

Appeal Decision

Site Inspection on 27 February 2017

by Graham Self MA MSc FRTPI

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

Decision date: 08 March 2017

Appeal Reference: APP/G1250/C/16/3160572

Site at: 54a Arnewood Road, Bournemouth, Dorset BH6 5DL

- The appeal is made by Mr Jason Viney 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 Bournemouth Borough Council.
- The council's reference is ENF/2016/6919.
- The notice is dated 15 September 2016.
- The breach of planning control alleged in the notice is: "Without planning permission: use of land for the siting of four storage containers".
- The requirements of the notice are: "Remove the storage containers from the land and leave the land in a satisfactorily tidy condition".
- The period for compliance is two months.
- The appeal was made on grounds (f) and (g) as set out in Section 174(2) of the 1990 Act.

Summary of Decision: The enforcement notice is corrected and varied. Subject to those amendments, the notice is upheld and the appeal fails.

The Enforcement Notice

1. The enforcement notice is flawed in three ways. First, the allegation describing the use of land for "siting" containers is inadequate. The principle established long ago in the Court of Appeal judgment in the case of *Wealden District Council v Secretary of State for the Environment* [CA 1988] applies here: where an enforcement notice is directed at the placing on land of a movable object (in the Wealden case, a caravan), the mere "siting" of the object is not a sufficient allegation, because that is not the real use of the land. To define the use of the land properly, the allegation has to describe the purpose for which the object or objects are on the land. A caravan or containers, for example, could be placed on land for residential purposes, or for agricultural purposes, or for storing things inside, or for merely storing the caravan or containers.
2. In this instance, the containers do not appear to have been placed on the land for the purpose of storing the containers themselves. During my inspection I could not see inside the containers but the appellant refers in his statement to "the contents of the containers" and says that the items being stored are for his property rental business. I shall therefore correct the allegation so that it refers to the storage use.
3. Second, the mere "use" of land does not amount to "development" as defined in Section 55 of the 1990 Act. It is the act of *making a material change of use* which is development requiring planning permission. I shall also allow for this point in correcting the allegation.

4. The third fault in the enforcement notice is that the requirement to leave the land in "a satisfactorily tidy condition" is imprecise. What may appear unsatisfactorily untidy to one person may be satisfactorily tidy to another person. I return to this point later in this decision.
5. The council should note for future reference that I have considered quashing the enforcement notice because of its flaws. However, quashing the notice would almost certainly result in the council issuing another notice, which would be followed by another appeal, causing delay and cost for all involved. The appellant has evidently understood what the enforcement notice was directed at, and the necessary amendments do not affect the basis of either side's case on the grounds of appeal pleaded, so I am satisfied that I can use the powers available to me under Section 176 of the 1990 Act to rectify the notice without causing injustice to any party.

Implied Ground (c)

6. This case is more complicated than either the appellant or the council appear to have realised. Mr Viney argues in parts of his written submissions that there has not been any change of use of the land. In particular, he says that "the containers are placed on a B1/B8 commercial/industrial use site" and he refers to a letter from a council officer written in May 1999 to a Mr Way, who appears to have enquired about the pre-1999 history of the site. This letter referred to an application in 1963 and stated that at the time of that application:

"The property was used as a workshop-store and office which falls under Use Class B1 of the Use Classes Order 1987. The property appears to have remained in that use up to the present day. It is my opinion that this is therefore the recognised planning use."
7. Mr Viney's argument appears to be really a claim that what has happened on the land did not constitute a breach of planning control. If Mr Viney wanted to make such a claim he should have pleaded ground (c) of Section 174(2) of the 1990 Act. He did not do so, and the council have not put forward any counter-argument on this aspect.
8. I am not obliged to consider grounds of appeal not pleaded. Nevertheless in the interests of fairness, I have considered the appeal as if ground (c) had been pleaded.¹ There is reason to believe that the authorised use of the site in 1999 (including the building shown within the shaded area on the enforcement notice plan) may well have been use as a workshop, within Class B1 of the Town and Country Planning (Use Classes) Order 1987 as then amended ("light industry"). Under the Town and Country Planning (General Permitted Development) Order (the "GPDO"), a change of use from light industry to storage use would be permitted development. However, there is no evidence about the history of the site between 1999 and the date when the containers were placed on the land. I do not know whether a material change of use occurred to some other intervening use, or whether a use which was carried on before 1999 was abandoned at some stage.
9. The onus of proof in respect of ground (c) is on the appellant. The information submitted about the past history of the site is very thin. Mr Viney has not supplied sufficient evidence to justify the assertion that there has not been any change of use, or that a material change of use of the land to use for storage was

¹ If I had been minded to allow the appeal on ground (c) I would have first given the council an opportunity to submit comments, in the interests of fairness to the council. In the event I have not considered that to be necessary.

permitted under the GPDO. I conclude that the implied ground (c) appeal does not succeed.

