



Appeal Decision

Site visit made on 19 January 2018

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 March 2018

Appeal Ref: APP/Z5060/C/17/3181657

Land and premises at Former Site of Lisnaveane Lodge, 183 Lodge Avenue, Dagenham, Essex RM8 2HQ

- 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 Usman Malik against an enforcement notice issued by the Council of the London Borough of Barking & Dagenham.
 - The enforcement notice was issued on 7 July 2017.
 - The breach of planning control as alleged in the notice is, without planning permission, the unauthorised change of use as an unauthorised car lot (Sui Generis).
 - The requirements of the notice are:
 - Cease the use as an unauthorised car lot.
 - Remove all waste material from the site.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. Since the notice is found to be a nullity no further action will be taken in connection with this appeal. In the light of this finding the Local Planning Authority should consider reviewing the register kept under section 188 of the Act.

Reasons

2. The breach of planning control as alleged in the notice is, without planning permission, the unauthorised change of use as an unauthorised car lot (Sui Generis). It is apparent from this wording that the enforcement notice is concerned with the use of the land in question, albeit the wording is imprecise and with unnecessary duplication. For example, nowhere in the alleged breach of control is it expressly stated that the change of use is considered by the Council to constitute a material change of use that requires planning permission: that is left to be inferred by the term 'without planning permission'.
3. If that was the only defect within the notice, or if there were only other minor defects, I would have corrected the notice to make the alleged breach of planning control clear. I am satisfied that I could have done so without causing injustice to any party. But the imprecise wording of the alleged breach of planning control is only the first of several defects contained within the notice. Moreover, these other defects are more serious and in some respects go right to the heart of appellant's ability to understand the notice.

4. Because the alleged breach of planning control relates to the use of the land other than as use as a single dwellinghouse, the time limit within which the Council could take enforcement action in this case is ten years, as set out in Section 171B(3) of the 1990 Act. However, in the reasons for issuing the notice at paragraph 4(1), it is stated that it appears to the Council that the breach of planning control has occurred within the last four years. The time period referred to in paragraph 4(1) is therefore incorrect for the breach of planning control that is alleged in the notice.
5. In its evidence, the Council has provided a photograph that shows the building formerly known as Lisnaveane Lodge in situ as of October 2008. The notice was issued in July 2017. It therefore follows that, even had the correct time period been stated in the notice, the appellant could not have succeeded with an appeal on ground (d): that, at the date on which the notice was issued, no enforcement action could be taken. Consequently, the error at paragraph 4(1) of the notice is of no practical consequence, and I could have corrected it without causing injustice.
6. In paragraph 4(2) of the notice, the Council sets out its reasons for issuing the notice. It is here that the real defects of the notice are to be found. It is helpful to examine this paragraph forensically in order to fully understand the real consequence of these defects.
7. The first part of the first sentence in paragraph 4(2) contends that the use a car lot results in a negative impact on present and future occupants and neighbours. The reference to 'neighbours' is clear but, given that the site itself is being used as a car lot, the reference to 'future occupants' is somewhat ambiguous and prompts the obvious question: future occupiers of where? The answer obviously cannot be the site itself and it cannot be the same as 'neighbours' because the construction of the sentence implies that they are separate from the 'future occupants'. I have great difficulty in understanding how the recipient of the notice could have been reasonably expected to understand the meaning of 'future occupants' and therefore how to respond to that in framing his ground (a) appeal.
8. The second half of the first sentence in paragraph 4(2) refers to the car lot as "having little regard for the layout, function and design of the building". This sentence begs the question: what building? The land is being used as a car lot and, aside from being enclosed by a fence, is devoid of buildings. Furthermore, there is no building adjoining the site with which the use is directly associated, such as to explain the use of the word 'the' in that sentence. In the absence of any 'building' with which these words can be directly associated, I can only assume that they have been carried over from a previous enforcement notice or a refusal of planning permission that involved design issues.
9. My suspicions in that respect are reinforced by the next sentence in paragraph 4(2). This sentence reads: "The construction of the side extension is contrary to policies BP8 'Protecting Residential Amenity' and policy (*sic*) BP11 'Urban Design' of the London Borough of Barking and Dagenham Borough Wide Policies – Development Plan Document (Adopted March 2011)". The breach of planning control alleged in the notice does not include any form of extension, and it is therefore apparent that the reference to the 'extension'

and by association the words in the preceding sentence have been inadvertently carried over from a previous enforcement notice or a refusal of planning permission.

