Sinners welcome

Is our planning system fit for use ..... or abuse? asks Roger Wilson

I pose the question almost in a rhetorical sense, in that which ever side of the fence one sits, the answer is probably No ... and Yes!

The Rule of Law is a trite phrase often quoted by parliamentarians and lawyers, but seldom by the public at large and rarely in relation to planning. Its meaning is simple: without laws there is anarchy; without Rule by those laws, there is anarchy. In simple terms, we have laws to give our society structure and standards of behaviour by which we can all live in harmony. In times long ago the Ten Commandments would have sufficed. Nowadays, we've added a few new ones and adapted old ones as circumstances have changed. Those laws are administered by the Police, the Courts, and others given authority by the laws, e.g. local Councils where, in the case of Planning law, they act as Local Planning Authority.

It has been an acknowledged truth that laws ignored, whether in their breaking or administration of justice, are bad laws because they do not have the respect of the public. Similarly, if there is nobody willing or able to uphold a law, the greater the chances that it will be broken. A simple example is the road speed limit. If offenders see no risk either from being caught, and even if caught, being appropriately 'encouraged not to re-offend', then drivers will simply ignore the limit and drive without restraint. Again, it is well understood by the Police that if burglars, whether in reality or even by perception, are unlikely to be apprehended, or if so, given a meaningless fine, the risks will be seen to be worth taking and crime will inevitably rise as surely as the sun does every morning.

The Police, it is said, do so only with our consent. This is another factor that has come into play more recently in the administration of the Coronavirus Rules and Regulations. Although the Rules have been widely advertised through the media, one would have thought that no one could have been unaware of them or their implications for day-to-day life. Yet, the press and social media have regularly reported transgressions, sometimes wilful, but often just by chancers who thought the rules applied not to everyone .... just everyone else!

The Prison Service regularly offers the mantra that they can only manage the prisons with the consent of the prisoners. Where prisoners outnumber prison officers by a significant factor, this has to be true.

It may seem an odd way of introducing a planning topic, but I've more recently become aware of situations where the ability and/or willingness of Councils to uphold Planning Law may be called into question. Following on from my earlier examples, it is but a short step for Councils not to enforce planning decisions (or the law); not to properly monitor planning agreements; or to set aside accepted conventions of public notice and participation (it's called democracy) either through ignorance or just for convenience. The outcome is a Local Planning Authority without respected local authority.

Roger Wilson

Edmund Burke was an 18th century Irish politician and philosopher, who somehow managed to capture in a pithy sentence, eternal truths that will always be recognised by those that hold to the Rule of Law. Among his erudite quotes:

"The only thing necessary for the triumph of evil is for good men to do nothing" is perhaps his best known, but here are some others:

"Nobody made a greater mistake than he who did nothing because he could do only a little".

"When bad men combine, the good must associate; else they will fall one by one, an unpitied sacrifice in a contemptible struggle".

"The greater the power, the more dangerous the abuse".

"Never despair, but if you do, work on in despair".

"There is no safety for honest men except by believing all possible evil of evil men".

One only has to think of Hitler and other despots who were not confronted by 'good men' to know the truth of these statements, so hold them in mind as I return to planning.

There are a growing number of developers and planning consultants bolstered by central government into believing that development, almost at any cost it seems, must be allowed irrespective of its quality or impact: "How dare the Council/Planning Inspector refuse planning permission when the Government is telling us that we need more houses/offices/works etc.?"

There is more than a hint of bullying in this sentiment, and what makes it more attractive to the developer and more unacceptable to the rest of us, is that Councils (and I'm not naming names here) are sometimes unwilling, sometimes unable, to get a grip and uphold the Rule of Law. I know there is a shortage of (good) staff, or 'resources' in management speak, but that is no excuse for avoiding the obligations of the 'public service' we pay for. There is also fear; fear of law cases against them and the cost of defeat; fear of being outwitted by cunning developers and their consultants; fear of being confronted and wrong-footed. Each Council will trot out examples of each as a 'fig leaf' to hide its willingness to succumb to the bullies.

Encouraging development should not mean allowing anything irrespective of its quality or impact, otherwise why have a Local Plan? In particular, the planning process should not be abused to achieve it.

As criminal law is to would-be burglars and muggers, for unscrupulous developers and their agents, it comes back to the risk of being rumbled, and if caught, the limited penalty they would face, if any. There are many cases of protected trees being felled to make way for development because the likely fine for such an offence is a risk worth taking in return for the benefits it brings. Maybe there is a 'loop-hole exploiting' parallel between Planning Consultants and Tax Consultants in seeking financial gain at the expense of the rest of society.

