

Who's Planning What

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Breaching planning conditions

When planning permission for a commercial development is granted, it will typically include conditions limiting the way in which the development can be built and requiring it to be operated in certain ways. For example, archaeological investigations might need to be carried out before building works start or a site might need to be landscaped before occupation is allowed.

When such a condition is breached, local planning authorities can usually take action. However, such action must happen within 10 years of the breach first occurring. If, for instance, a nightclub was built on 1 June 2001 without required acoustic insulation, the council could issue a breach of condition or enforcement notice up to 31 May 2011 requiring the insulation to be installed. When the 10 years is up though, the breach will have effectively become lawful and the council can no longer take any action. The purpose of this time limit is to ensure a degree of fairness by giving an authority enough time to take action but protecting developers from having to defend themselves where the breach occurred many years ago.

The situation is a little more complicated where a condition imposes an ongoing obligation. This could be something like limiting the opening hours of an office to between 8 am and 7 pm Mondays to Fridays or requiring a hot food takeaway to operate fume extraction equipment during cooking. If the condition is breached in a consistent or regularly repeated manner for at least 10 years, the entire condition may cease to be enforceable.

Alternatively, if the condition is only partially breached, then that partial breach may become immune from enforcement action. An example could be a nightclub breaching the noise limits it is subject to on Fridays and Saturdays but not otherwise. The nightclub could then potentially operate

without a noise limitation on those two days, but continue to be bound by the limits during the rest of the week.

Being able to show that no or only partial enforcement action may be taken in respect of a breach of condition can be a defence to such action. If a developer thinks a condition no longer applies, he does not need to wait for the council to issue an enforcement notice to test the theory. He can instead proactively seek confirmation of the condition's status by applying for a lawful use certificate. This would involve submitting evidence such as statements and other documents. If successful, the certificate would conclusively prove the lawfulness of the breach. There is a right of appeal to an independent planning inspector in the event the application is refused.

Applying for a certificate as soon as the ten-year period has expired is a prudent thing to do, as the breach must generally be continuous. Obtaining a certificate would lock in the benefit of the breach which has accrued. Acquiring such immunity can also potentially increase the commercial value of the premises and make it more attractive to purchasers and tenants.

Complicated areas of law can be involved when considering if a condition can still be enforced. Legal and planning advice should therefore always be obtained before submitting an application for lawfulness or when faced with enforcement action.

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