

## Appeal Decisions

Inquiry held on 2 August 2016 and 14 September 2016

Site visit made on 3 August 2016

**by P N Jarratt BA DipTP MRTPI**

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

**Decision date: 23 September 2016**

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**Appeal A: APP/L1765/C/15/3140487**

**Appeal B: APP/L1765/C/15/3140488**

**Boarhunt Garage Ltd, Southwick Road, North Boarhunt, PO17 6JW**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
  - The appeals are made by Mr Jason Chambers (Appeal A) and Mrs Debbie Chambers (Appeal B) against an enforcement notice issued by Winchester City Council.
  - The enforcement notice, numbered 15/00059/WKS, was issued on 12 November 2015.
  - The breach of planning control as alleged in the notice is the material change of use of the Land from a mixed use comprising (a) petrol filling station and occasional car sales to include ancillary office and storage (b) retail with ancillary office and storage and (c) first floor single dwelling house (as described in a Certificate of Lawful Use issued on 9 September 2015) to a mixed use comprising:
    - i) general industry involving the assembly and supply of motorway lighting equipment,
    - ii) storage and distribution of plant and equipment, including the parking/storage of cranes and other heavy commercial vehicles, used in connection with the above industrial use,
    - iii) storage of bricks, and
    - iv) the siting of shipping containers used for storage of equipment used in connection with the above industrial use.
  - The requirements of the notice are;
    - 1 Cease the use of the Land for general industry and storage and distribution and the siting of shipping containers.
    - 2 Remove the shipping containers from the Land.
    - 3 Remove from the Land all plant, equipment and vehicles used in connection with the unauthorised uses referred to in paragraph 3 of the Notice.
  - The period for compliance with the requirements is 3 months.
  - Appeal A is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the 1990 Act.
  - Appeal B is proceeding on the grounds set out in section 174(2) (b), (c), (f) and (g) of the 1990 Act.
  - **Summary of Decisions: Appeals dismissed, planning permission refused and notice upheld**
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### Preliminary matters

1. An application for costs was made by the Council against the appellants. This application is the subject of a separate Decision.
  2. All oral evidence to the inquiry was given on oath.
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3. A Statement of Common Ground (SoCG) was submitted at the inquiry (Document 1).
4. Although originally pleading ground (d), this was withdrawn prior to the inquiry. However at the inquiry ground (d) was re-introduced and the appellants submitted a bundle of new evidence at the inquiry (Document 2).
5. The appeal on ground (g) was withdrawn during the inquiry.
6. The allegation refers to a change of use comprising four elements as listed as (i) – (iv) in the notice. Item (i) refers to “general industry involving the assembly and supply of motorway lighting equipment” and (ii) refers to “storage and distribution of plant and equipment, including the parking/storage of cranes and other heavy commercial vehicles, used in connection with the above industrial use”. The description of this part of the allegation is unnecessarily detailed and the appellant states there have not been cranes on the site but hoists/cherry pickers. Whilst this may be a semantic point, this could be avoided by simplifying the allegation. Additionally, the allegation fails to have regard to uses within the existing building on the land subject to the notice. Accordingly, a more accurate description would be achieved by deleting (i) – (iv) in the allegation and replacing it with “the use of the land as a highway maintenance contractor’s yard for plant, vehicles and equipment including the siting of shipping containers for storage purposes; for the storage of bricks; for a B1 office use and for residential accommodation.”
7. With an amendment to the allegation, step (1) of the requirements of the notice would also need to be corrected to “Cease the use of the land as a highway maintenance contractor’s yard for plant, vehicles and equipment including the siting of shipping containers for storage purposes.” Steps 2 and 3 are satisfactorily worded.
8. The parties have indicated that if I use my power under s176(1) to correct or vary the notice in this way no injustice would be caused to either the Council or the appellants. I therefore propose to correct and vary the notice accordingly.
9. The Council considers that the use of part of the building which is within the appeal site as an office is ancillary to the use of the land as a contractor’s yard. The allegation attacks activities taking place outside the building on the forecourt and the parties accept that there are no steps in the notice that require the cessation of the ancillary office use. Similarly, there are no steps in respect of the residential accommodation on part of the first floor of the building. At my site inspection, this consisted of 2 vacant self-contained one bedroom flats although I note that the LDC described the residential accommodation as a first floor single dwelling house.
10. The appellants’ advocate refers to s173(11). This provides for circumstances where the notice could have required any buildings or works to be removed or 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 s73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities. Whilst this could apply to the office space and residential accommodation, the benefit of any permission is predicated on all of the requirements of the notice being met.

