

Appeal Decision

Site Inspection on 12 September 2016

by Graham Self MA MSc FRTPI

Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 20 September 2016

Appeal Reference: APP/Y11110/C/16/3146595

Site at: East Yard, Ide Lane, Pocombe Bridge, Exeter, Devon EX2 9SW

- The appeal is made by Mr Tony Creed under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by Exeter City Council Council.
- The council's reference is ENF/15/0004.
- The notice is dated 10 February 2016.
- The breach of planning control alleged in the notice is:
 - "A material change of use of the Land without planning permission, namely:-
 - The change of use of the Land from agricultural to a mixed use of agriculture and domestic.
 - It appears to the council that the above breach of planning control has occurred within the last ten years."
- The requirements of the notice are:
 1. Cease the use of the Land for domestic purposes.
 2. Permanently remove the static caravan with any mobile caravan(s)
 3. Permanently remove all garden ornaments, the polythene tunnel together with any other domestic paraphernalia.
- The period for compliance is six months.
- The appeal was made on ground (a) as set out in Section 174(2) of the 1990 Act.

Summary of Decision: The enforcement notice is quashed. The whole decision should be read for a proper understanding of the reasons.

Legal and Procedural Matters

1. I think it is necessary in this case for me to explain here some basic points of planning law. There are two main types of "development" as defined in the 1990 Act. One is carrying out what is known as "operational development" such as constructing buildings. The other is making a material change of use of any buildings or other land. As is apparent from the details summarised above, the enforcement notice is a "use" notice - it alleges that an unauthorised material change of use of the land has occurred.
2. Although the appeal purported to be against this enforcement notice, the documents which were submitted by the appellant's agent to lodge the appeal (the standard form and the supporting statement) refer to the erection of a building. The appeal statement quotes the requirements of an enforcement

notice which are completely different from the requirements of the notice subject to this appeal. The reasons and arguments put forward do not make out any case relating to the change of use of the appeal site as alleged in the enforcement notice.

3. The City Council wrote to the Planning Inspectorate in March 2016, pointing out this discrepancy and suggesting that the appeal as submitted was not valid. The council also mentioned that another enforcement notice, which was apparently issued by the council at the same time as the "use" notice and was directed at the operational development of constructing a building, had not been appealed against. The Planning Inspectorate sent the council's email to the appellant's agent and invited comments. He replied stating:

"The appeal was clear, the notice we are appealing against attached is for Enforcement Notice - Material Change of Use. I believe the grounds for appeal is *[sic]* also clear and relate to this notice. If further information in support of the application is required please advise. Not sure of the point she is making. If there are additional grounds needed or information regarding the enforcement notice, please advise and information will be provided."

4. As far as I can tell, the appellant's agent has completely misunderstood the appeal process. The appellant (through his agent) has appealed against an enforcement notice but without submitting any reasons or argument to support the grounds of appeal. The matter has been drawn to the appellant's attention (again, through his agent), so he has had an opportunity to rectify the situation, but has not done so - instead he has merely confirmed that the appeal was against the "use" notice, without making any attempt to submit a case relating to this notice. It is not for the Planning Inspectorate to advise appellants what grounds of appeal they should plead or how to make their case.
5. The council have - quite understandably - stated that because the material submitted by the appellant's agent makes no reference to the change of use enforcement notice, they are unable to comment on the grounds of appeal.
6. In these circumstances the normal procedure would be for the appeal to be summarily dismissed, since although the appeal may have been technically valid when it was made, no facts were submitted in support of the appeal and there is simply no case for me to consider.¹ As for the "operations" enforcement notice directed at the building, it came into effect months ago and it is now far too late to appeal against it. Moreover, since the period for compliance with the operations notice is about to expire or may have already expired,² the building in question will be not merely unauthorised but also illegal, and presumably liable to be the subject of prosecution proceedings.
7. However, there are further considerations. The enforcement notice issued by the council is seriously flawed. The notice alleges that the use of the appeal site (the land edged red on the plan attached to the notice) changed from agriculture to a mixed use for "agriculture and domestic". This description comes nowhere near correctly describing the use of the site which was clearly going on when the enforcement notice was issued, and was being continued at the time of my

¹ Under Section 176(3) of the 1990 Act, an appeal against an enforcement notice may be summarily dismissed if grounds of appeal and other necessary information are not supplied within the appropriate time limit. This provision applies here because none of the written material submitted on the appellant's behalf related to the enforcement notice being appealed against and the time limit expired long ago.

² I do not know when this decision will be issued, but on the basis that the "operations" notice took effect at the same time as the "use" notice and allowed a six-month compliance period, it is likely that this period will have expired by the time this decision is issued.

inspection. For a start, the term "domestic" is vague and really means "residential". Any so-called "agriculture" also appears to have been so minimal as to be more appropriately ignored. I saw a few tomato plants in a small polythene greenhouse but this appears to be ancillary or incidental to residential use, and there is no evidence of any substantive agricultural use being carried on within the site at the relevant time. But those are relatively minor points.

