

## **THE EROSION OF THE CONCEPT OF DEVELOPMENT: PROBLEMS IN ESTABLISHING A MATERIAL CHANGE OF USE.**

The concept of development for the purposes of s.55 of the Town and Country Planning Act 1990 is a jurisdictional one: its purpose is to establish the threshold of a local authority's powers to control land use. In the absence of cognisable development landowners enjoy such powers as the common law bestows to use land as they see fit. This embraces a right to undertake activities which cause harm to neighbouring land where these fall short of a public or private nuisance. This means that the law tolerates the infliction of some injury to the enjoyment of neighbouring land provided no statutory or common law rule is thereby infringed. Certain limited detrimental activity cannot, by itself, trigger the intervention of either the aggrieved neighbour, nor of the State. Development falling within the definition of section 55 of the Town and Country Planning Act 1990 thus establishes the powers of the local planning authority to control the detrimental activity.

Once its jurisdiction is established, the local authority must then decide whether or not to consent to the use in question. This is a matter of planning merits to be considered in accordance with ss. 54A and 70 of the 1990 Act. Thus there are two distinct and separate issues, for which Parliament has enacted different provisions of the 1990 Act. First it must be asked: is the jurisdiction of the planning authority over the use established? (1) Only if the answer to this question is in the affirmative is the authority entitled to proceed to the second issue which requires a decision on the planning merits of the matter (2).

The purpose of the present article is to argue that these distinct issues have become conflated. In this confusion it may be possible to identify a broad intention on the part of some planning authorities to use planning powers as a means of curbing (i) activity which has off-site consequences which ought only to be relevant as issues of planning merit if (and only if) a material change of use can be established, and (ii) unconventional activity with certain off-site consequences. In either case it is possible to identify some marginalisation of the concept of development in s.55 of the Town and Country Planning Act 1990. A material change of use can now, it seems, be established not merely by reference to the change in use of the planning unit but also by reference to its *consequences*, (the merits question) and in particular whether off-site harm can be identified. The danger of this approach is that, in some cases, it may

arguably lead local authorities to use planning powers for ulterior objects contrary to established principles of the general Administrative law.

It is proposed to focus on cases in the first category, that is cases where a material change of use can be established by reference to off-site consequences, and then to examine the second category in which unconventional activity takes place, and it is alleged that this use is incidental to the enjoyment of a dwellinghouse as such. ( 3)

### *Off-site Consequences of Development and the Threshold Question*

The expansion of planning powers has resulted from the conflation of the fundamentally different issues of planning jurisdiction and planning merits. An early decision in which this confusion can be identified is *Panayi v. Secretary of state for the Environment* (4) where the alleged change of use concerned the change of a property divided into four self-contained flats into one used as a hostel for homeless persons. Kennedy J. held that although the new use remained classed as residential the Inspector had been entitled to hold that the property had so altered in character that a material change of use had taken place. "It was certainly open to the inspector to decide that, if a building that contained four self-contained flats, even without structural alterations, became a hostel for homeless persons, that could amount to a material change of use. The change could give rise to *important planning considerations* and could affect, for example, the residential character of the area, strain the welfare services, reduce the stock of private accommodation available for renting and so forth. The fact that, in the broadest sense the property continued to be used for residential purposes does not mean that there could not have been a material change of use..." (Emphasis supplied)

The reference to the off-site consequences as "*important planning considerations*" at first appears unobjectionable: each example identified is a material consideration on determining whether planning permission ought to be granted for any material change of use. But before this issue falls to be considered the prior question (has a material change of use occurred) must be answered in the affirmative. A close examination of his lordship's judgment reveals that the same considerations are deployed in his consideration of this jurisdictional matter as those in relation to the issue of planning merits. Thus the "*important planning considerations*" enjoy a dual function; and they are

identically reproduced (and, it seems, given equal weight) for the purposes of two separate sections of the 1990 Act. (5) In essence, off-site harm is identified not only as a merits issue but also as a threshold issue establishing the jurisdiction of the planning authority to intervene.

This may be so for reasons of policy. If the consequences are perceived as detrimental, controls can only be triggered if a material change of use has taken place. If development has not taken place, planning powers cannot be invoked. Thus the judiciary may be tempted to hold that off-site harm which may become relevant in planning terms as an issue of planning merits is also relevant in making it more likely that any change of use will be "material". Thus two statutory provisions, each relying on an idea of materiality, have essentially been merged into one lest detrimental activity should escape the net.

