



Appeal Decision

Site visit made on 13 July 2020

by **P H Willows BA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 1 September 2020

Appeal Ref: APP/P3040/C/19/3237156

Land at East Midlands Helicopters, adjacent to Oaklands, Loughborough Road, Costock, Leicestershire LE12 6XB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Nigel Burton against an enforcement notice issued by Rushcliffe Borough Council.
 - The enforcement notice was issued on 12 August 2019.
 - The breach of planning control alleged in the notice is failure to comply with a condition of planning permission Ref 98/00075/FUL, granted on 3 March 2000.
 - The development to which the permission relates is the use of premises for helicopter operations including siting of two portacabins. The condition in question is No2, which states that: *The helicopter business shall operate within the hours of 7.00am to 9.00pm each day save in an emergency.* The notice alleges that the condition has not been complied with because helicopter flights to and from the land regularly occur outside the permitted hours for operating the helicopter business.
 - The requirements of the notice are: *Cease operating the helicopter business between the hours of 9pm and midnight and between midnight and 7am each day, save in an emergency.*
 - The period for compliance with the requirements is 28 days.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) and (d) of the Town and Country Planning Act 1990 as amended.
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This decision is issued in accordance with Section 56(2) of the Planning and Compulsory Purchase Act 2004 (as amended) and supersedes the decision issued on 3 August 2020.

Decision

1. It is directed that the enforcement notice be corrected by deleting the word 'Rempstone' from section 2 (The land affected) and section 3 (the breach of planning control alleged) and replacing it with the word 'Costock' and by changing the postcode in sections 2 and 3 to LE12 6XB. Subject to these corrections, the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary matters

2. The enforcement notice gives the postcode for the site as LE12 6RQ and refers to the village of Rempstone. However, in the appeal form the appellant gives the postcode as LE12 6XB and refers to Costock rather than Rempstone. The Council does the same in its appeal questionnaire and this is also consistent

with the addresses at neighbouring houses. Thus, it appears that the address given in the notice is incorrect. However, the site is clearly identified by the plan attached to the notice and the different address does not appear to have caused confusion to any party. Accordingly, I am able to correct the notice without causing injustice.

3. Subsequent to the issuing of the enforcement notice, the Council adopted the *Rushcliffe Local Plan Part 2: Land and Planning Policies* (LP2) in October 2019. The Council no longer relies on the *Rushcliffe Non-Statutory Replacement Local Plan* referred to in the notice.

The appeal on ground (d)

4. An appeal on ground (d) is brought on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters stated in the notice. In this case the appellant argues that Condition 2 has been continuously breached for more than 10 years. Section 171B(3) of the Act states that, in the case of any other breach of planning control (which would include this case), no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. A key question in this case is whether, on the balance of probability, the breach of the condition has been continuous.
5. There is a variety of evidence before me relating to non-compliance with the condition. However, the most detailed evidence is the flight logs provided by the appellant. The copies of the logs provided are not all legible, but the Council has provided a summary table. This shows details of flights from 2008 up until 2019. While there is no dispute that the flights recorded in the logs took place, the appellant states that the records are incomplete and that there were many more breaches of the condition in the early years of the business than the logs suggest (the appellant estimates 2-3 breaches per month). However, there is no detailed evidence to back up this very generalised assertion and I give it little weight.
6. The flight logs show that the condition was breached each and every year between 2008 and 2019 (this assumes that none of the flights outside of the permitted hours were for emergencies, but I have no evidence to show that they were). The appellant also says that there has never been any intention of complying with the condition. Consequently, it is argued, the breaches that have occurred over the years should be regarded as a single continuous breach over that period rather than a series of individual breaches. The Council disputes that view.
7. To help decide that matter, I have been referred to court decisions¹ by both parties. From these it is clear that the question of whether a series of incidents amount to a number of individual breaches of a condition or a single, continuous breach is a matter of fact and degree, highly dependent on the details of the particular case. The number of specific breaches is an important consideration, but so are other matters, such as timing and intent.
8. In this case, there is no dispute that the first breach of the condition took place more than 10 years before the Council served the enforcement notice. Yet the

¹ *Nicholson v SSE & Maldon DC* [1998] JPL 553; *North Devon DC v FSS & Stokes* [2004] JPL 1396; *Basingstoke and Deane BC v SSCLG & Stockdale* [2009] EWHC 1012 (Admin)

breaches in the early years of the business were few and far between and I am not persuaded that they amounted to a single, continuous breach. It would have been theoretically possible to breach the condition every day, but the flight logs indicate that the number of breaches per year were only 5 in 2009 and did not reach double figures until 2011, when there were 12 breaches in total. Moreover, the breaches took place irregularly, with significant periods of compliance in between. Indeed, there is no record of any breach of the condition during a 6 month period between November 2010 and April 2011. When the condition was breached again in May 2011, that was a new breach in my view and the 10 year period started again. Accordingly, the 2019 enforcement notice was not out of time.

