INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter. We hope that you are all well.

This edition features articles from Richard Harwood OBE QC (on planning and the way out of lockdown for leisure, hospitality and attractions), and Richard Wald QC (on the recent TW Logistics case in the Supreme Court).

Contents

We would also like to draw your attention to two webinars that the group is holding next week in the ongoing '39 from 39' series.

On Monday 15 March
Episode 4: *The UK / EU Trade and Cooperation Agreement – Aviation, Chemicals and Waste*

www.39essex.com/series-3-episode-4-the-uk-eu-trade-and-cooperation-agreement-aviation-chemicals-and-waste/

On Thursday 18 March
Episode 5: *Town and Village Greens post TW Logistics in the Supreme Court: Where have we got to and where are we going?*

www.39essex.com/39-from-39-series-3-episode-5-town-and-village-greens-post-tw-logistics-in-the-supreme-court-where-have-we-got-to-and-where-are-we-going/

Our Pilot Briefings service remains open and popular for all of our clients to use. To utilise the service, we will require a short email detailing the issues at hand and the questions you would need addressing. On receipt, a 15 minute time slot will be arranged with a member of our established team of silks, senior juniors and juniors, who will be able to discuss the legal query you have. If you would like to book a Pilot Briefing with one of our Planning, Environment and Property experts, then please contact:

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PLANNING AND THE WAY OUT OF LOCKDOWN FOR LEISURE, HOSPITALITY AND ATTRACTIONS

Richard Harwood OBE QC

The leisure and hospitality sectors have had a particularly horrible 12 months in the Covid pandemic. In the first lockdown the value generated by accommodation and food services fell by 90%. Over 60% of accommodation and food businesses have paused trading.

This comes at a huge human cost. 1.6 million people were furloughed in this sector in the first lockdown. The arts, entertainment and recreation sectors employ 473,000 people. 455, 000 were furloughed in the first lockdown. These business are presently shut down or operating under severe restrictions. In Chambers we are pleased to have been able to help the excellent coffee shop – Press – in the ground floor of our building on Chancery Lane keep going. Please drop in and see them (and us) if you are nearby.

Moving out of lockdown will be difficult. Some sectors will be restricted to outdoor activities only for a period, such as hospitality, and even following the end of lockdown social distancing measures may reduce capacity, particularly indoors. The English weather is capable of being cold and wet, even in spring and summer. Enlarged outdoor areas and greater shelter will assist trade. There is likely to be increased demand for visiting and holidaying in the UK, and attractions and hospitality need to be able to make the best of those opportunities.

On 23rd February I was able to discuss the way planning can help these sectors, and potential reforms with Celina Colquhoun a colleague at 39, and Nick Laister, an operational director at RPS who does a huge amount of work in the leisure and mobile home sectors. The recording and slides from our webinar is here.

Concerns about the difficulties in getting temporary shelters and pavement licences were being raised in the press the following weekend: *Sabotaging plans for Alfresco April*. On 5th March Robert Jenrick MP, the Secretary of State for Communities and Local Government wrote to local authorities about new measures to help the sectors. He also covered these points in the Sun on Sunday that weekend.

Business and Planning Act 2020 – pavement licences

In response to Covid, measures were taken in 2020, extended into 2021, in the Business and Planning Act 2020 (street licensing) and permitted development rights (takeaway uses, temporary use of land and wider use classes in particular). Ministerial statements have encouraged pragmatic decisionmaking. The response in planning legislation and policy to the pandemic has been quick and imaginative.

The Business and Planning Act provides for pavement licences to put removeable furniture on part of the highway to sell, serve or for the consumption of food or drink supplied from or in connection with adjacent premises.[1] It allows pubs, restaurants and cafes to extend onto adjoining pavements and roads. The licence also amounts to planning permission for the use and the stationing of the furniture.[2]

Two issues are picked up in Robert Jenrick's article. Firstly the local authority may require a licence fee of up to £100.[3] The licences granted last year were either until 30th September 2021 or to a shorter period in the licence. Many businesses are now having to reapply and Mr Jenrick is asking local authorities not to charge a fee. Secondly the Minister intends to make regulations extending the duration of the licence provisions from 30 September 2021[4] to September 2022.

Temporary uses of land and moveable structures for those uses

Long established permitted development rights under Part 4, Class B[5] authorise the temporary change of use of land for up to 28 days a year. As a response to the pandemic, an additional 28 days are authorised by the new Part 4, Class BA.[6] Class BA was originally introduced for the remainder of 2020, but has been extended to authorise 28 days in the 2021 calendar year.[7] In both cases moveable structures may be sited for these new uses.