10. I have read the policies in the development plan cited in the reason for issuing the notice at paragraph 4(2). These policies cover a wide range of topics and issues that may be relevant to residential amenity and urban design, and I acknowledge that they could both be relevant to the alleged use of the land as a car lot. However, this raises a further issue with the reason for issuing the notice.
11. Because the reason for issuing the notice conflates the use as a car lot with reasons that evidently relate to operational development, it is by no means clear what the Council's objections to the breach of planning control are. Even though the first part of the first sentence in paragraph 4(2) alleges a negative impact on present and future occupants and neighbours, and setting aside for now the problems with this sentence identified above, nowhere in the reason for issuing the notice does it specify the precise objections held by the Council. It is not clear on the face of the notice whether those objections relate to noise, dust, air quality or any other of the potential impacts that might arise from such a use. In the absence of even that basic level of detail, the appellant would have considerable difficulty in framing an appeal on grounds (a) and/or (f) set out in section 174(2) of the 1990 Act.
12. The reasons for issuing the notice are important because, as set out in section 172(1)(b) of the 1990 Act, a local planning authority may issue an enforcement notice where it appears to them that it is expedient to do so having regard to the provisions of the development plan and to any other material considerations. It is therefore a prerequisite to taking enforcement action that it should appear to the local planning authority to be expedient to issue the notice. In this context, Regulation 4(a) of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 indicates that an enforcement notice issued under section 172 of the 1990 Act shall specify the reasons why the local planning authority consider it expedient to issue the notice.
13. The reasons for issuing the notice thus go to expediency, and in that respect link directly to the provisions at section 172(1)(b) of the 1990 Act and to Regulation 4(a). I accept that minimal, incomplete or incorrect specification of the reasons for issuing the notice may not necessarily render a notice invalid. I am also mindful of the wide-ranging powers of correction available to me through the provisions at section 176(1) of the 1990 Act where doing so would not cause injustice.
14. However, in this case the reasons for issuing the notice is so vague and for the most part so far removed from the breach of planning control alleged that they could not be regarded as being merely incomplete or incorrect. The extent of the deficiency goes beyond being a just minimal specification of the reasons why the Council considered it expedient to issue the notice. The reasons for issuing the notice are, fundamentally, so hopelessly ambiguous and disconnected to the breach of planning control alleged that the recipient could not be reasonably expected to understand from within the four corners of the document the case to which he had to respond in making his appeal.

15. I have considered carefully whether I could correct the notice to overcome these deficiencies, but two difficulties present themselves. Firstly, to do so would require me to make certain assumptions about the Council's reasons for issuing the notice and therefore the expediency of issuing that notice. Both are matters solely for the Council and do not fall within my remit. Secondly, correcting the notice would deny the appellant an opportunity to re-cast his appeal on ground (a) to meet the revised reason(s) for refusal. It would also deny the appellant the opportunity to make an appeal on ground (f) if he considered that appropriate in the light of the new details contained within a re-drafted reason(s) for issuing the notice. This would cause injustice to the appellant.
16. For the reasons set out above, I consider that the reasons for issuing the notice as originally drafted do not accord with the requirement set out in Regulation 4(a) in qualitative terms and cannot be corrected without causing injustice to the appellant. I adopt without hesitation the principle advocated in judicial authority that the question of nullity should not be approached in a way which is unduly technical or formalistic. Nevertheless, in this particular case I can see no practical alternative to declaring the notice a nullity.

Paul Freer

INSPECTOR