "Where an enforcement notice has been issued in respect of any development of land planning permission is not required for its use for the purpose for which (in accordance with the provisions of this part of this Act) it could lawfully have been used if that development had not been carried out." This short and apparently helpful subsection has generated in the past a great deal of debate on two issues:

(a) What was the previous lawful use? In particular was a use which was neither an existing nor a permitted use but was immune from enforcement action, lawful?
(b) Does the subsection only permit reverter to the use to which the land was being put immediately preceding the change of use the subject of the enforcement notice or did it permit reverter to an earlier lawful use if there was one?

On question (a), the courts disagreed. There were decisions of the Divisional Court to the effect that a use immune from enforcement was lawful. But in 1976 the Court of Appeal, in a judgment given by Cairns L.J. concluded that it was not.[22] I later had the temerity to disagree with Cairns L.J. and said so in one judgment but was later persuaded to change my mind. Cairns L.J.'s judgment (and thus my

[20] *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527, DC.
[21] *Durham C.C. v. Secretary of State for the Environment* (1989) 60 P. & C.R. 507; *Regent Lion Properties v. Westminster City Council* [1991] N.P.L. 569.
[22] *LTSS Print & Supply Services v. Hackney LBC* [1976] Q.B. 663, CA.

somewhat shamefaced change of mind) was upheld by the House of Lords in *Young v. Secretary of State for the Environment*[23] which also made it clear that the answer to the second question is that reverter under the subsection can only be to a lawful use immediately preceding the use the subject of the enforcement notice. Thus the effect of an enforcement notice can be that land has no lawful use unless and until a permission is given for a new use.

The first question has become academic since the Planning and Compensation Act 1991 added a new subsection (191(2)) to the Act of 1990 which now provides that a use immune from enforcement action is lawful.

Many of you will no doubt think that this issue is thus of historical interest only. But I have two reasons for referring to it. The first is of course to tell the story against myself—to show that it was only the skill of a good advocate that put me right on the second occasion when I had to decide the issue.

The second more important reason reverts to the theme of this talk. As planning law has developed and expanded over the last 50 years, gaps which required filling have become apparent. How should they be filled? I believe the answer is by legislation, primary or secondary. Like the criminal law, planning law in my view is and should remain exclusively a creature of statute.

The issue what constitutes a lawful use is one on which the courts had to intervene to solve the problem but at last the minister has grappled with it by legislation as I have said. A question in the same category, whether demolition of a building constituted development—which was a planning lawyer's play thing for many years—is another case where in the end legislation has been introduced to answer the question. There remain however the issues to which I have referred earlier where important parts of existing law are still the result of the joint efforts of the minister and the courts and have no direct statutory parentage.

Estoppel in planning law

When, as often happens, a planning officer is asked to express a view as to the acceptability of a proposed development or more frequently of, *e.g.* an amendment to a plan, he will invariably say that he cannot commit his authority. Nevertheless, attempts are made to argue that if a landowner has acted on a view expressed by a planning authority the LPA could be prevented, *i.e.* estopped from coming to or enforcing a contrary view. One such case was *Lever Finance v. Westminster City Council*[24] in which a development was carried out in accordance with an amended plan with which the planning officer had expressed himself satisfied but for which no formal consent had been obtained.

In that case Lord Denning M.R. said "If an officer acting within the scope of his ostensible authority makes a representation on which another acts then a public authority may be bound by it just as much as a private concern would be". In other words the LPA would be estopped from denying what the officer had represented.

But in *Western Fish Products*[25] Megaw L.J. (who was a member of the Court in *Lever Finance*) said that the proper explanation of that earlier case was that the officer had delegated authority to give the relevant decision. Subject to this qualification *Western Fish Products* is clear authority for the proposition that proprietary estoppel generally has no place in planning law. The name of the authority inevitably leads me to call this concept "the one that got away".

[23] *Young v. Secretary of State for the Environment* [1983] 2 A.C. 662 and see *S. Staffs. D.C. v. Secretary of State for the Environment* [1987] J.P.L. 635, DC.
[24] *Lever Finance v. Westminster City Council* [1970] 3 All E.R. 496.
[25] *Western Fish Products v. Penwith D.C.* [1981] 2 All E.R. 204, CA.