There are though limitations, including that whilst the temporary uses can include camping (in tents) they do not include use as a caravan site.

A few changes could usefully be made.

The new right, in Class BA, allows the change of use of any open land including within the curtilage[8] of a building, provided it is not a listed building. However Class B only applies to land outside the curtilage of buildings. The Class B right can be extended to match the BA right in that respect.

Consideration should be given to extending the 56 day period for the summer season for leisure, hospitality uses and camp sites in 2021. This will enable them to make full use of the weather. It is important to recall that a temporary use may need to be split, between Easter, the late Spring half term and the school summer holidays, but these activities may need time to set up. Putting up and taking down facilities is counted within the 56 day period, so cuts down the available trading

1 Business and Planning Act 2020, s 1.
2 Business and Planning Act 2020, s 7(2).
3 Business and Planning Act 2020, s 2(1)(c).
4 Business and Planning Act 2020, s 10(1).
5 In the Town and Country Planning (General Permitted Development) (England) Order 2015, Schedule 2.
6 Added by Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 reg 20.
7 Town and Country Planning (General Permitted Development) (England) (Amendment) Regulations 2020, reg 4.
8 Curtilage being land which is seen as being part and parcel of a building and often includes gardens, yards, parking areas and outbuildings.

days. Additionally, if a site is arranged for the use, for example with toilets, showers and glamping tents, it will still be in that use even if there are no customers. The 56 day period can therefore be used up very quickly. If a business has to put up and remove these items between holiday periods then there will be considerable costs.

The 56 day period could be extended for the whole spring/summer season, say six months, but in a defined category of uses.

Given the need for businesses to have the opportunity to recover from the Covid pandemic, and to encourage investment, it would be useful to extend the Covid-related measures to the end of 2022.

Restaurants, pubs and cafes as takeaways

One of the earliest Covid planning responses was to allow a change of use of restaurants, cafes, pubs, wine bars and other drinking establishments to food takeaways.[9] This was originally until 23rd March 2021, but the period has been extended to 23rd March 2022.[10] The Minister says he is considering making this right permanent.

Such a use does not affect the existing use of the building and land.[11] Takeaways includes hot food takeaway (what was use class A5) and the provision of hot or cold food that has been prepared for consumers for collection or delivery to be consumed, reheated or cooked by consumers off the premises.[12]

Markets

A market is a place where, in Lord Denning's words, 'every member of the public is entitled to come into the market place, to bring things there for sale: and others are entitled to come in to buy them', although a seller must have a pitch allocated by the owner.[13] It may be indoors or outdoors. The temporary use permitted development rights in Part 4, Classes B and BA only authorise markets for 14 days each (so 28 days in total).

To encourage outdoor trading during Covid separate permitted development rights were created for 'the use of any land for the purposes of holding a market by or on behalf of a local authority'. These Part 12, Class BA rights were originally introduced until 23rd March 2021,[14] but have since been extended to 23rd March 2022.[15] Markets can be operated for any period for a local authority, which includes parish or town councils.

The holding of markets is subject to market franchise rights, where franchise holders are under a duty to hold a market. Markets may be held by persons without franchise or statutory rights to hold markets, but they must not compete against authorised markets which are within 6⅔ miles. A local authority may establish a market under the Food Act 1984, provided it does not interfere with another's market rights.[16]

Temporary shelters and moveable structures for hospitality, leisure and attractions

With the British weather, some form of shelter is likely to be needed for outdoor uses at pubs, restaurants, cafes, leisure operations and attractions. It is useful to consider firstly whether planning permission is needed, then pick up on permitted development rights (or their absence), and finally what rights might be introduced.

9 Town and Country Planning (General Permitted Development) (England) Order 2015, Schedule 2, Part 4, Class DA, inserted by Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2020 art 4.

10 Town and Country Planning (General Permitted Development) (England) (Amendment) Regulations 2020, reg 5.

11 Town and Country Planning (General Permitted Development) (England) Order 2015, Schedule 2, Part 4, Class DA, condition DA.1.

12 Town and Country Planning (General Permitted Development) (England) Order 2015, Schedule 2, Part 4, Class DA, para DA.2.

13 *R v Barnsley Metropolitan Borough Council ex p Hook* [1976] 1 WLR 1052 at 1056.

14 Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020, reg 21.

