

Appeal Decision

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 5 October 2016

Appeal Ref: APP/M3835/C/16/3142339

**Land known as the Former United Reform Church, 7a Shelley Road,
Worthing, West Sussex, BN11 1TT**

- 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 Salwan Rassam against an enforcement notice issued by Worthing Borough Council.
- The enforcement notice, Council's reference awen/0132/15, was issued on 9 December 2015.
- The breach of planning control as alleged in the notice is without planning permission, within the last four years, the laying of a hardstanding (the hardstanding), the approximate position of which is shown for identification purposes only, marked as A and outlined in blue on Plan 2 attached to the notice.
- The requirements of the notice are to:
 1. Permanently cease the use of the hardstanding for car parking. The approximate position of which is shown for identification purposes only, marked as A and outlined in blue on Plan 2 attached to the notice.
 2. Erect a wooden fence of between 1m and 2m in height in the location shown marked in a blue dotted line on Plan 3.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The enforcement notice is quashed.

Application for costs

1. An application for costs was made by the Appellant against the Council. This application is the subject of a separate Decision.

Procedural Matters

2. The scheduled site visit was cancelled given the cases made by the Appellant and the Council in respect of the drafting of the notice and given my determination as set out below it was not re-arranged, no site visit being necessary in the circumstances.
3. The address given above is as stated on the notice.

The notice

4. The Appellant has made a preliminary case that the notice should be quashed because there is a mismatch between the allegation and the requirements.
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5. An enforcement notice dated 21 October 2015 in virtually identical terms to that of the notice in this appeal was the subject of an appeal¹. The notice was withdrawn by the Council following a letter from the Inspectorate in which it was stated that 'items not covered in the allegation are introduced and the allegation itself is not addressed. The requirements cover a use of the land, not the operational development as detailed in the allegation; therefore it is not clear if the notice complies with s.173 of the 1990 Act'².
6. Pursuant to s.173 of the 1990 Act a notice must state the matters that appear to the Council to constitute the breach of planning control so as to enable any person on whom a copy is served to know what those matters are; specify the steps that the Council requires to be taken, or the activities it requires to cease, in order to achieve wholly or partly the purposes specified in s.173(4); and specify the reasons why the Council considers it expedient to issue the notice. The purposes specified in s.173(4) are remedying the breach by discontinuing any use of the land or by restoring the land to its condition before the breach took place or remedying any injury to amenity which has been caused by the breach.
7. S.173(11) provides that where an enforcement notice in respect of any breach of planning control could have required buildings or works to be removed, or an activity to cease, but has stipulated some lesser requirement, which has been complied with, then, so far as the notice did not so require, planning permission shall be deemed to be granted under s.73A for that operation or use. This is often known as 'under-enforcement'.
8. The notice with which I am concerned alleges the laying of a hardstanding and the requirements are to cease the use of the hardstanding for car parking and to erect a wooden fence. The notice therefore combines an allegation of operational development with requirements relating to a material change of use. This formulation does not accord with the statutory requirements of the purposes of the notice as provided for in s.173(4) which are purposes dependent on the allegation, that is, either a material change of use for which the requirement is to discontinue the use; or operational development for which the requirement is restore the land to its condition before the breach took place; or to remedy any injury to amenity which has been caused by the breach.
9. The Council's case is that the requirements seek to remedy the injury to amenity caused by the breach and it is under-enforcing pursuant to s.173(11) because complete removal of the hardstanding would be excessive. But to my mind this argument is misconceived because the injury to amenity must arise from the breach, in this case, the operational development of laying the hardstanding. This is an argument the Council appear to accept as it is also said in its statement that 'it is not the physical works of the laying of the hardstanding which are harmful rather the resulting use of the area so created'.
10. Similarly it seems to me that any under-enforcement also has to relate to the operational development alleged. It is notable that the Council also appears to acknowledge this in that it states 'a second notice could be served relating to the unauthorised change of use of the land for car parking'. However, the

¹ APP/M3835/C/15/3138098

² Letter dated 20 November 2015

Council did not issue a second notice because it considered 'this would have placed an additional burden on the Appellant and was felt to be excessive when one notice could suffice'.

11. A notice is a nullity if it is so defective on its face that it is without legal effect. A notice may be flawed in some way, and so invalid, but not so defective on its face as to be a nullity.
12. For the reasons given above I find that although the notice is flawed it does contain the statutory requirements as provided for in s.173, albeit incorrectly applied, and it is not therefore a nullity but it is invalid.
13. In an appeal in such as this where the notice is invalid there is a power in s.176 to correct any defect, error or misdescription in the notice or to vary the terms of the notice so as to remedy the flaw and hence the invalidity. The power to vary or correct can only be exercised where the correction or variation will not cause injustice to either the Appellant or the Council. If a notice is invalid because of some fundamental misunderstanding or illogicality, and cannot be corrected without causing injustice it must be quashed.
14. The Appellant says in his final comments that if the notice was corrected to include a car parking use it would be prejudicial to him because he would not be afforded the chance to enter an appeal on ground (b), that is, that the alleged breach of control has not occurred as a matter of fact. It is the Appellant's case that he would be able to provide evidence to that effect.
15. Taking the above paragraphs into account, although the Courts have encouraged a wide-ranging use of the power to correct even fundamental and basic errors in a notice, I am satisfied that any correction of the notice in this case to include (or substitute) an allegation of a material change of use would cause injustice to the Appellant in that he would not have had to opportunity to make an appeal on ground (b) or any other relevant ground.

Conclusions

16. For the reasons given above I conclude that the steps required for compliance with the enforcement notice do not follow the alleged breach of planning control. It is not open to me to correct the error in accordance with my powers under s.176(1)(a) of the 1990 Act as amended since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances the appeals under grounds (a), (c) and (f) as set out in s.174(2) of the 1990 Act as amended and the application for planning permission deemed to have been made under s.177(5) of the 1990 Act as amended do not fall to be considered.

Decision

17. The enforcement notice is quashed.

Gloria McFarlane
Inspector