

Appeal Decision

Hearing held on 7 February 2017

Site visit made on the same date

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: 07 March 2017

Appeal Ref: APP/J0540/C/16/3152721

Land at 55 Cherry Orton Road, Orton Waterville, Peterborough, PE2 5EH

- 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 R Phillips (RP Meats Limited) against an enforcement notice issued by Peterborough City Council.
- The enforcement notice, reference 12/00499/ENFACC, was issued on 16 May 2016.
- The breach of planning control as alleged in the notice is without planning permission the change of use of the area under the canopy (shaded blue on the Plan attached to the notice for identification purposes) from a mixed use to sole use as industrial land by the placing of a walk-in refrigerator unit under the said canopy.
- The requirements of the notice are
 - (i) Cease the exclusively commercial use of any part of the land save for those parts where such use is lawful.
 - (ii) Remove the walk-in refrigerator unit and associated plant from the area shaded blue on the Plan.
 - (iii) Remove the plinth which forms the base of the walk-in refrigerator unit.
- The period for compliance with the requirements is
 - (i) In respect of (i) and (ii) within two months beginning with the day on which the Notice takes effect.
 - (ii) In respect of (iii) within three months beginning with the day on which the Notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed and the enforcement notice is quashed.

Applications for costs

1. At the Hearing applications for costs were made by the Council against the Appellant and by the Appellant against the Council. These applications are the subjects of separate Decisions.

Preliminary Matters

2. At the Hearing the Appellant withdrew the ground (g) appeal.
 3. The Appellant was legally represented at the Hearing whereas the Council was not. In the circumstances provision was made for the Council to make legal submissions in writing after the date of the Hearing with time thereafter for the Appellant to respond in writing.
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The appeal on ground (c)

4. In an appeal on ground (c) the Appellant is saying that there has not been a breach of planning control as alleged in the notice. The allegation relates to a material change of use of land, not operational development.
5. The appeal site as shown on the plan attached to the notice comprises a dwelling (No 55) and garden; an open parking/loading/circulation area; various buildings containing fridges, freezers, preparation and other associated rooms; and a residential garage/store¹. A wholesale meat business has operated from the site for many years, possibly since the mid-1950s, and in 1961 an Inspector found that 'the appeal site was used partly for residential purposes and partly for business purposes, the business consisting of the killing, processing, packing, storing and sale of poultry'².
6. The piece of land with which this appeal is concerned is a small piece of land located underneath a canopy that was granted retrospective planning permission in 2011³; the permission did not include any reference to the use of the land and was solely for operational development. The notice alleges a mixed use for the plot of land under the canopy on which the walk-in refrigerator is located and it is the Council's case that the whole of the appeal site is in mixed use.
7. It is the Appellant's case that the appeal site is two planning units – one residential planning unit comprising the dwelling, garden and garage/store and the other comprising the remainder of the appeal site which is in commercial use by the Appellant trading as RP Meats Ltd.
8. In order to determine whether there has been a change of use it is first necessary to ascertain the correct planning unit and the present and previous primary (as opposed to ancillary) uses of that unit. The tests set out in the case of *Burdle*⁴ are firstly, when there is a single main purpose of the occupier's use of the land to which secondary activities are incidental or ancillary the whole unit of occupation should be considered; secondly, where the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to the other and the different activities are not confined within separate and physically distinct areas of land; and thirdly, where within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes, in which case each area used for a different main purpose ought to be considered as a separate planning unit.
9. The appeal site has a long and complicated planning history and I note that it has, until this appeal, been considered to be one planning unit in that all applications by the Appellant have included the whole of the site within the red line as did a previous enforcement notice. The descriptions of the various planning applications and the allegation in the notice are as follows: The change of use of a residential store to a store-room for business use and change of use of part of an existing garage to upgraded toilets was permitted in July 2011⁵; the change of use of the remaining part of a residential garage

¹ Document 6

² Document 3

³ Ref: 11/00430/FUL

⁴ Document 4

⁵ Ref:11/00879/FUL

to business use [for the siting of a refrigerator] was refused on appeal in August 2013⁶; and an enforcement notice alleging the change of use from residential garages to business use to site a refrigerator unit [the unit that is the subject of this appeal] was upheld on appeal in May 2014⁷. These various descriptions are, to my mind, somewhat confusing and confused and they do not assist in establishing the nature of use of the appeal site.