9. Of course, it is not necessary to have a breach every day for the full 10 years to show continuity. Moreover, the extent of non-compliance in recent years suggests that the appellant has not intended to comply with the condition during that more recent period. However, the 6 months referred to above is a significant period of compliance and the intermittent pattern of the breaches of the condition in earlier years does not demonstrate anything about intent, just occasional failure to comply with the condition. This distinguishes this case from the Basingstoke case to which the appellant refers.
10. I cannot rule out the possibility of other breaches, not recorded in the flight records, and note the appellant's suggestion that the Council does not have evidence to counter his claim of such further breaches. However, the burden of proof falls on the appellant. Even if there were further breaches, the evidence before me, including the various references made by local residents to breaches of the condition, does not show, on the balance of probability, that the condition was breached to such an extent that my conclusion above is undermined. Nor does the fact that the Council did not pursue some of the earlier breaches of the condition alter my view that there has not been a single continuous breach for a 10 year period.
11. For these reasons, the appeal on ground (d) fails.

The appeal on ground (a)

The appellant's proposal

12. The appellant does not propose that flying hours should be entirely unrestricted. Instead, the following condition is proposed to replace the disputed Condition 2:

No helicopters shall operate from the site (including take offs, landings, hovering or the running of engines on the ground) between the hours of 7.00 am and 9.00 pm Monday to Sunday (inclusive) save that up to 2 helicopters may take off and up to 4 helicopters may land at the site between the hours of 9.00 pm and 11.30 pm in any one week Monday to Sunday (inclusive) save that this restriction shall not apply to any helicopter flights in the case of any emergency.

Main issue

13. The main issue is whether the disputed condition is necessary in order to prevent harm to the living conditions of nearby residents and whether the alternative condition proposed by the appellant could adequately address any such harm.

Reasons

14. The appellant's helicopter business has been on this site for many years, and planning permission was granted retrospectively in 2000. The helicopters carry passengers to and from the site, often as a stage in a longer journey.
15. I have no technical noise assessment from either party and must therefore rely on my own judgement to decide the case. Clearly, helicopters can be very noisy machines, with the potential to cause a great deal of disturbance, depending on the circumstances in which they are used.
16. In this instance, although the site is in a rural area, there are a number of dwellings close by. The nearest of these is 'The Oaklands', which is directly next to the site, with other dwellings on the opposite side of Loughborough Road, and a short terrace of properties just to the north of the appeal site. I consider it likely that the noise from helicopters operating from the site will be very intrusive at these nearby dwellings. Any screening from noise due to the buildings and other features of the site will only apply when the helicopters are on or very close to the ground and I have no technical evidence to quantify even this. For the same reasons, the construction of a further earth bund at the site would not address my concerns. In my judgement, the level and nature of the noise is likely to be highly intrusive at late hours, with the potential to cause loss of sleep. While a single event (such as a landing) may be brief, it may be enough to wake someone at a nearby property, particularly if windows are open, perhaps during warm weather.
17. While I understand that the homes close to the appeal site also lie under the flightpath of East Midlands Airport, I do not have any noise assessment to establish the effect of this. In my judgement, the proximity of the appeal site to some properties, together with the distinctive noise produced by helicopters, means that noise arising from the appellant's operation is likely to be distinctive and intrusive, even against the background of other aircraft noise. My view on this is reinforced by the comments of a number of local residents, which suggest that the helicopters have been a source of significant disturbance due to noise in recent years. The fact that not all nearby residents have complained does not undermine the views of those who have done so.
18. I understand that the operational procedures at the heliport require the helicopters to use routes away from residential properties as far as possible, but that does not alter my view that noise at late hours will be at harmful levels, given the proximity of the site to some dwellings. The appellant suggests that the flight path of the helicopters could be altered to take the helicopters away from residential properties and proposes to fell some trees at the site to facilitate this. This could be secured with a planning condition. However, there is no technical evidence to quantify the extent of any benefits arising from this. In any event, since the position of the helipad, close to the dwellings I have identified, would remain unchanged, my concerns about noise would not be adequately addressed. Thus, it is important that the hours of operation of helicopters at the site are controlled.
19. The next question is whether the particular hours specified in Condition 2 are appropriate. In my view they are. In this rural location people might reasonably expect a degree of peace and quiet by 9pm. Indeed, some people, young children in particular, may be trying to sleep at that time. Neither party

