Case Name: *Caldwell & Anor v Secretary of State for Levelling-Up, Housing and Communities & Anor* [2023] EWHC 2053 (Admin) (07 August 2023)

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Commentary: This was a successful challenge to a dismissed appeal against the issue by Buckinghamshire Council (the "**Council**") of an enforcement notice requiring the demolition of an unauthorised dwelling. Construction of the dwelling, without planning permission, began in 2013 and was substantially completed in April 2014.

In February 2021 the Council issued an enforcement notice stating that there had been an unauthorised material change of use of the land from agricultural to residential use. The enforcement notice required the claimant to demolish the constructed dwelling in accordance with section 173(4)(a) of the Town and Country Planning Act 1990 (as amended) (the "**1990 Act**") which empowers local planning authorities to specify the actions that are required to be taken in order to achieve the purpose of restoring land that has been subject to a breach of planning control to its condition before the breach took place.

The claimant appealed to the Secretary of State on the basis that the dwelling had been substantially completed more than four years before the enforcement notice was issued, so it benefited from section 171B(1) of the 1990 Act which provides that "where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed." In contrast, unauthorised material changes of use are one of the "other breach[es] of planning control" in respect of which "no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach" pursuant to section 171B(3).

The Secretary of State's inspector dismissed the claimant's appeal and upheld the Council's enforcement notice. The key issue before the court was whether the inspector erred in law in relation to the scope of the power to require the removal of operational development pursuant to section 173(4)(a) of the 1990 Act. The previous case of Murfitt v Secretary of State for the Environment [1980] 40 P&CR 254 established that the power to require restoration can include the removal of operational development. However, this caselaw principle cannot override the statutory provision at section 171B(1) which gives operational development, including the erection of dwelling houses, immunity from enforcement action four years after substantial completion.

In previous cases where the Murfitt principle has been applied, the operational works have been secondary, ancillary or "associated with" the change of use; they have not been fundamental to or causative of the change of use. The court noted that both the

1990 Act and the caselaw point to a limitation on the section 173(4)(a) power where the operational development is itself the source of or fundamental to the change of use. Whether that limitation is reached is a matter of fact and degree. However, the inspector in this case had erred in not appreciating that there was such a limitation.

Concluding that the Council's attempt to achieve the removal of the claimant's dwelling by enforcing against the material change of use that had occurred (because the operational development itself could no longer be directly enforced against) was contrary to the statutory scheme, the court quashed the inspector's decision and remitted the matter for redetermination.

Case summary prepared by Erin Gardner and Safiyah Islam