
Appeal Decision

Site visit made on 22 March 2018

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 16 May 2018

Appeal Ref: APP/P4415/C/17/3180419

Land at 16-20 Barnsley Road, Wath on Dearne, Rotherham S63 6PY

- 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 David Travis against an enforcement notice issued by Rotherham Metropolitan Borough Council.
 - The enforcement notice was issued on 21 June 2017.
 - The breach of planning control as alleged in the notice is without planning permission, the unauthorised change of use of 16-20 Barnsley Road from car accessory sales to a mixed use of car accessory sales and car repairs and car sales.
 - The requirement of the notice is: cease the use of the premises for car repairs (including MOT testing and tyre fitting) and car sales.
 - The period for compliance with the requirement is within 2 weeks from the date on which this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a),(b), (c) and (f) of the Town and Country Planning Act 1990 as amended.
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Summary of Decision

1. The appeal succeeds in part and the enforcement notice is upheld as varied in the terms set out below in the Formal Decision.

Matters concerning the notice

2. The Council stated that the compliance period was intended to be 28 days in accordance with the authorisation to issue the notice. The period of two weeks was inserted in error and the appellant has been made aware of this. Although the notice may be said to be defective, I see no reason why I could not rectify it as clearly no injustice would be caused to the appellant. I will therefore vary the notice to extend the period for compliance to 28 days.
 3. The second matter concerns the installation of a hydraulic lift. The lift is not referred to in the notice and does not appear to be targeted by it. Yet as will be apparent from what follows, it is my view based on the evidence that its installation, which I assess as operational development, is part and parcel of the material change of use alleged to have taken place.
 4. Having regard to the established tests for what constitutes a building operation, I note that although it could be moved as a single structure, it is securely bolted to the ground in several places and electricity is supplied to it by underground cable. It was erected in 2016, and is a substantial structure that rises to approximately the level of the first storey of the adjacent dwelling. I am satisfied from its size, degree of permanence and physical attachment to the land, that the installation of the lift is operational development.
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5. The Council's case includes that the ancillary fitting of small parts sold from the shop does not require use of the hydraulic lift which is out of keeping with the character of the surrounding residential area and accentuates the appearance of a commercial car repair premises. Further, that noise from its use impacts adversely on the living conditions of nearby residents. It also considers that a condition to restrict its use would be impracticable to enforce and that planning permission should be refused on this basis.
6. However the notice alleges a material change of use of land and the hydraulic lift is only attacked in the Council's statement. Quite inexplicably, the notice does not require its removal or even refer to it.
7. As a general rule a notice alleging a material change of use can require the removal of works where they are integral to or part and parcel of the making of a material change of use. This reflects the remedial power, in s173(4)(a), to require the restoration of land to its condition before the breach of planning control took place. However if I varied the notice to require removal of the lift I must be satisfied that no injustice would thereby be caused to the parties.
8. An enforcement notice should clearly disclose exactly what the Council seeks to achieve. The appellant has offered some justification for the installation of the lift, but the appeal has proceeded on the understanding that the notice requires the use only to cease. Reluctantly I have come to the view that to vary the notice to include the lift as operational development would cause injustice to the appellant. As the erection of the lift is not in the scope of the notice, it is for the Council to consider what further action it wishes to take in that respect.

The appeal on ground (b)

9. The issue on ground (b) is whether the alleged breach of planning control has occurred as a matter of fact. The appellant must show on the balance of probabilities that the matters as alleged in the notice have not in fact occurred.
10. On this ground the appellant points out that MOT testing does not take place. Although it is a requirement of the notice to cease this activity, it does not form part of the allegation of the breach so is not a matter I can properly consider under this ground. I deal with it in ground (f) below.
11. The appellant does not deny that the matters alleged in the notice to be the breach of control have occurred, but says that they occur so infrequently that they do not amount to a material change of use of the premises. This is not a relevant argument to advance on ground (b) but I consider it in ground (c). From the evidence supplied it is likely that, whether or not they amount to a material change of use, the car repairs and car sales are not so insignificant that they are "de minimis"; that is to say they could be disregarded altogether.
12. Therefore on the balance of probability the matters alleged in the notice have taken place and consequently the appeal on ground (b) must fail.