This conflation can be identified in other decisions of which *Lilo Blum v. Secretary of State for the Environment and Richmond upon Thames LBC* (6) marks an important development, since the merger of the two issues was openly acknowledged. Here an enforcement notice had been served alleging that a material change of use had occurred when livery stables were additionally used as a riding school. This notice was broadly upheld by the Inspector on appeal and subsequently by the High Court where Simon Brown J. considered that the Inspector had found that the character of the use had changed. (7) In part this was so because there would be more horse traffic involving riders travelling along bridle ways in a conservation area (an issue which the Inspector had also identified as the main issue relevant to the planning merits to be considered on the deemed application for permission). This increased use of the bridle ways was likely to damage them. Here again the issue of effect of off-site harm had controversial consequences. These might be identified as follows:

1. The single issue of off-site harm to the bridle ways was found to be relevant both to whether a change of use had occurred and whether that change merited planning permission; and
2. planning powers were held to be appropriately used to preclude the increased horse use of paths. This is interesting when it is recalled that these paths were dedicated as bridle ways and so expressly provided for horse use as one of their primary functions. (8) It is difficult to see how planning law can

preclude this simply because such increased lawful use was likely to damage the surface. The question of damage should be considered in relation to the duty of the highway authority is to keep such paths in repair.(9) That it cannot do so for lack of funds seems an insufficient to ration the lawful use of the bridle ways by resort to planning powers to slow the rate of their decline. This does invite the conclusion that planning powers may be employed for an ulterior purpose. (10)

The relevance of off-site harm in the identification of a material change of use was finally confirmed in *Forest of Dean District Council v. Secretary of State for the Environment & Howells*. (11) Here the propriety of considering off-site detriment in determining whether a change of use was material formed the *ratio* of the decision.

In this case an appeal was instituted against the decision of an Inspector who had quashed an enforcement notice. This had been issued to restrain the change of use of static holiday caravans to permanent residential accommodation. On appeal it was argued for the respondent that no proper distinction could be drawn between human habitation of a caravan site for one purpose as opposed to another. The character of the use remained the same. (12)

There was, however, substantial evidence at the inquiry that traffic using the site would be increased by the change to permanent residential user. The Inspector had not considered that issue since, in his opinion, it was irrelevant. In his view the question whether a material change of use had taken place had to be judged in relation to the site itself and not the effects on road use off-site. (13) Thus the question directly raised in this appeal was whether off-site harm could be relevant in determining whether a change in land use was material, or whether it went instead to planning merits. (14)

David Widdecombe QC held that the "off-site effects... were relevant to the question whether development had taken place." This is to be read with the subsequent passage in which his lordship stated: "It made a nonsense of planning if the effects of use on neighbouring land had to be ignored." (15)

As in *Panayi* David Widdecombe QC appeared here to be drawing upon the off-site consequences of a change in use (which may be relevant to the planning merits) and holding them to be as relevant to the threshold question as they are the merits issue. The question is whether this is permissible. This is discussed further below.

The confusion of planning jurisdiction and planning merits can subtly, but nevertheless extensively, widen the scope of planning powers. This can be seen in the following examples which are derived from those to which Lord Parker CJ made reference in *Birmingham Corporation v. Habib Ullah* (16) and which, under orthodox planning rules, do not involve development. In the first example, a young childless couple move into a large dwellinghouse in a residential area. A number of unruly children are born to them so that after number of years they have a large family. Elderly and infirm relatives also come to live on the premises to receive care in the family. The impact of this family on the area is not inconsiderable and may be very similar to that which caused so much concern in *Panayi*: its presence could affect, for example, the residential character of the area (as unruly children often do), strain the welfare services and education services, reduce the stock of private accommodation available for renting, increase traffic and parking difficulties, and so forth. These are all examples of off-site harm which are coupled with a significant increase (or "intensification" (17)) in the number of residents of the house. Yet there would have been no doubt that there is no material change of use and no development in a case of this kind. (18) However, if detrimental off-site consequences can be considered as relevant to the threshold question it is appropriate to ask whether the conclusion concerning this kind of case has altered, and if so how? In endeavouring to answer this question certain difficulties are presented.

Two further examples may serve to clarify these issues:

(i) Let it be supposed that a dynamic entrepreneur acquires a run-down bicycle shop and makes it profitable. The enterprise becomes extremely active; a larger number of (off road) cycles are sold. Many of these cycles are ridden on the woodland site on the edge of the town. This results in damage to the public woodland paths. Local residents object to the state of the paths and ask the planning authority to serve an enforcement notice restricting bicycle sales.