Let me give another current example, this time in Central London. In 2016 after an appeal, the Planning Inspector gave planning permission for a 166-bedroom underground hotel. Whether visitors to London would want to live like troglodytes, almost touching the Central Line, 4- and 5- levels deep below where Bloomsbury abruptly collides with the West End, did not trouble the Inspector very long. However, such was the public concern about the likely environment created above and below ground from intensification of use, air quality, traffic generation, disposal of waste and a host of other concerns, he imposed a raft of conditions and allowed a s106 Unilateral Obligation – not unexpectedly, the Council did not sign an agreement – covering hotel management, construction, servicing, streetscape improvement and other matters. By these means, he felt, the Council's and third parties' concerns would be met. One might reasonably believe, too, that these would tie the developer to these terms, but nothing could be further removed from reality.

One of the anomalies of Planning Law is that works below ground level, unless they are structural or drainage, do not require Planning Permission or even a Notice of Commencement. Only works above ground or when the use comes into operation is Planning Permission in play. Thus, the commencement of works on site was only the start of what has become an 18-month long (and counting) war of attrition between the developer, the Council, neighbours and the local resident and business communities.

Details and plans to satisfy the discharge of conditions often bore no resemblance to what the Inspector had approved; s106 'Plans' were different too; the Construction Management Plan was a long time coming after works actually started, and then only with the reluctance of a condemned man being dragged to the scaffold; the Council proved unable to see the shortcomings of the Plans and incapable or unwilling to stand up to a rampant developer and his planning agent, who by now had the wind behind them. I attended one meeting where the Planning Officer's inability to read drawings caused despair and a sharp intake of breath.

There was countless correspondence with the Council about infringements to the approved Plans and their implementation that any competent local planning authority should have addressed, but never did.

Now we come to the denouement, which even after all these events over 18 months of works on site is staggering in its impudence and nerve. The developer has constructed not 166 bedrooms, but over 200! This is not a mere oversight of the "Sorry, I couldn't count" type; the plans are so different it cannot be anything other than a wilful departure from what the Inspector approved. From a review of the below ground layouts, it might even be suggested that this was the developer's intention from the day work commenced. And the changes don't end there: entrance arrangements, servicing facilities, ventilation and air-handling plant locations (not to mention technical requirements) and fire access are all significantly different.

To put the matter into perspective, it might have been a calculated risk the developer was prepared to take from the very begin- >>>

>>> ning. After all, in commercial terms, the greater the risk, the greater the potential gain. Nevertheless no reasonably minded developer would willingly risk such a move unless he was pretty sure that the Council would not enforce the terms of the Planning Permission granted by the Inspector.

The Council has been placed in an unenviable position whereby they have inspected the site and knowingly, though if I were being charitable, perhaps unwittingly, allowed works to proceed towards an unapproved scheme. It wasn't until the divergence became evident, albeit notified by third parties, that the Council duly advised the developer of the 'potential' offence. In the Council's defence, they might say that there is no planning offence until the new use comes into operation, and that the risk is therefore with the developer. True, but what is the real risk the developer faces? Does he close off 42 rooms, or does he say that only 166 rooms are ever in use at one time? Unless the Council adopts the equivalent of the distilling industry's standard of having Revenue men on site is it ever going to be able to monitor or, even less, enforce that requirement when the location is invisible, hidden deep below ground?

The matter is now under review, but some say the developer is adopting tactics that pervert the course of planning justice, so read on.... if your heart hasn't already been broken.

The Government was encouraged by development interests to make planning more flexible. They did this by removing a tranche of cases from the planning system by allowing 'non-material' amendments, e.g. insignificant changes to windows, by a delegated process (s96A) so that developers weren't forced to reapply for planning permission simply to cover their backs should some smart solicitor raise the matter later on. There was a similar and parallel move under s73 whereby an applicant could ask for a variation to, or removal of, a condition that was either insurmountable or somehow not required anymore. Because most planning permissions refer to approved drawings in conditions, together, these two facilities enabled developers to simply substitute different drawings to cover the amendment.

However, that facility came unstuck in the Finney case[1]. Planning Permission had been granted for wind turbines with a maximum height to the tips of the rotors of 100m and this was confirmed by the written description on the application and on the drawings, which were the subject of a matching condition. The developer wished to increase the height to 125m, and rather than go through a new application (s70), he proposed an amendment to the condition, substituting a new drawing (125m) from the approved one (100m). This was refused by the Council, then allowed at appeal, taken to the High Court and then finally overturned at the Court of Appeal. The case turned (no pun intended) on whether the Inspector had the power to amend the condition that would be at odds with the original development description that included the height of the turbine blade. The final judgment was that it was incompatible and s73 could not be used in those circumstances.

On reflection, it might appear obvious that such an amendment was sufficiently significant to make it inappropriate for a s73 application in any event. However, the plot thickens, because a number of councils are using s73 to allow minor, or not so minor, material amendments, which goes beyond its intended purpose. It

"The greater the power (of the developer) the more dangerous the abuse"

brings into question a judgement on what is 'minor' and what is 'material'. One legal commentator suggests that s73 should not be used where there is deviation from the scope and nature of the original development. Indeed, while the Act is silent on the matter, any reasonable reading of the section would not expect it to apply except in the most insignificant cases.