10. I add here that there are some circumstances whereby placing large containers on land may amount to "operational development" (akin to a building operation) for the purpose of planning law, as opposed to a use of land. Some of the available evidence suggests that Mr Viney's intention has been for the containers to be permanent fixtures, and degree of permanence is one of the factors which can point towards development of this type being an "operation" rather than a "use" - in which case the previous use of the land and any possible rights to change to use for storage would be irrelevant. On balance, I have decided not to interfere with this aspect of the enforcement notice.

Ground (f)

11. The council's statement asserts that the only ground of appeal is ground (g). That is incorrect, as ground (f) was also pleaded. Under this ground it is claimed that the requirements of the enforcement notice are excessive, or go beyond what is necessary to remedy the breach of planning control.
12. When the appeal was lodged in October 2016, the appellant stated that "a scheme will be undertaken to rectify the harm". It was claimed that the scheme would change the design and scale to address the concerns relating to the impact on the character and appearance of the area. The statement added that the scheme "will be submitted within the next few months".
13. No details of a "scheme" have been submitted in support of the appeal, although in later statements, Mr Viney wrote that he proposed to fence and gate the site to secure and screen it, and also to add anti-climb paint. A planning application has evidently been submitted.
14. Fencing and gating the site or painting the containers would not remedy the breach of planning control. What Mr Viney seems to be pursuing is a means of leaving the containers on the land - but that would be tantamount to granting planning permission, and cannot be achieved through an appeal on ground (f). I am not dealing with an application for planning permission - there is no such application before me.² In these circumstances, the requirement to remove the containers is not unreasonable or excessive.
15. I mentioned above that the requirement to leave the land in a "satisfactorily tidy condition" is flawed because it is imprecise. I have decided that for simplicity and clarity, the best I can do is to delete this part of the notice. If the land were to be left in a state which adversely affects the amenity of the area, or if the land were to become in such a state, the council have separate powers (under Section 215 of the Planning Act) to remedy matters.

Ground (g)

16. This ground of appeal concerns the compliance period. Mr Viney says a further time of six months is required "to liaise with all neighbouring properties and with planning officers to ensure any application is suitable". He adds that a place of storage needs to be found, and time is needed to move the contents of the containers before a new structure is built.

² Ground (a) of Section 174(2) was not pleaded, and there is no planning application before me under Section 177(5) of the 1990 Act because the fee for the deemed application was not paid.

17. Part of Mr Viney's case on ground (g) seems to be that council officers have not communicated with him or worked with him to resolve the situation by means of a planning application. The council say that no request for pre-application advice has been received for the erection of structures on the land. The two sides here seem to be talking about different things and not understanding each other - as I have noted above, the enforcement notice is directed at the use of land, not structures. Be that as it may, I do not know exactly what has been said by whom or to whom, and I am not in a position to resolve a dispute about alleged lack of co-operation.
18. Mr Viney has been entitled to await the decision on his appeal before taking action to comply with the enforcement notice. However, the case for any substantial extension to the compliance period is weak. There is certainly no good reason to allow time for a planning application to be decided, since the outcome of such a process is unknown. Mr Viney apparently runs a small business, and it is generally desirable as a matter of national policy to encourage small businesses, but a balance has to be struck bearing in mind the harm being caused by the presence of the containers, including complaints by a local resident about loss of light and potential safety hazards. Contrary to the appellant's claim that the containers are "set back from the neighbouring boundary", one of the containers is very close to the boundary between the appeal site and 100 Kimberley Road, and its height reaches above the boundary fence to an extent which restricts the outlook from the ground floor of that property. Other local residents apparently have no objections to the containers.
19. On balance, I have decided to allow an extension of the compliance period from two months to three months. This period runs from the date of this decision. Ground (g) succeeds to that limited extent.

Formal Decision

20. I direct that the enforcement notice be corrected and varied in the following ways:
 - (i) by deleting the wording of the allegation and substituting: Without planning permission, making a material change of use of the land to use for stationing containers for the purpose of storage".
 - (ii) by deleting from the requirements the words "and leave the land in a satisfactorily tidy condition".
 - (iii) by deleting "two months" from the text specifying the periods for compliance and substituting "three months".
21. Subject to the above correction and variations, I dismiss the appeal and uphold the enforcement notice as corrected and varied.

G F Self

Inspector