### **Relevant Planning History**

11. In September 2015 a Lawful Development Certificate was issued for a mixed use comprising (a) petrol filling station and occasional car sales to include ancillary office and storage (b) retail with ancillary office and storage and (c) first floor single dwelling house (ref 15/01425/LDC). The Council considered that there was insufficient evidence to prove B2 and B8 uses on the site, or for two residential units.
12. There is an outstanding planning application for the change of use of the existing building, including extensions and alterations, to provide 5 self-contained residential units and the erection of a 3 bedroom house.

### **The appeal site and its surroundings**

13. The site is a corner plot situated within the settlement of North Boarhunt adjacent to Southwick Road in an area largely of residential development, although there are commercial premises set back from the frontage on the south side of Southwick Road. The site comprises a former petrol filling station with the canopy and pumps remaining in situ and steel fencing towards the road frontages.
14. The two storey building on the site houses offices for the appellants' business on the ground floor, vacant office space on two floors to the rear of the building and two vacant one bedroom second floor flats. There is a grassed amenity area to the rear of the forecourt. At the time of my site inspection two containers were sited on the forecourt which contained boxed street lanterns, together with a skip, a Chambers truck with hoist displayed for sale and a fork lift truck. Any bricks that had been stored on the site had been removed at the time of my visit.
15. Vehicular access to the site is across an unfenced part of the forecourt which also provides vehicular access to adjacent dwellings. There is a further gated access at the other side of the forecourt.

### **Appeals A and B: The appeals on ground (b)**

16. An appeal on this ground is that breach of control alleged in the notice has not taken place as a matter of fact.
17. The appellants claim that no storage of cranes has taken place on the appeal site and that the vehicles are 'cherry pickers'. With the correction and simplification of the allegation that I propose to make, there is no reference to 'cranes'. It is evident from my site inspection and from Mr Chamber's own evidence and that of local residents that the appeal site has been used as a highway contractor's yard, for the storage of bricks and for the siting of shipping containers.
18. The appeals on this ground fail.

### **Appeals A and B: The appeals on ground (c)**

19. An appeal on this ground is that there has been no breach of planning control.
20. The appellants argue that the parking of commercial vehicles on the site and their operation in the evening and at night reflects that of the previous owner

who operated a vehicle recovery business along with haulage for a number of decades.

21. This argument appears to suggest that there is no material change of use between the operation of a motor garage and the operation of a highway contractor's yard. In 1997 or thereabouts the planning unit changed through the separation from the site of what had been a workshop and the subsequent construction of a house called 'The Oaks'. This change in the site is evident when comparing the 1992 and 1997 valuation reports (Document 1.2 and 1.3). The premises are described in the 1997 report as comprising a two storey building with shop/post office, office and living accommodation, a private garden, and a former petrol station and a yard area used for the display of commercial vehicles for sale. Mr Ward, a local resident recollected that there was a break in the previous activities in 1997 before which the vehicle recovery operations moved.
22. The premises were leased to M and A Neal for a number of years and a lease agreement defines the permitted use as 'petrol filling station with motor vehicle sales, post office, off licence and general store at ground level with residential accommodation at ground level and over (Document 2.4).
23. The uses alleged in the notice are materially different to the previous uses and have different characteristics. These include the visual impact of the use of the site through the siting of the containers and the storage of highways associated material and bricks. There are noise and disturbance characteristics emanating through the operation of the business associated with the storage and movement of highway lighting columns and lanterns including vehicular noise, the verbal communications between operatives and the noise associated with moving stock and material around. The times of disturbance occur late in the evening, at night and in the early morning and there is additional disturbance from light arising from the headlamps of operatives and from lights attached to vehicles. The absence of the shop also impacts on the character of the use.
24. Whilst there may be some similar elements in the historic use and in the current use of the site, such as its use by vehicles whether for sale or for operational purposes, the current use of the site is an unauthorised sui generis that requires planning permission. It gives rise to different impacts and is materially different. I have had regard to the cases referred to by the appellants in this regard and also to the absence of enforcement, the break in activities and dormant use but they do not alter my conclusion that the unauthorised use is materially different to the lawful use or that this ground of appeal should succeed.<sup>1</sup>
25. It has not been shown on the balance of probability that no breach of planning control has occurred. The appeals on this ground therefore fail.

### **Appeals A and B: The appeals on ground (d)**

26. An appeal on this ground is that it is too late to take enforcement action. The appellants contend that the site has been used for the same use continuously for 10 years prior to the issue of the notice.