In the case of the Troglodyte Hotel, the Finney case has been cited as the modus operandi for increasing the number of 'cells' by 25 per cent and the occupation by 36 per cent. To make this device work, the developer's planning agent has now applied under s96A to change the wording of the planning permission, erasing the 166 rooms and thus leaving the hotel use unrestrained. Because the planning permission refers to a package of drawings describing the 166 rooms, he then intends to apply under s73 for an amended condition with a new layout for 208 rooms. To the average person riding by in a Boris bus, such an increase cannot by any stretch of the imagination, be regarded as minor, let alone non-material. This disingenuous device leaves me, and many others in this profession, cold and disillusioned. To rub salt into the wound, there appears to have been at least tacit approval by the Planning Officer for this tactic, made even worse, if that were possible, by the expectation of a delegated decision, since the normal rules for notices to third parties, public consultation and committee approval do not normally apply to s96A applications.

Consider this: If planning permission were granted for a tower block of x storeys next to a Central London conservation area, could the number of storeys be omitted from the description through a s96A application and then drawings of a tower of x+n storeys substituted in the condition without further ado? I think not, but then why should intensification of use above ground be considered any differently to that below? Sadly, Burke never expressed a view on 'Out of sight, out of mind'.

Since this article is not a textbook, I'll not go into the depths of legal interpretations. Suffice it to say that plain common sense (which surely is what planning is all about) suggests that this

degree of change can only be dealt with by a full application for retrospective planning permission under a s70 application and the developer must then take his chances..

To paraphrase Edmund Burke, "The only thing necessary for the triumph of bad planning and unscrupulous developers is for Councils to do nothing". Similarly....

"No Council made a greater mistake than one who did nothing because they could do only a little."

"When bullying developers and their agents combine, Councils and public must associate; else they will fall one by one, an unpitied sacrifice in a contemptible struggle".

"The greater the power (of the developer,) the more dangerous the abuse". To Councils and the public, "Never despair, but if you do, work on in despair".

"There is no safety for honest men except by believing all possible deviousness of devious men". ■

LEFT:
Image of Burke
EdmundBurke 1771

1 Finney v Welsh Ministers [2019] EWCA Civ 186

Epilogue

It has been a long story. The first application to change the use of an existing underground space into London's first entirely subterranean hotel was made eight years ago in 2012. That was followed by three more that were either withdrawn or refused.

An appeal was made against the last refusal, the Local Planning Authority's decision was overturned and planning permission granted by the Inspector in 2016.

Construction started in October 2018. Pre-commencement conditions and obligations had not been discharged. The Construction Management Plan was eventually approved in March 2019. Since that time, there have been numerous infringements of that Plan that have impacted on local residents and businesses.

Though long suspected, interested parties were informed that a larger hotel was being built than what had been approved at a site meeting in January 2020. A non-material amendment to the planning permission for change of use, namely to alter the development description to omit the number of hotel rooms was registered on 4 April 2020.

The application is the first part of a two-step process by the applicant that proposes significant changes to the original approved development. It will be followed by a subsequent retrospective application under s73 seeking to legitimise a 25% increase in the number of hotel rooms and a 36 per cent increase in guest occupancy, with increased impacts and other significant changes at street level, as a minor material amendment. The target date for completion is July 2020.

This is a story of a development that is seeking to establish new thresholds, new uses, new precedents and new procedures that have never been tried, or never been pushed to such extremes before. The human race is pretty good at finding clever ways to push things to extremes as the global economy and the intensification of development in cities around the world demonstrates. However, sometimes things are pushed too far, they start to harm the things you value, cherish and safeguard and eventually fail catastrophically. The current virus pandemic is a case in point as is climate change and the failed 60s experiment with high-rise social housing.

It also has potential importance as a precedent for circumventing proper process when making changes to an approved development, and for local planning authorities' view of what constitutes 'non-materiality' in a planning context. It requires close scrutiny.

The story so far

- 'Basement hotel 'pods' – a density too far for London?' - Planning in London, Issue 96, January 2016
- 'Conditioning or screening - the jury's still out' - Planning in London, Issue 99, October 2016
- 'Deep Storeys: London's first underground hotel' - Planning in London, Issue 100, January 2017
- 'Sinners welcome: Is our planning system fit for abuse?' – Planning in London, Issue 114, July 2020

Watch this space for more...

Roger Wilson is an Architect with over 35-years experience in private practice, the Planning Inspectorate and the Scottish Government's Planning Appeals Service. He is a frequent visitor to Bloomsbury and has advised the Bloomsbury Association on these emerging proposals since 2012.