15 Town and Country Planning (General Permitted Development) (England) (Amendment) Regulations 2020, reg 7.

16 Food Act 1984, s 50.

Planning permission is required for two types of activities: carrying out building, engineering, mining or other operations ('operational development') or making a material change of use of land.[17] If a land is in a lawful use then items can be brought onto the land as part of that use without planning permission, provided that they are not themselves operational development.

The definition of 'building' is quite wide, including a structure or erection.[18] Putting up a building will be considered to be a building operation. Whether something is a building is judged by a threefold test of size, permanence and degree of annexation.[19] This is referred to as the *Skerritts* test from a case[20] where the Court of Appeal upheld as lawful a Planning Inspector's decision that a large 7 bay marquee (40 metres by 17 metres, and 5 metres high), which took several days to erect, and which sat on plates spiked into the ground between February and October each year was a building amounting to operational development.[21] Since *Skerritts* it has been assumed in a number of cases that marquees have required permission.[22] In one case a Planning Inspector found that umbrellas and panels had been assembled together at shisha lounge to create a building and that judgment was upheld by the High Court.[23]

It has to be remembered that Skerritts was at the larger and more permanent end of potential structures. It does not follow that all marquees will need planning permission.

Generally speaking the position is:

i) Moveable objects will not need planning permission if they are part of a lawful use: for example, chairs, tables, umbrellas, heaters, barriers, bench tables.

ii) Llarger objects which can be readily moved on or off site in one piece and rest on the ground, such as caravans, portable toilets, showers, wheeled kiosks and booths will usually not be operational development. There may though be some pre-assembled structures which are not generally intended to be moved – such as some arbours or summerhouses. These may be sufficiently permanent to be buildings.

iii) Large items that need assembly on site in a manner similar to the work of a builder may need planning permission. A shelter which is put together by a carpenter may be a building. The status of marquees and tents will vary. Erecting a marquee in a house's garden for a wedding reception would not be the erection of a building. Keeping a large marquee up for several months might be.

Except for amusement parks[24] and caravan sites,[25] leisure and hospitality uses do not benefit from permitted development rights. So whilst a temporary use of land under Part 4, Classes B or BA is able to site moveable structures (such as portable toilets), existing uses are not. A pub garden or car park would usually already be in the public house use[26] and so could take advantage of these classes to site moveable structures.[27] There are also no temporary rights

17 Town and Country Planning Act 1990, ss 55, 57.

18 Town and Country Planning Act 1990, s 336(1).

19 *Dill v Secretary of State for Communities and Local Government* [2020] UKSC 20; [2020] 1 WLR 2206.

20 *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2000] JPL 1025.

21 See the summary of *Skerritts* in *Dill* at para 52.

22 For marquees treated as requiring permission see: *Thornton Hall* [2019] EWCA Civ 737; *Ikram v Secretary of State for Communities and Local Government* [2021] EWCA Civ 2.

23 *Islam v Secretary of State for Communities and Local Government* [2012] EWHC 3482.

24 These have extensive permitted development rights for new rides and side-stalls under Part 18, Class B. These do not include shelters.

25 Where works required by a caravan site licence are permitted development: Part 5, Class B.

26 Unless perhaps it was on the other side of the road.

27 Except to support other building operations (Part 4, Class A) or film-making (Part 4, Class E).

to site buildings or non-moveable structures. So if a marquee or temporary shelter needs planning permission as operational development, that can only be obtained by making a planning application. Deciding whether planning permission is required is difficult and so businesses may make unnecessary planning applications or be reluctant to try.

Outdoor shelter would be needed in the period before inside opening is allowed, and also to provide more capacity in COVID-Secure premises and encourage trade once there is a more general opening up.

This can be dealt with by granting temporary planning permission as permitted development for such installations or moveable structures at particular categories of uses. The hospitality sector (pubs, restaurants and cafes) can be identified as it stands. In addition, events, leisure and recreation uses may have cafes as ancillary facilities and so may need shelter for similar reasons.

The buildings or structures could include marquees as well as temporary shelters. There is a case for temporary shelters (except possibly marquees) having to keep the structure mainly open. This will reflect the purpose of providing shelter, rather than new indoor space and will be essential for use during the period that outdoor only activities are allowed. The tests applied to smoking shelters (and used in the Coronavirus legislation to define 'inside') are fairly well understood and can be applied. Moveable structures would not need to be partly open (particularly portaloos). Height limits ought to be imposed, with an eye on marquee heights, but a lower height near the boundary of residential property.