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<sup>1</sup> East Barnet UDC v British Transport Commission [1962] 2 QB 484  
Thurrock BC v SSETR [2011] EWHC 128 (Admin)  
Hawes v Thornton Cleveleys UDC (1965 63 LGR 213  
Panton v SoSR [1999] JPL 461

27. Prior to the appellants' own use of the site in 2015, the site had been vacant for a number of years, before which it had been used for a variety of mixed uses as activities came and went including car sales, petrol sales and the shop.
28. As referred to above, the planning unit changed in 1997 through the separation of the part of the site used as a workshop, thereby creating two distinct planning units that were functionally and physically separate and which were in different ownerships. The retained site appeared to change from that of a mixed use which included a motor garage, vehicle repair workshop and vehicle recovery business, to a mixed use as described in the LDC. The planning unit is relevant to the consideration of continuity or material changes of use and the use as a motor garage, vehicle repair workshop and vehicle recovery business ceased when the planning unit changed, such that the uses on site were materially different.
29. Similarly as I have concluded in the ground (c) appeals that the current use is sui generis and is materially different to the lawful use, it follows that the use cannot be immune from enforcement through the passage of time. The appeals on ground (d) also fail.

### **Appeal A: The appeal on ground (a) and the deemed planning application**

#### **Main issues**

30. From my inspection of the site and its surroundings, and from representations made at the inquiry and in writing, I consider that the main issues in this appeal is the effect of the development on the living conditions of the occupants of nearby dwellings and on the character and appearance of the area.

#### *Living Conditions*

31. A number of local residents have referred to the noise disturbance from vehicle movements, reversing beeps and deliveries; and, from light intrusion including that arising from orange flashing lights and headlights. This disturbance has arisen since the appellants took over the site and used it late into the evening and early in the morning for their commercial activities. It is materially different in its impact to the previous use of the site. Ms Ayoub who lives close to the site has installed triple glazed windows to reduce the disturbance although she acknowledged that the disturbance had reduced from previous levels. Mr Ward referred to the disturbance affecting his daughter's sleep and Mr Norwood's daughter had to move elsewhere in the house when doing her GCSEs. Mr Cuttler, ward councillor, indicated that he had received more calls and complaints than any other issue in North Boarhunt.
32. It is clear that the use of the site has affected the living conditions of local residents. Although the appellants have suggested conditions could be imposed to limit the times of use of the site to prevent noise disturbance in the evenings, at night and at weekends, their suggested hours limitation would still permit the movement of plant and vehicles from 5am to 9pm and this would not overcome the harm caused. Such a use from the unsocial hour of 5am could result in noise associated with the unlocking and locking of gates and vehicle doors, the sounds of audible warning systems and the conversations of operatives. Light intrusion could also occur. This potential level of disturbance would be unacceptable at such an early time of the day.

33. Whilst the operating times of the previous use were not restricted by planning conditions I consider that it would be unlikely to have resulted in the level of disturbance caused by the current use in the eventuality that it reverted to its previous use.
34. The unauthorised use would conflict with saved Policy DP.11 (Unneighbourly Uses) of the Winchester Local Plan 2006 and Policy DM19 (development and noise) of the emerging Winchester Local Plan Part 2: Development Management and Site Allocations. As Policy DP.11 is generally in accord with the National Planning Policy Framework (the Framework), I attach significant weight to it. I am able to attach some weight to the policies of the emerging plan in view of the stage it has reached

*Character and appearance*

35. The site is in a prominent corner location at the easterly entrance to the village. Its previous uses as a petrol filling station, shop and vehicle sales would not have appeared incongruous in its context and would have generated a degree of activity throughout the day.
36. The current use with the presence of the shipping containers gives an appearance that is more industrial by nature out of context with the locality. The containers are detrimental to the appearance of the site through their bulk and appearance. Whilst the appellant's suggestions for landscaping and for the cladding of the containers could ameliorate the visual impact of the containers to some extent, this would not overcome the harm caused.
37. Notwithstanding the existence of other commercial/industrial sites in the area, these do not occupy such a prominent position as the appeal site. I conclude on this issue that the use of the site has a detrimental impact on the character and appearance of the area and is contrary to Saved Policy DP.3 (General Design Criteria), and Policies DM14, 15 and 16 relating to design and development principles.

*Other Matters*

38. Concern has been expressed about highway safety issues relating to the use of the site, such as the parking of heavy plant vehicles on the highway whilst stock is loaded or unloaded, and employee parking on the highway which have resulted in obstruction and inconvenience to other road users and interference with visibility at the junction. Whilst these events may have occurred, I note that the highway authority has not made any representations although a suggested condition by the appellant could provide better parking, loading and unloading arrangements.
39. I attach very limited weight to the Boarhunt Village Design Statement adopted in 2002 which, due to the passage of time, does not now reflect the economic circumstances relating to the shop and post office.
40. It is acknowledged that there are space limitations on the appellant's other business site at Southwick and that he employs 20 members of staff, 6 of whom are full time, but the fact that he has a current undetermined planning application for residential use of the appeal site suggests that he anticipates alternative arrangements for operating the business can be achieved.

41. Although Policy CP6 applies to the retention of local services and facilities, as there is little prospect of the reversion of the offices back to a village shop, there is no significant conflict with the policy.
42. I have had regard to the other policies referred to by the parties and to the Framework's support for sustainable development but none of these are of sufficient weight to overcome the harm that I have identified.

