

APPENDIX 2
OF
PROOF OF EVIDENCE
OF
JEMIMAH SMITH BSc
FOR
THE ENVIRONMENT AGENCY

REGARDING AN APPEAL BY NICK BROOKES
AGAINST THE ISSUE OF AN ENFORCEMENT NOTICE UNDER REGULATION 36 OF THE
ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) REGULATIONS 2016

PINS APPEAL REFERENCE NUMBER: APP/EPR/684 (ENV/3353252)

Submissions on estoppel on behalf of the Environment Agency

1. These brief legal submissions are prepared to accompany the Environment Agency's evidence in the above appeal and set out the Environment Agency's position on the nature of estoppel and its extremely limited application in the enforcement of environmental regulation.
2. The most important case law authorities cited are included as core documents and reference is made to them in the form **CD/#**, where # is the core document number.
3. The Appellant relies upon estoppel by conduct¹ (see e.g. para. 80 of its Statement of Case). This may be regarded as a form of estoppel by representation – which usually arises in contract law disputes between private parties. It is settled that a claim of estoppel can only succeed if the representation relied upon is clear and unequivocal in its meaning.² Where established, such an estoppel may operate to prevent one party from disputing the truth of an understanding of fact (or of fact and law).
4. However, in public law – and especially planning and environmental law, where the interests of third parties and the public are at stake – there is no role for the private law concept of estoppel.
5. This matter was authoritatively settled by the House of Lords in R (Reprotech (Pebsham) Ltd) v East Sussex CC [2002] UKHL 8; [2003] 1 WLR 348 (**CD/10.2**). There the respondent

¹ Sometimes referred to as estoppel by convention.

² See e.g. Low v Bouverie [1891] 3 Ch 82, 103-104, 106 and 113.

company sought to rely upon representations from a local authority officer and the resolution of a local authority sub-committee that generating electricity at a waste treatment plant would not be separately regulated in planning law.³ Lord Hoffmann held the authority's conduct could not reasonably be taken as a binding representation (para. 32). In addition, he referred to *"the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty"* (para. 35) and stated (at para. 33):

"... I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in Newbury District Council v Secretary of State for the Environment [1981] AC 578, 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone"."

6. The principle has been applied in subsequent cases, including on enforcement: see e.g. Wandsworth LBC v SSTLGR [2003] EWHC 622 (Admin); [2004] 1 P & CR 32 (**CB/10.4**) per Sullivan J (as he was) at para. 21: *"the House of Lords could not have made it more plain that estoppel no longer has any place in planning law."*
7. Nor does the alternative concept of legitimate expectation assist. Legitimate expectation must also be founded upon a clear and unambiguous undertaking that has been relied upon.⁴ It would be exceptional for the conduct of an authority to give rise to a legitimate expectation that undermines or otherwise goes against a statutory code relating to planning or environmental matters: see Henry Boot Homes Ltd v Bassetlaw DC [2002] EWCA Civ 983; [2003] 1 P & CR 23 (**CD/10.3**) at para. 46.

³ i.e. as it did not amount to a material change of use requiring planning permission.

⁴ See e.g. Re Finucane's Application for Judicial Review [2019] UKSC 7; [2019] 3 All ER 191, para. 64.

8. The question of the scope of the Environmental Permit in this case is not answered by reference to the concepts of estoppel and/or legitimate expectation. Those concepts are irrelevant to the determination of the issues here: how the Environmental Permit should be interpreted (which is a question of law) and the significance of that interpretation for the adequacy of the Appellant's Environmental Management System (a question of fact).

Ned Westaway

FTB Chambers

14 October 2025