Changes of use in planning law – two common pitfalls for property lawyers

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Change of use for planning law purposes is a complex legal area; landowners, and even their advisors, often misunderstand the rules. A recent High Court case offers a neat example of the confusion that can arise in two respects, and acts as a useful reminder of the law, especially for property lawyers who venture into the planning sphere only rarely.

The two questions that arose in *Barton Park Estates Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1200 (Admin) concerned, first, the scope of rights flowing from an existing grant of permission and, second, the implications of an 'intensification' of the permitted use. Both questions concern issues of law that are often misunderstood.

The questions arose because the landowner, relying on a historic permission for a caravan site, sought a certificate of lawfulness (under section 192 of the Town and Country Planning Act 1990) for the proposed use of the land, also as a caravan site. But whilst the historic permission, by its operative part (the important bit, usually at the top, following the words "…hereby grants permission for:" or similar) set out specified numbers of certain types of caravan and chalet. It was also subject to conditions, effectively limiting the use of certain parts of the site to certain times and duration of occupation. The proposed use was for a greater number of units, without any qualification. The question was whether the proposed use fell within the terms of the consent.

In establishing the scope of the consent in cases such as this, the starting point is clear (for discussion see Supreme Court's discussion in *Trump International Golf Club v Scottish Ministers* [2015] UKSC 74):

- The permission should be construed on its face, including the conditions and any reasons for them.
- Reference to other documents is prohibited except where incorporated by reference, or where necessary to resolve ambiguity.
- By contrast to the approach in contractual disputes, the question is not what the parties intended, but what a reasonable reader would understand.
- The natural and ordinary meaning of the words should be adopted.
- Conditions should be construed benevolently and given their common sense meaning.

The next step is where the first common misconception arises. Having established what the permission means, it should be clear what is permitted. But that doesn't necessarily indicate what is not allowed. It's often assumed that everything else is automatically prohibited. For example, it was seemingly argued at some point in the *Barton Park* case that the references, in the operative part of the consent, to numbers and certain types of unit served as restrictions.

But this isn't the case. In fact it's clear from a line of cases, going back as far as *I'm Your Man Ltd v SoSE* (1998) 4 PLR 107, that for a limitation on the grant of permission to be effective, it can't appear in the operative part, but needs to be done by condition instead. As Hickinbottom J said in *Cotswold Grange County Park v SoSCLG* [2014] JPL 981 in relation to an application for a certificate of proposed use:

> *"Simply because something is expressly permitted in the grant does not mean that everything else is prohibited. Unless what is proposed is a material change of use – for which planning permission is required, because such a change is caught in the definition of development –*

generally, the only things which are effectively prohibited by a grant of planning permission are those things that are the subject of a condition…"

So in the *Barton Park* case, the Inspector had held, rightly, that the scope of the consent was not limited by reference to the number or types of unit; accordingly, there would be nothing unlawful about a future increase in the number of units, or a variation in their type.

But that wasn't the end of the story. First, because the conditions, by contrast, did limit the consent in terms of time and duration of occupation. Unlike the operative part, they did identify what was not allowed. And the proposed use – unrestricted in those terms – fell into that prohibited category.

Second, there was a further point that was more interesting, and raised another legal issue that is sometimes misunderstood: intensification. Bear in mind that the law prohibits a 'material change of use' from the one permitted. What amounts to a material change will often be obvious, but where the new or proposed use appears to be the same type of use (in the *Barton Park* case, use as some form of caravan site) it's often assumed that there's no issue. But this overlooks the concept of 'intensification'. A comprehensive analysis of the law in this area was conducted by Ouseley J and, later, the Court of Appeal in *Hertfordshire CC v Secretary of State for Communities and Local Government* [2012] EWHC 277 (Admin) and [2012] EWCA Civ 1473 respectively, from which the following essential principles are clear:

- The intensification of a use can in principle amount to a material change.
- This is the case even where the use remains of the same generic type.
- It will require an increase in the scale of activities on site.
- It will also require a definable change in the character of the use made of the land.
- Off-site impacts (such as traffic or noise) and their effect on other premises may be considered when determining whether a material change has taken place.

(A further point to note is that intensification within a use class (for the purposes of the Use Classes Order 1987) will not amount to a material change unless its effect is to take the use outside the category altogether.)

So, in the *Barton Park* case, the Inspector concluded that although both the permitted and the proposed use could be described as a caravan site, year round occupation of the whole of the site by permanent residents in a larger number of units would change both the its appearance (by introducing more activity, light and domestic paraphernalia, and by extending its visual impact) and the pattern of movements to and from the site. Thus there would be a change in the definable character of the use, and a material change would take place. The certificate was accordingly refused.

This case offers a good example of two of the more common misconceptions concerning change of use. Other areas where it's easy for the unwary to trip up include the relationship between primary, ancillary and mixed uses, the concept of the planning unit and, of course, the complexities surrounding operation of the four and 10 year rules on immunity. It is a complicated area of law that has given rise to a large amount of caselaw; caution is required!