suggests that the 7am start time should change. Thus, I do not consider it desirable to change the operating hours.

20. The appellant's suggested condition would allow a limited number of flights between 9pm and 11.30pm each week. However, I have already concluded that flying after 9pm is likely to cause excessive disturbance and the proposed condition would leave open the possibility of a movement at late hours most days of the week.
21. For these reasons I conclude that the appellant's suggested condition would not give sufficient protection to local residents against noise arising from helicopters operating from the site. This gives rise to conflict with Policy 1 of LP2, which seeks to ensure that developments do not cause significant adverse effects to the amenity of the surrounding area and residential properties. The Council also refers to Policy 10 of the *Rushcliffe Local Plan Part 1: Core Strategy* (LP1). However, this is aimed at design and enhancing local identity and appears to me to be more relevant to new built development.
22. Policy 1 of LP1 sets out a presumption in favour of sustainable development, broadly reflecting the National Planning Policy Framework (the Framework). While the appellant suggests that the Council has not followed the positive approach outlined in the policy, nothing in the policy or in the Framework persuades me that permission should be given for the appellant's proposal, given the harm and policy conflict I have found.
23. LP1 Policy 5 encourages economic development of an appropriate scale to diversify and support the rural economy and LP2 Policy 22 gives similar support. However, there is nothing in either policy to suggest that this should be done at the expense of maintaining satisfactory levels of amenity at nearby residential properties.
24. Overall, given the direct and relevant conflict with LP2 Policy 1, I find that there is conflict with the development plan as a whole.

Other considerations

25. The appellant's company has operated from this site for many years. It employs a number of people and no doubt makes a valuable contribution to the local economy. The appellant advises, and I have no reason to doubt, that adherence to the existing condition would have a severe impact on the business. I am mindful of the uncertainties that arise due to matters outside the appellant's control, such as poor weather or delays to connecting flights. Moreover, the appellant has described the devastating impact the Covid-19 pandemic has had on the business, in common with most of the aviation sector. Indeed, the appellant suggests that the extra movements a revised condition would allow is essential to the survival of the business. This important consideration weighs in favour of the appellant's proposed condition. Local and national policies both seek to encourage businesses and enterprise, including in rural areas.
26. The appellant suggests that other land elsewhere could be used for late landings for 28 days each year under permitted development provisions if the appeal fails. However, no details of the land have been provided and I cannot tell from the appellant's comments whether such an outcome is likely or the

harm that would arise from it if it did occur. Accordingly, I give this consideration little weight.

27. The Council has suggested conditions to address various matters relating to the operation of the site, but these would not overcome my concerns.

Conclusion

28. The jobs the company supports and the contribution it makes to the local economy are important considerations, particularly given the current economic challenges arising from the Covid-19 pandemic. However, the proximity of the site to a number of dwellings is such that flying hours need to be strictly controlled. In my view the existing condition provides an appropriate balance and the harm that would arise from applying instead the condition suggested by the appellant is not justified.
29. I have considered whether the condition should be modified so as to control only the hours of operation of the helicopters rather than of the business as a whole. However, while the helicopters appear to be much the greatest source of intrusive noise, I am mindful that the business lies directly next to one dwelling (The Oaklands) and car movements associated with it could cause disturbance if the hours of operation were uncontrolled. I have no specific evidence to show that the company has a need to carry out any activity other than flying at late hours. Consequently, I conclude on the evidence before me that changing the condition in this way would not be justified.
30. For these reasons I conclude that the appeal on ground (a) should not succeed. I shall uphold the enforcement notice with corrections and refuse to grant planning permission on the deemed application.

Peter Willows

INSPECTOR