The appeal on ground (c)

13. In an appeal on this ground the appellant has to demonstrate on the balance of probability that the matters alleged in the notice to have occurred do not constitute a breach of planning control. I am unable to take into account the planning merits of the development on this ground.

14. The Council has granted a lawful use certificate (LDC) related to the premises. It makes lawful *"use as a motor vehicle parts sales shop (with ancillary fitting of parts) only. This excludes car repairs, sale of vehicles, MOT testing and tyre fitting."* Of course an LDC is a snapshot in time in the sense that it identifies what is lawful as at the date of the application: it does not necessarily prohibit future activity. In each case it has to be assessed whether an activity falls outside the lawfully permitted use and if so whether it constitutes development for which planning permission is required.
15. There is no dispute that the LDC has been implemented and that there is a lawfully permitted use of the appeal site, being a single planning unit for the primary use of the retail sale of vehicle parts which includes a specific ancillary use comprising the fitting of those parts. However the LDC does not necessarily permit all items sold in the shop to be fitted on the premises. It depends on whether this can be done in a way that is genuinely ancillary to the permitted retail use, without materially changing the retail character of the site. The outward effects of the activity are also relevant in assessing whether a material change in use has occurred.
16. The diary entries submitted by the occupier of the adjoining property, 12 Vicar Road, are most compelling in their detail. The diary and photographs submitted show that car repairs have been ongoing in the yard area on a regular basis since May/June 2016 when a hydraulic lift was installed within some 20 inches from the flank wall of No 12. The repairs have also been witnessed by the Council's enforcement officer. Some may be done for or by, friends of the appellant, but whether for profit or not, they are still repairs.
17. Complaints received by the Council relate to the noise caused from tools used in furtherance of the repairs and particularly from the hydraulic lift in the yard. The ancillary fitting of small parts sold from the shop such as wiper blades and bulbs does not require such equipment. However the erection and subsequent use of the lift highlights how the use of the yard has changed by facilitating the expansion of operations to vehicle repairs including tyre fitting.
18. Vehicle repair and maintenance, including tyre fitting are uses that are materially different from a retail use and would fall within Use Class B2 for which planning permission is required. No such permission has been granted and therefore a breach of planning control has occurred.
19. The use of the site for tyre fitting is admitted and from the evidence it clearly takes place on more than the odd occasion as the appellant claims. Indeed the appellant's company advertises this as a service in the local press and on their website. I disagree that whilst tyres may be sold from the premises their fitting is also an ancillary use to the primary retail use of the shop. The fitting of tyres involves an industrial process which, as with car repairs, is a material change of use to a use within Class B2.
20. Furthermore several complaints have been received that vehicles are displayed for sale. This also appears from the information supplied, to be more than an occasional use. The Town and Country Planning (Use Classes) Order 1987 (as amended) excludes from any Use Class, use for the sale or display for sale of motor vehicles. By definition therefore such use constitutes a sui generis use which is a material change in character from the permitted A1 retail use of the appeal site. No permission exists for the sale of vehicles and therefore this use also is a breach of planning control.

21. The changes of use described above clearly represent material changes from the permitted retail use and ancillary fitting within that use. By s55(1) development includes the making of any material change in the use of any buildings or land and s57(1) states that planning permission is required for any development of land which includes a building. No such planning permission has been granted and s171A(1)(a) states that development without the required planning permission is a breach of planning control. I conclude on the balance of probability that the notice correctly alleges a breach of planning control. The appeal on ground (c) therefore fails.