Permanent fixing of awnings

A modest change would be to create permitted development rights for restaurants, cafes, public houses and drinking establishments, and visitor attractions to fix awnings to their buildings. Those rights can extend to conservation areas and listed buildings. In the former case, an awning is extremely unlikely to be harmful. Works to a listed building will need listed building consent in any event and the owner will simply avoid having to pay a planning application fee.[28]

These rights can be permanent: this will enable the cost to be recovered better over time; and the potential for an awning to have a harmful impact is very modest.

Decision making and enforcement

Finally it may be useful to keep in mind sensible conduct and enforcement. Businesses need to be able to maximise their opportunities to trade, and people would like to enjoy themselves. Provided that does not cause disturbance to neighbours or damage to ecological, landscape or heritage interests, they ought to be able to do so. A series of Ministerial Statements in the pandemic have encouraged pragmatic local authority decision making and enforcement: 13 March, 13 May, 14 July (on caravan sites), 30 November 2020. Local authorities should act proportionality in their enforcement roles.

The leisure, hospitality and art sectors have suffered a dreadful 12 months in the pandemic, and deserve every chance to build back business and jobs.

28 No fee is charged for a listed building consent application.

TW LOGISTICS IN THE SUPREME COURT – ONE QUESTION ANSWERED, ANOTHER LEFT HANGING...

Richard Wald QC

The appetite of the highest court in the land for appeals relating to town and village greens (TVGs) remain unabated. On 12 February the Supreme Court gave judgment in almost its 10th TVG case which either it or the Appellate Committee of the House of Lords before it, had considered in twice as many year. At least half of these cases have centred around the operation of section 15 of the Commons Act 2006 registration of village greens. On this occasion, in *TW Logistics v Essex CC & Ian Tucker* [2021] UKSC 4 the Supreme Court considered whether the possibility of post-registration criminal sanction on part of a working quay should act as a bar to its registration as a TVG. In a unanimous judgment the Court decided that the principle of coexistent user, first enunciated by the SC in *R(Lewis) v Redcar and Cleveland Borough Council No 2* [2010] 2 AC 70, and the necessary give and take between landowner and local inhabitants which that principle implies meant that such criminal sanction should not arise unless either of these parties materially altered its use of the registered land in such a way as to interfere with the registered or subsisting rights of the other.

The Supreme Court started its judgment, like several of those which had gone before it, by observing how far from the traditional image of a TVG we had come. Mistley Quay, the subject of this case, presented, it noted, a good example of a registered TVG which does not conform to the notion of a bucolic area of grass where local inhabitants can walk and play [1]. Turning to the central question of whether the land had been validly registered as a TVG the Court noted that the registered land lies along the quayside in Mistley port in Essex and that owner/operator of it, T W Logistics ("TWL") had been using it for the passage of port vehicles, including heavy goods vehicles, and the temporary storage of cargo on the quayside. Crucially, this activity was, throughout the 20 year period relevant to the TVG registration, concurrent with its use by local inhabitants to walk dogs, to stop and chat on the quayside, and for general recreation. In September 2008, following concerns about people falling into the water and a threat by the Health and Safety Executive of enforcement action, TWL erected a 1.8 metre high chain link metal fence along the quayside. This provoked Mr Tucker, a concerned local inhabitant to apply to the Essex County Council ("the Council") on 18 August 2010 to register a large part of the quay as a TVG pursuant to section 15(3) of the Commons Act 2006. In 2013, the Council appointed Inspector Alun Aylesbury to hold a non-statutory public inquiry. He found that the land in question satisfied the statutory criteria in that it had been used "as of right" for lawful sports and pastimes by significant numbers of local inhabitants for the preceding 20 years. The Council therefore registered the Land as a TVG and TWL challenged that registration in the High Court on a number of grounds, all of which were dismissed by Mr Justice Barling. The Court of Appeal unanimously upheld the High Court's decision and TWL appealed to the Supreme Court.

The Supreme Court unanimously dismissed TWL's appeal and upheld the TVG registration. TWL's three grounds of appeal were that: (1) land should not be registered as a TVG if that would criminalise the landowner's existing commercial activities, due to HSE legislation and 2 Victorian Statutes which imposed criminal sanctions on those who interfered with the use of TVGs; (2) on the facts of this case, TWL's commercial activities would be so criminalised after registration; and (3) the use of the Land by the local inhabitants was not "as of right" [40].