In this example, there could be no question of intervention because, even under the widest interpretation of s.55 there has been no material change of use. In planning terms the *status quo ante* the sale of the business and *post* its renaissance is such that there has been no material change. Arguments based on intensification are unlikely to succeed on the facts. (19)

(ii) Now let it be assumed that the facts are as in (i) above but that the shop owner wishes to enhance the business even further by advertising. This is done by sponsoring and organising a cycling team. The team members commute to and from the premises for training advice, meet on the premises, and train on and off neighbouring roads including riding in the above mentioned woods thereby increasing damage to woodland paths. Can the local planning authority serve an enforcement notice on these facts?

The position is less clear than in example (i) above because it might arguably be analogous to the *Lilo Blum* case. The increased road and off-road use caused by the cyclists is off-site harm to which can be added, perhaps, the change in the balance of uses in the shop (since cycling advice, otherwise incidental to retail use, now takes place in a more structured training environment).

If the analogy with *Lilo Blum* is permissible it follows that the cycle shop must apply for planning permission to run a cycle team. This conclusion seems insupportable in land use terms. Nevertheless, this would seem to follow from the recent case-law. The off-site effects are of a serious nature and detrimental to the environment. The change in use of the shop (to provide a base for a cycle team) may also makes the question of development on the grounds of intensification somewhat near the border. If so, the court may be especially tempted to focus on off-site effects to determine whether the change of use is a material one.

However, the cycle shop is essentially being required to seek planning permission in order to make its business more successful. The impermissible nature of such an outcome is supported by well-established authority. This holds that no material change of use occurs where a significant change occurs in the conduct of a retail business such that its success causes increased activity or an appearance detrimental to the neighbourhood. (20) The presence of a

successful business as opposed to an unsuccessful one detrimental to a residential area is not sufficient to trigger the jurisdiction of the planning authority.

### *Materiality*

It is arguable that the error in treating off-site harm as relevant to the threshold question is confusion over different meanings of materiality which is used in all three relevant sections of the 1990 Act. Of these, s.55 relates to development (the threshold question), and ss 54A and s 70 with the decision whether or not to grant planning permission (the planning merits)

s.55 (omitting references to operational development) states that development occurs upon the making of *any material change of use* of any buildings or other land.

Section 54A of the Town and Country Planning Act 1990 states: "Where in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless *material considerations indicate otherwise.*"

s.70 (1) provides: "Where an application is made to a local planning authority for planning permission..... (a) they may grant permission, either conditionally or subject to such conditions as they think fit;

or

(b) they may refuse planning permission

In dealing with such a planning application the authority shall have regard to the provisions of the development plan so far as material to the application and *any other material consideration.*"

Thus the draftsman has incorporated a reference to materiality in all three sections. It is not at all clear, however, that materiality for the purposes of s.55

and s.70 should be treated as co-extensive with materiality for the purposes of s.55. Yet this appears to be what the courts are suggesting in cases like *Panayi*, *Lilo Blum* and *Howells* because, as has been demonstrated, a matter which is undoubtedly an issue going to planning merits (off site consequences of a new or altered use) is deemed to be a "material consideration" for the purposes of s55 (whether a change of use is material).

It is doubtful whether the draftsman intended the idea of materiality to bear the same meaning under each of the three sections. In ss. 54A and 70 materiality appears in the context of planning merits where the local authority must have regard to the development plan and to other material considerations. Here materiality simply directs the attention of the planning authority to relevant issues affecting the planning merits of the application. No regard is to be had to immaterial or irrelevant matters.

For the purposes of s54A and s.70 it is commonplace that material considerations must be considerations of a planning nature which relate to the character of the use of land, (21) although they need not be restricted to matters of amenity. (22) The s.55 threshold question is different. This asks whether there has been a *material* change of use, and the issues which are relevant to this question are very different from the question of planning merits. A change is material if the change is *substantial*. This has been interpreted in *Palser v. Grinling* (23) to mean "considerable solid, big". It does not mean "not insubstantial or de minimis". Thus materiality examines whether the alleged change of use has occurred to such a degree that it is material for the purposes of the section. According to one view, it can be argued that this mandates an examination of the change itself and not of any off-site consequences of that change. It is the change of use which must be material and not the change in consequences of that use. To put the matter differently: s.55 mandates that the change must be material. If it is material development has occurred and there is no reason to consider off-site harm at this threshold stage. If the change is immaterial, no development has occurred. Off-site harm cannot make an immaterial change material without serious erosion of the concept of development and the very broad extension of planning powers.