10. As I saw on my visit, there were dedicated parts of the appeal site which were in sole use by the business and a garage with access through the yard was in domestic use. At the time of my visit, among other things, a 'classic' car was being renovated in the garage; any vehicle associated with the house accessing the garage would have to be driven across the yard and, given that it is currently occupied, any such vehicle would have to be parked in the yard or outside the appeal site; and any person associated with the house would have to walk across the yard to get to the garage. I also noted that commercial vehicles were parked adjacent to the area of grass at the rear of the house and that the grass had been churned up and had deep tyre marks on it. The grassed area was not enclosed along its boundary with the yard and its condition and location seemed to me to indicate that it had been used for parking/turning of vehicles.
11. In response to a planning contravention notice the Appellant (RP Meats Ltd) replied that the whole of the appeal site was owned by Mr C G Phillips; that his affairs were dealt with by the Court of Protection; that Mr R Phillips was one of Mr C G Phillips deputies; part only of the land was occupied by RP Meats Ltd pursuant to a parol tenancy; and the directors of RP Meats Ltd do not have any interest in the land. As a matter of law a parol tenancy only creates limited rights in land.
12. From the documentation and evidence, which does not include any information about the use of the house, I do not consider it is possible to establish with the required certainty whether there is one planning unit in mixed use or two separate planning units at the appeal site. However, as I will set out below, in the particular circumstances of this appeal it matters not.
13. A mixed use is one where it is not possible to say that one use is incidental or ancillary to the other and the different activities are not confined within separate and physically distinct areas of land. The Council accepts, as stated in the allegation, that the use of the plot of land under the canopy was a mixed one prior to the use for the walk-in refrigerator. In a mixed use there is no 'exclusive use' as alleged in the notice for the identified plot of land under the canopy. It therefore follows that there has not been any material change of use of the appeal site or of the plot of land identified on the notice if the whole of the appeal site is in mixed use.
14. If there are two separate planning units it is apparent from the documentation and from what I saw on my visit that the land beneath the canopy had been used for the business prior to the installation of the walk-in refrigerator. The location of the walk-in refrigerator is within the business use planning unit as described by the Appellant⁸ and the presence of a walk-in refrigerator in that planning unit would not amount to a material change of use.

⁶ Ref:12/01922/FUL and APP/J0540/A/13/2195055

⁷ Ref:13/00037/ENFNOT and APP/J0540/C/13/2209909

⁸ Document 6

15. In either the case put by the Council or that put by the Appellant, the ground (c) appeal succeeds.
16. The Council in its ground (a) appeal raised the question of intensification of the business use occasioned by the presence of the walk-in refrigerator. An intensification of a use could amount to a material change of use but it has been established that if a notice relies on a material change of use by intensification it must say so⁹. Although the notice refers to intensification in the reasons it does not do so in the allegation. In addition, the *Hertfordshire* case¹⁰ established that the test for whether there has been a material change of use is whether there had been a change in the character of the use. Insofar as this appeal is concerned the presence of the walk-in refrigerator has not changed the character of the use of the appeal site in that it is used for the storage of meat and other products associated with the business use¹¹.
17. For the reasons given above I conclude that there has not been a breach of planning control as alleged in the notice and the appeal on ground (c) succeeds.

Conclusions

18. For the reasons given above I conclude that the appeal should succeed on ground (c). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under the various grounds set out in section 174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Decision

19. The appeal is allowed and the enforcement notice is quashed.

Gloria McFarlane
Inspector

⁹*Kensington and Chelsea RBC v Mia Carla Ltd* [1981] JPL 50

¹⁰ Document 5

¹¹ Although I note that deliveries by HGVs have become more frequent as told to me by local residents there is no evidence that any such increase is associated with the presence of the walk-in refrigerator

APPEARANCES

FOR THE APPELLANT

Mr M Ingle	Solicitor
Mr J Dadge Dip TP MRTPI	Planning Consultant
Mr R Phillips	The Appellant

FOR THE LOCAL PLANNING AUTHORITY

Mr N Harding BSc(Hons) DMS MRTPI	Head of Planning
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INTERESTED PERSONS

Mr R Lucas	Local resident
Mr A Drake	Local resident
Cllr J Stokes	Ward Councillor

DOCUMENTS SUBMITTED AT AND AFTER THE HEARING

Document 1 -	Copy of the Council's letter of notification and list of persons notified
Document 2 -	Appendices A, H and I to the Council's statement, previously omitted
Document 3 -	Council's statement for LDC appeal – undated but after 1977 and possibly 1982
Document 4 -	Transcript of <i>Burdle and Another v SSE and Another</i> [1972] 1 WLR 1207, submitted by the Appellant
Document 5 -	Transcript of <i>Hertfordshire CC v SSCLG and Metal Waste Recycling Limited</i> [2012] EWCA 1473, submitted by the Appellant
Document 6 -	Plan of the appeal site and accompanying email, submitted by the Appellant
Document 7 -	The Council's comments on the planning unit
Document 8 -	The Appellant's reply to the Council