The appeal on ground (a) and the deemed planning application

Main issues

22. The main issues are firstly, the effects of the development on living conditions of occupiers of neighbouring properties, in particular 12 Vicar Road, and secondly, its effects on the character and appearance of the area.
23. The appeal site is in an area allocated for retail use as a Local Centre, and there are residential properties to the rear of the site on Vicar Road. There is a common access through the yard for the benefit of two private dwellings.
24. In his own personal statement the appellant describes what the business provides, namely "minor vehicle fitments" such as replacement bulbs, wiper blades, number plates, and fitting batteries. In June 2016 the appellant decided to concrete the yard surface and install a "vehicle ramp" which is a reference to the hydraulic or "two post lift", as it is sometimes known.
25. It is claimed that the previously rough surface made it difficult to safely jack up a car. This may be so but having made the surface even, there was then no necessity to install the lift simply for the purposes of fitting minor vehicle parts. It has been erected in the open yard to the rear of the shop. Vicar Road is a predominantly residential environment, where the lift and its use constitute a highly intrusive and alien feature that undermines local character.
26. Furthermore vehicles displayed for sale, as well as those parked for the purposes of repairs, diminish the off-road parking available for customers of the lawful business. This extra parking causes further harm to the visual environment. I agree with the Council that the unauthorised uses, including the use of the hydraulic lift and other power tools, give the appeal site the appearance of a commercial repair operation that undermines the character and appearance of the residential street scene on Vicar Road.
27. I was inside the house at 12 Vicar Road when the hydraulic lift was operated. It produced a loud and intrusive noise that was clearly audible in all parts of the house. The appellant considers that the unauthorised uses can be adequately controlled through appropriately worded conditions as to the type of tools and machinery used and hours of use. However no specific conditions are proposed. In any event I see no practicable means by which the serious harm caused to the adjacent neighbour's living conditions can be alleviated, in particular due to the very close proximity to No 12 of the unauthorised use of the hydraulic lift.
28. The repairs carried out by customers themselves also make it more difficult to enforce by condition the types of tools that could be used and the manner of their use, when they are engaged in their own repair work.

29. Although the use of the lift is integral to the purpose of facilitating the unauthorised use of car repairs and tyre fitting, the minor fitting activities mentioned by the appellant which require the car to be raised, such as the need to fit bulbs on (only some types of) cars due to the need to access the area through the wheel arch, could be achieved by other means, for example by a mobile jack or a simple ramp, that would have much less harmful visual and aural effects on the immediate environment.
30. I have considered the several letters in support of the appellant. Whilst I have no doubt that his business is well regarded by its users, the representations do not persuade me other than that the use now carried on in the yard area is unneighbourly in its unacceptable impacts on surrounding residents.
31. The appellant also points out that no action has been taken under environmental health legislation. That may be true but it does not follow that the Council regards the unauthorised use as acceptable, nor does it mean that enforcement under planning legislation is necessarily inappropriate.
32. I find that on the first main issue the harm caused by the noise and disturbance from the unauthorised use is substantial and contrary to Policy ENV3.7 of the Rotherham Unitary Development Plan 1999 which seeks to prevent development that produces poor environmental conditions.
33. Secondly, the use of the premises for car repairs and sales detracts significantly from the mainly residential character of Vicar Road. The additional harm is contrary to the National Planning Policy Framework, Paragraph 17 which seeks to secure in development, high quality design and a good standard of amenity for all existing and future occupants of land and buildings. It would also conflict with Paragraph 58 in failing to reflect the identity of local surroundings or to create attractive, comfortable places to live and work.

Conclusion on ground (a)

34. For the above reasons and considering all other matters raised, the appeal on this ground fails and planning permission will be refused.

The appeal on ground (f)

35. The issue on ground (f) is whether the steps required by the notice to be taken, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. Having regard to those purposes that should inform such steps, it is clear that the main purpose of the notice is to remedy the breach of planning control.
36. I have already considered above in ground (a) that the adverse effects of the development could not be effectively managed by conditions attached to an eventual permission. No other lesser alternative requirements to those set out in the notice are suggested that would provide a complete remedy to the breach of control.
37. The appellant points out, and the Council accepts, that MOT tests are not carried out at the premises. Such activity does not form part of the allegation in the notice and as, therefore, this part of the requirements of the notice is excessive, I will vary it by deleting the wording under s176(1)(b) of the 1990 Act, no injustice being caused to either party. Otherwise the requirements of

the notice as varied are necessary and sufficient to remedy the breach. The appeal on ground (f) therefore succeeds to this extent only.

Conclusion

38. For the reasons given above I conclude that the requirements are excessive and a reasonable period for compliance would be 28 days, and I am varying the enforcement notice accordingly, prior to upholding it. The appeal under ground (f) succeeds to that extent. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the deemed application.

Formal decision

39. The appeal is allowed on ground (f) and it is directed that the requirements of the notice be varied by deleting the words "MOT testing and".

40. It is further directed that the period for compliance be varied by deleting "2 weeks" and substituting "28 days".

41. Subject to these variations the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended.

Grahame Kean

INSPECTOR