8. More importantly, the site evidently was and is in mixed use which included, as major components, industrial and commercial storage uses. A block of single-storey buildings divided into separate units rather like large lock-up garages occupies the northern and western parts of the site. Most of the units were locked at the time of my inspection and I was told that no key was available (despite the fact that the inspection had been arranged with ample time for the appellant and his agent to have keys to hand so that a full inspection of the site could be carried out). Two of the units were open and I saw that they were fitted with workshop equipment and tools, and appeared to be used for vehicle repair or restoration.
9. Other available evidence, including information from a planning contravention notice, indicates that when the enforcement notice was issued the other units were used mostly for commercial storage. That may still be so, possibly involving vehicle storage, although there may also be some industrial use involving vehicle repair or restoration in these units as well as in the ones which I could inspect.
10. Other components of the site's mixed use include: use as the base for the operation of a vehicle recovery business (this component of the overall use being indicated by the presence of a breakdown recovery vehicle and related items)³; the stationing of a caravan which may or may not have been used as a dwelling at the time the enforcement notice was issued (the evidence on this aspect is unclear - it is possible that the caravan is now used as daytime accommodation and toilet facilities in connection with other activities on the site); and a building which seems to be in mixed residential and other use. This building appears to be occupied as a dwelling and partly as an office in connection with the breakdown recovery business, and it also apparently provides toilet facilities for some occupiers of the industrial or storage units.
11. The appeal site is a single "planning unit" where all the activities - residential, breakdown recovery, vehicle repairs, storage and so on - are intermingled. They share the access, circulation and parking areas; and as noted above, the building and caravan are partly used for purposes linked with the activities elsewhere on the site. This is a classic case of a mixed use with overlapping, intermingled components.
12. A certificate of lawfulness covering storage use was evidently issued in 2007 for a parcel of land in the general location of the appeal site. The land subject to the certificate is not the same as the appeal site, and in any case the certificate did not cover the present mixed use. Even if the site had been the same, the appellant's reference (in the appeal statement) to "permitted use of the site as storage and light industrial" is incorrect. The workshop equipment and tools which I saw - even without being able to inspect all the units - were indicative of a use well beyond mere storage; and the appellant's statement itself refers to the existence of "light industrial space". It seems to me from what I saw, and from the appellant's own evidence (submitted through his agent) that Mr Creed gave inaccurate information in his response to a planning contravention notice in June 2016.

³ The appeal statement also mentions that Mr Creed runs a vehicle breakdown service from the site.

13. The council do not seem to have realised that when issuing an enforcement notice directed at the use of a site in mixed use, all the components of the mixture have to be included in the allegation, irrespective of whether some of them considered individually might have been authorised, immune or otherwise lawful. This is a long-established principle - an explanation of it was set out more than 19 years ago in the old Circular 10/97 and still holds good.⁴ Moreover, a component of a mixed use which might at one time have been "immune" or lawful can lose that status if other uses come on to the site and cause a materially change in the overall mixed use.⁵
14. I have powers under Section 176 of the 1990 Act to amend the enforcement notice, and I have considered whether I could correct the allegation so that it properly reflected the mixed use of the site. But that is not feasible, for the reasons explained in the next paragraph. To understand these reasons, it is necessary to note carefully the difference between the *allegation* and the *requirements* of an enforcement notice.
15. If I were to correct the allegation so that it properly described the mixed use of the land, and then upheld the enforcement notice with the requirements covering the same activities as the council (possibly with a minor variation of "domestic" to "residential"), the effect - once the notice had been complied with - would be to grant unconditional planning permission for all the activities or components of the mixed use included in the corrected allegation but not included in the requirements. The activities and components thereby permitted would include the industrial uses such as vehicle repairs and the operation of the breakdown business. This is because of the provisions of Section 173(11) of the 1990 Act.⁶ I could not overcome this problem by including all these other components in the requirements of the notice, because that would make the notice more onerous than it was originally, thereby creating possible grounds for the appellant to claim injustice.
16. I add in passing (as a matter which does not directly affect the validity of this enforcement notice) that in one corner of the site a substantial building has been erected, apparently quite recently after the enforcement notice was issued. Part of this building is within the red-edged area denoting the boundary of the appeal site, and part is beyond the boundary. There were several vehicles inside this building at the time of my inspection.
17. I reach the following conclusions. The appellant and his agent have made such a mess of the appeal that I would be entitled to dismiss it summarily, without considering it in any detail, since no relevant facts or arguments have been put forward to support the appeal. However, the allegation in the enforcement notice as issued by the council is so defective, and as a result the notice is so seriously faulty, that I cannot see how I could properly uphold it. In summary, both sides

⁴ This circular was published in 1997 and stated (in paragraph 2.10): "Where the land is in mixed use, it is important that the notice should allege a change of use to that mixed use, specifying all the component elements in the notice's allegation. The deemed application for planning permission under Section 177(5)....should properly relate to the mixed use in its entirety, not just to those elements of the use which the LPA may have identified as being in breach of planning control and which are covered by the notice's requirements." Although this circular has been superseded, the advice just quoted and the reasons for it still apply.

⁵ A court judgment relevant to this point is the case of *Beach v SSETR and Runnymede BC* [2001].

⁶ Section 173(11) provides that: "Where an enforcement notice in respect of any breach of planning control could have required....any activity to cease, but does not do so, and all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of Section 73A in respect of development consisting of....the carrying out of the activities". Planning permissions arising from Section 173(11) are unconditional.

in this case have created a situation which is best described (here I have to adapt modern English usage) as omniflawed.

18. I have considered the possibility of writing to the parties involved in this case drawing attention to these issues and inviting comments; but I have decided against doing so, as I think it would merely have delayed the inevitable. Having regard to all the points explained above, I have decided to quash the enforcement notice, so that all those involved can start again on a proper footing. In order to quash the notice it is necessary for me to allow the appeal, but the appellant should note that this is being done only for the legal reasons I have explained, and does not mean that any development at the site is being authorised.

Formal Decision

19. I allow the appeal for legal reasons and direct that the enforcement notice be quashed.

G F Self

Inspector