However if this is unduly simplistic and the courts are indeed to resolve border-line threshold cases by references to off-site harm on the grounds that

the consequences of the change may make it a material one, the practical difficulties seem daunting. If the examples offered above are correct, it might be asked whether it is truly the purpose of planning law to require the cycle-shop owner to seek planning permission to run a cycle team where the cyclists in the team might increase road and off-road traffic? Would the family inhabiting the large dwellinghouse be required to seek planning permission when they have children or wish to move in elderly relations? If the answer to one or both of these questions is in the negative, in what threshold cases is off-site harm relevant? How is a distinction to be drawn between cases where it is to be ignored and cases where it is determinative?

The concern of the local planning authority for off-site consequences (the loss of visual and other amenity enjoyed by neighbours) perhaps also lead to the marginalisation of the concept of development in *Croydon LBC v. Gladden*. (24) Here the Court of Appeal had to decide whether to uphold an appeal against injunctions granted under s.187B of the 1990 Act which (inter alia) sought to restrain the appellant from placing a full size replica of a Spitfire in the back garden of a small suburban property. Importantly, one of the appellant's purposes in wishing to place the replica in the garden was to annoy the local council.

The Court of Appeal rejected an argument based on s.55 (2) (d) of the 1990 Act which if applicable would have removed from control "the use of any land within the curtilage of a dwellinghouse for any purpose incidental to the use of the dwellinghouse as such" and unanimously upheld the injunctions (although with slight amendment).

Dillon LJ followed the earlier decision of the same Court in *Wallington v. Secretary of State for Wales* (25) and held that the enjoyment of a dwellinghouse as such could not as a matter of law be determined subjectively; it demanded an element of objective reasonableness. It was not, in his lordship's opinion, reasonable to place a replica Spitfire in a small garden, *a fortiori* where it was done with the intention of annoying the local planning authority; and so the exemption in s.55 (2) (d) was not applicable on the facts.

Stuart-Smith LJ accepted that it was a question of fact and degree whether the Spitfire could be incidental to the enjoyment of a dwellinghouse as such. However his lordship was careful to note that certain unconventional uses-such as the placing of a unconventional statue could still be regarded as erected for a purpose incidental to the enjoyment of a dwellinghouse. However, the Spitfire was a plain case because it was done for the purpose of "teasing" the local authority.

Hobhouse LJ agreed with both judgments.

Two observations might be made upon this decision. The first concerns the marginalisation of development. A consideration of s.55 (2) (d) only becomes apposite where development takes place; indeed, it only applies where a material change of use (as opposed to operational development) takes place. If any change in use was insufficient otherwise to constitute development, it would not be appropriate to examine s.55 (2) (d). It is trite law that this is a matter of fact and degree, but it is by no means clear that even the placing of even a disproportionately large object on land comprising the rear garden is sufficient. This is an important matter because, as we have seen, the s.55 (2) (d) exemption is limited by notions of reasonableness which seem to draw heavily upon conventionality. It would be unnecessary to consider the reasonableness or otherwise of the activity if no material change of use had occurred.

To return to the issue of whether placing an object in a garden is a material change of use it should be noted that the planning unit is the dwellinghouse which remains used as such throughout; the use has not even been "intensified". It is arguable that a model train enthusiast who uses the garden for an extension of his model layout rather than the cultivation of ornamental plants does not require planning permission to enjoy the trains. (26) The Spitfire is perhaps only a different case because of its relative size. If so, this in turn raises the difficult question of the impact of the replica on neighbouring property, and thus we return to the controversial issue of employing off-site harm to establish development.

Nevertheless, whether or not development had occurred was not extensively considered; it appears to have been assumed (contrary to the above) that it did

occur, for otherwise their lordships would not have progressed to consider the s.55 (2) (d) exemption. (27)

Questions must also be posed about the scope of s.55 (2) (d). If it can be assumed that the placing of the Spitfire in the garden constituted a material change of use it must be a matter of concern that unconventional uses of land-which fall short of either a statutory or common law nuisance-should be within the scope of planning control. A rational argument asserts that land use which is not a private or public nuisance is land use which neighbours must tolerate, even if some (reasonable) detriment is inflicted by it. It seems bizarre that a householder should have to seek planning permission to keep a seventh dog. (28) Yet according to the Stuart-Smith LJ the placing of an unconventional statue, a "Wendy House", a gypsy caravan or a pirate ship for children's enjoyment" could still be within the s.55 (2) (d) exemption. But it seems that a replica Spitfire is not to be included in this list, at least on the facts of *Gladden*. It must be a question of fact but the difference in planning terms between a replica aircraft and a pirate ship are not immediately obvious. Both are capable of being substantial structures and may have some impact on visual amenity. (29)