### **Appeals A and B: The appeals on ground (f)**

43. An appeal on this ground is that the steps are excessive and lesser steps would overcome the objections.
44. The activities cause disturbance to the living conditions of local residents and the use of the site coupled with the siting of shipping containers adversely affects the character and appearance of the area. Whilst there may previously have been a Luton Van body on site, this was used as part of the then lawful use of the site whereas the shipping containers are not being so used and contribute to the negative image that the appeal site as on the area.
45. It is acknowledged that the bricks have been removed from the site but they represented a breach of planning control at the time that the notice was issued.
46. The purpose of the requirements of a notice is to remedy the breach by discontinuing any use of the land or by restoring the land to its condition before the breach took place or to remedy an injury to amenity which has been caused by the breach. It is necessary for the requirements to match the matters alleged and therefore I consider that the requirements of the notice in this case do not exceed what is necessary to remedy the breach.
47. The appeals on this ground fail.

### **Conclusions**

48. The appellants suggest that the site would have a nil use if the notice is upheld. This would not be the case in view of the LDC for the site. Whether a filling station or shop would be commercially viable is another issue.
49. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

### **Formal decisions**

#### **Appeal A: APP/L1765/C/15/3140487**

50. I direct that the enforcement notice be corrected by
- A) the deletion of
    - i) " general industry involving the assembly and supply of motorway lighting equipment,
    - ii) storage and distribution of plant and equipment, including the parking/storage of cranes and other heavy commercial vehicles, used in connection with the above industrial use,
    - iii) storage of bricks, and
    - iv) the siting of shipping containers used for storage of equipment used in connection with the above industrial use."

in the second part of the breach of planning control alleged and replacing it with the words: "the use of the land as a highway maintenance contractor's yard for plant, vehicles and equipment including the siting of shipping containers for storage purposes; for the storage of bricks; for a B1 office use and for residential accommodation."

B) the deletion of

"1) Cease the use of the land for general industry and storage and distribution and the siting of shipping containers"

in the first part of the requirements of the notice and replacing it with the words "1) Cease the use of the land as a highway maintenance contractor's yard for plant, vehicles and equipment including the siting of shipping containers for storage purposes." The second and third requirements remain unchanged.

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.

### **Appeal B: APP/L1765/C/15/3140488**

51. I direct that the enforcement notice be corrected by

A) the deletion of

- iii) " general industry involving the assembly and supply of motorway lighting equipment,
- iv) storage and distribution of plant and equipment, including the parking/storage of cranes and other heavy commercial vehicles, used in connection with the above industrial use,
- v) storage of bricks, and
- vi) the siting of shipping containers used for storage of equipment used in connection with the above industrial use."

in the second part of the breach of planning control alleged and replacing it with the words: "the use of the land as a highway maintenance contractor's yard for plant, vehicles and equipment including the siting of shipping containers for storage purposes; for the storage of bricks; for a B1 office use and for residential accommodation."

B) the deletion of

"1) Cease the use of the land for general industry and storage and distribution and the siting of shipping containers"

in the first part of the requirements of the notice and replacing it with the words "1) Cease the use of the land as a highway maintenance contractor's yard for plant, vehicles and equipment including the siting of shipping containers for storage purposes." The second and third requirements remain unchanged.

Subject to these corrections the appeal is dismissed and the enforcement notice is upheld.

*P N Jarratt*

INSPECTOR

## **APPEARANCES**

FOR THE LOCAL PLANNING AUTHORITY: Trevor Ward of counsel instructed by the Head of Legal Services

He called

|                              |                          |
|------------------------------|--------------------------|
| D K Townsend Dip TP<br>MRTPI | Team Leader, Enforcement |
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FOR THE APPELLANT: Ms P Pattni

She called

|                     |                                                     |
|---------------------|-----------------------------------------------------|
| J Chambers          | Appellant                                           |
| R W Doney           | Member of the family of the former owners           |
| D Neame DipTP MRTPI | Director, Neame Sutton Ltd, Chartered Town Planners |

## **INTERESTED PERSONS:**

|   |             |                 |
|---|-------------|-----------------|
| 1 | C I Ward    | Local resident  |
| 2 | N R Cuttler | Ward councillor |
| 3 | Ms T Ayoub  | Local resident  |
| 4 | C Norwood   | Local resident  |

## **DOCUMENTS**

- 1 Statement of Common Ground
- 2 Bundle comprising preliminary matters on behalf of the appellants relating to the reinstatement of ground (d) and submission of further evidence in support of grounds (d) and (b) consisting of 12 documents.
- 3 Closing submissions on behalf of the Council
- 4 Closing submissions on behalf of the appellants