The Supreme Court considered Ground 2 first [41]. In answer to the question of whether TWL's commercial activities would be criminalised after registration, the Court first set out the rights of the public and the landowner over the land following TVG registration [44] and observed that local inhabitants have to exercise their rights over a TVG in a fair and reasonable way, so as to respect the

concurrent reasonable and established use by the landowner [48], which has become known as the principle of "give and take" [50] (see e.g. Redcar). Following registration, the public acquired the general right to use the land for any lawful sport or pastime, whether or not corresponding to the particular recreational uses to which it was put in the preceding 20 years [65] but the landowner can continue to undertake activities of the same general quality and at the same general level as before. The landowner may also undertake new and different activities provided that these do not interfere with the right of the public to use the land for lawful sports and pastimes [66]. TVG registration does not therefore criminalise the landowner continuing its pre-existing activities on the land [72]. This is because the Victorian statutes treat certain acts as public nuisances and so, in accordance with the definition of the offence of public nuisance in *R v Rimmington* [2005] UKHL 63, TWL's activities are not criminalised where those activities are "warranted by law" [80]. In this case, because TWL has the legal right after registration to carry on its existing commercial activities, those activities are "warranted by law" [81] and no criminality for ongoing commercial activity arises. Similarly, TWL's right to carry on with what it has been doing means that it does so with "lawful authority" for the purposes of other legislative provisions such as section 34 of the RTA 1988 [88] and relevant health and safety legislation. If TWL is lawfully required by the HSE to take some particular action, that too would constitute lawful authority for doing so [90]. Accordingly the Supreme Court dismissed on the appeal on Ground 2 [91]. The question raised by Ground 1, namely is registration barred if it would criminalise the landowner's continuing activities? did not fall to be answered given the Court's findings in relation to Ground 1 [92]. And as for the question raised by Ground 3, i.e. was the local inhabitants' use of the Land "as of right"? the concept of use "as of right" involves use of land by the local inhabitants in a way which would suggest to a reasonable landowner that they believed that they were exercising a public right in doing so. Since the landowner's concerns at their use do not affect the quality of that use this ground of appeal was also rejected [95].

The Supreme Court's judgment answers a key question but leaves another unanswered. It tells us that TVG registration in the minority of coexistent user cases would only place a landowner at risk of criminal sanction in the event of an intensification or alteration of the use made of the land during the 20 year qualifying period and is therefore no bar to registration. However, in such cases, there may be real logistical and evidential challenges in understanding what the nature and extent of coexistent user had been in order to be able to either defend an action by the landowner in trespass or equip the landowner with the necessary evidence to defend proceeding brought in relation to an interference with the TVG rights of local inhabitants. Whilst this particular case saw very extensive descriptions of the coexistent user and the 'give and take' which characterised the use of the registered land over the requisite 20 year period (first in Inspector Aylesbury's comprehensive report and then in Barling J's equally comprehensive judgment), not all cases will benefit from such extensive public records of use. To make matters worse registration itself is a binary act. Land is either registered as a TVG or it is not and there is no statutory requirement to record details of it on the register. Perhaps one of the effects of this judgment will be to establish a greater role for registration authorities in recording and safeguarding the respective rights of local inhabitants and land owners after the registration of TVGs where coexistent user had occurred. One way of achieving this would be for such authorities to create and publish their own records of such use. One analogy for this might be certificates of lawful use in the planning context serve to record and formalise the use of land. But a better one derives from the registers of contaminated land which under Part 2A of the Environmental Protection Act 1990 make provision for the binary recording of land assessed to be contaminated for those purposes but not for the recording of an approved and completed decontamination process or for deregistration. A practice has arisen

in that context, for the inclusion of an informative on the contamination register to let any interested party know that albeit registered contaminated, the land had been satisfactorily remediated. TVG registration authorities might likewise provide an informative which describes the necessary detail of any coexistent user. And who knows, If the Supreme Court's enthusiasm for TVG cases continues, we might see further judicial comment on this before too long.

Richard Wald QC acted for the successful TVG applicant, Ian Tucker, in the Court of the Appeal and in the Supreme Court. He led Richard Eaton, Partner and Solicitor Advocate at Birketts LLP.
the Examining Authority and the Defendant decided that consideration of cumulative impacts from Vanguard and Boreas should be deferred to any subsequent examination of the Boreas proposal.

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Richard specialises in planning, environment, public and art law, appearing in numerous leading cases including SAVE Britain's Heritage, Thames Tideway Tunnel, Chiswick Curve, *Dill v SoS* and Holborn Studios. Recent cases include housing, retail, minerals, environmental permitting, nuisance, development consent orders, and development plans. He is a case editor of the Journal of Planning and Environment Law and the author of Planning Permission, Planning Enforcement (3rd Edition pending) and Historic Environment Law and co-author of Planning Policy. He is also a member of the Bar Library, Belfast. To view full CV click here.

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