But this does not conclude the issue because it will be recalled that Gladden's motives in wishing to place the replica in his garden included the annoyance and teasing of the local authority. Much emphasis was placed upon the issue of motive, and this was particularly so in the case of Stuart-Smith LJ. Whether or not it can be satisfactory in land use terms to regard motive as determinative of the need to seek planning permission is open to doubt because identical uses might be treated differently if undertaken with different motives.

However, if motive is now relevant, it may be more satisfactory to regard the decision in *Gladden* decision as confined to cases where the motive for development is not *bona fide*. The test would seem to be that the words in s.55 (2) (d) ("enjoyment of a dwellinghouse as such") require an enjoyment of the object in the context of the dwellinghouse, and not as a means of pursuing an off-site vendetta, or of inflicting harm on others. Simply put, the occupier should seek pleasure in the use or object for its own sake and in the context of the dwellinghouse and not as an means of perplexing or harming others. This is surely the true rationale of *Gladden* which ought not to be construed more

widely so as to constitute a curtailment of the activities of less conventional individuals whose use of land falls short of an actionable nuisance.

### **FOOTNOTES**

(1) This requires an examination of s.55 of the Town and Country Planning Act 1990.

(2) *Ibid.* ss. 54A and 70.

(3) s.55 (2) (d) of the 1990 Act.

(4) (1985) 50 P & CR 109, but see also *Devonshire County Council v. Allens Caravan (Estates), Ltd.* (1962) 14 P & CR 440,441 where the question whether a material change of use had taken place was held to require a consideration of amenities.

(5) s.55 on the one hand and ss54A and s70 on the other.

(6) [1987] JPL 278.

(7) *Ibid.* at p. 281.

(8) s..329 of the Highways Act 1980 .

(9) s.41 of the Highways Act 1980.

(10) But this argument was rejected because it was held that the local planning authority was entitled to take into account visual amenity. Thus it is arguable that the bridleways issue became relevant by re-definition.

(11) [1995] JPL 937.

(12) *East Barnet UDC v. British Transport Commission* [1962] 2 QB 484, 491.

(13) See pp 941-942.

(14) Which might not fall to be considered if the change was not material.

(15) at p. 943.

(16) [1964] 1 QB 178.

(17) "Intensification" here is simply meant to imply an increase in activity but one falling short of a material change in use.

(18) *Birmingham Corporation v. Habib Ullah* [1964] 1 QB 178.

(19) A businessman does not require planning permission to make a business successful: see *Marshall v. Nottingham City Council* [1960] 1 WLR 707 where the issue of serious impact on visual amenity of the neighbourhood was not considered sufficient to invoke planning powers in the absence of a material change of use, and that impact did not by itself establish such a use.

(20) *Marshall v. Nottingham City Council*, above.

(21) *FN Newbury DC v. Secretary of State* [1981] AC 578, 599 *per* Lord Dilhorne; *Westminster City Council v. Great Portland Estates* [1985] AC 661, 670; *Westminster City Council v. British Railways Board* [1985] AC 671.

(22) *Per* Cooke J. in *Stringer v. Minister of Housing and Local Government* [1970] 1 WLR 1281 at 1294. Contrast Lord Widgery CJ in *Copeland Borough Council v. Secretary of State* (1976) 31 P & CR 403.

(23) [1948] AC 291.

(24) [1994] JPL 723.

(25) (1990) 62 P & CR 150.

(26) But this may be open to doubt after *Wallington* if the hobby is seen as unreasonable in its nature or extent.

(27) They cannot have regarded it as operational development because the s.55 (2) (d) exemption would not apply to such development.

(28) Presumably after *Wallington* if a bitch has six or more puppies a solicitor must now advise that planning permission be sought. It is true that the inspector in *Wallington* had not identified six as the upper maximum limit of the number of dogs, but he was entitled to conclude that the enforcement notice could permit a maximum of six dogs to avoid over-enforcement.

(29) Indeed it is possible to argue that a different distinction from that drawn by his lordship applies. This is because the pirate ship, as a structure, might constitute operational development whereas a replica Spitfire (presumably on wheels) would not be. See ss 55 and 336 of the 1990 Act and *Wealden DC v. Secretary of State* [1988] JPL 268 respectively.