The Planning Inspectorate

# Appeal Decision

Site visit made on 15 January 2019

**by P N Jarratt BA Depp MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 29 January 2019**

**Appeal Ref: APP/D1780/C/17/3193098**
**Land at the North East Side of Kent Road, Southampton, SO17 2LJ**

- 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 McNichol as Construction (Holdings) Ltd against an enforcement notice issued by Southampton City Council.
- The enforcement notice, numbered 18/00061/APENF, 17/00218/ENBOC, was issued on 1 December 2017.
- The breach of planning control as alleged in the notice is the change of use of land for storage of vehicles and materials/plant.
- The requirements of the notice are to cease the use of the land for storage of vehicles and materials/plant.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
- **Summary of decision: notice varied, appeal dismissed and notice upheld.**

## The appeal site and relevant planning history

1. The appeal site is on land that was formerly within the confines of the existing Waste Water Treatment Works accessed from Kent Road. Kent Road is accessed under a railway bridge to the north and the A3035 to the south. A height restriction under the bridge restricts certain vehicles from accessing the site, which has to be gained via a narrow residential street to the A3035. The site subject to the allegation includes the access road and two areas described as Areas B1 and B2 of the Itchen Business Park in the appellant's statement, although a projecting part of the west side of Area B2 is not included in the allegation.

2. At the time of my site visit the fenced-off site was occupied by a number of parked cars, 5 containers (two of which were stacked above others and having external staircases) used as offices or staff facilities, and various plant and material associated with civil engineering and highway works.

3. Planning permission 960043/7072/W dated 14 March 1996 authorised the change of use from wastewater treatment works to an area proposed for the parking of vehicles and storage of materials and plant, subject to a personal condition to the benefit of Pipeworks Ltd and time restrictions on vehicle movements. The land benefitting from the permission is significantly greater than the area subject to the notice.

4. Planning permission 13/1020/FUL dated 13 August 2013 was for the change of use of part of the former sewage works site to car parking facility (retrospective) subject to conditions limiting hours of operation; the number of

parking spaces and areas for that purpose; lighting and security and the submission of a flood safety plan.

5. A Planning Contravention Notice was served on the appellant in October 2017 as the Council considered that the use of the land had changed.

**The appeal on ground (c)**

6. The appellant contends that there has not been a breach of planning control as the development does not amount to development under s55; that the change of use is not a material one; and that what has been done is within the terms of permission 960043/7072/W. Although this was subject to a personal condition to the benefit of Pipeworks Ltd, the list of occupiers of the site shows the condition has been breached for more than ten years.

7. The Council contends that permission 960043/7072/W is no longer relevant as there has been a change of use of the land since that permission was granted and that the use of the site for parking purposes has caused a clear break in the storage use of the site.

8. The evidence submitted by the appellant (Russel Clarke's statutory declaration[1] and the lease and tenancy arrangements of the occupiers) is set out in a timeline in the Council's statement at paragraph 4.8. This shows that Area B1 of the site was used for parking purposes by Travel Parking Operations Ltd/Looking4ParkingLtd and occurred between 18 October 2012 and November 2013. Area B2 of the site was used by Parking for Cruises Ltd between May 2015 and August 2015.

9. The 1996 permission is a B8 storage use that allows a range of items to be stored on the site, whereas a 'car park' or a 'car parking space' is a *sui generis* use. The Council's reference to two appeal decisions supports this view. In appeal decision APP/Z1510/C/07/2061879, an enforcement notice was upheld because the use of storage buildings for the keeping of motor vehicles were being parked rather than stored. In decision T/APP/G5750/X/99/3293 it was recognised by the inspector that the use for long-term passive storage of vehicles was a B8 use and considered the differences between B8 and *sui generis* uses for vehicle parking/storage.

10. The material change of use of the site to car parking led to the 2013 retrospective planning application being granted which, from the submitted evidence, indicates that Area B1of the site (the eastern half of the appeal site) was occupied by Travel Parking Operations Ltd/Looking4ParkingLtd. This permission allowed for the parking for a total of 125 cars for cruise ship and airport passengers and not, as the Council points out, for 'vehicles' which covers a wider range of transport, or for other forms of storage such as plant and materials.

11. The appellant however confirms in the statutory declaration that the site has been used over the last ten tears for the storage of vehicles and materials/plant continuously and without interruption. It is also stated that the permitted user clause of the appellant's lease, dated December 2015, is for the 'storage and distribution (of materials and plant connected with the civil engineering industry) and also to site and use portable cabins and for any other

[1] Appendix RC1 of the appellant's statement – statutory declaration of Russel Clarke, managing Director of Lainston Ltd, landlord of the appeal site.

se or uses that fall within Use Classes B1 and B8 with ancillary offices of the Town and Country Planning (Use Classes) Order 1987.

12. The Council considers the use permitted in 1996 falls within the B8 use class and that the other occupiers of the site, except for Travel Parking Operations Ltd/Looking4ParkingLtd and Parking for Cruises Ltd, were also B8 uses as they included the storage of vehicles, plant and machinery and that this is a very different use to a business based on providing long stay car parking for cruise ship and airport customers.

13. The evidence supports the Council's assessment of the uses of the site and it is apparent that irrespective of any status that the 1996 permission may have, a material change of use has occurred from the previous lawful use granted through the 2013 decision to the current *sui generis* use, albeit that the current use is likely to have come with the ambit of the 1996 permission. This material change of use this represents development for the purposes of s55 for which no extant permission exists.

14. The appeal on this ground fails.

**The appeal on ground (d)**

15. An appeal on this ground is that at the time the notice was issued it was too late to take enforcement action against the matters stated in the notice.

16. By virtue of s191(3), a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful if at the time for taking enforcement action in respect of the failure has expired and it does not constitute a contravention of any enforcement notice or breach of condition notice which is in force. A breach becomes immune from enforcement action within the limits set out in s171B, which is a period of 10 years beginning with date of the breach for changes of use. The appellant needs to show on the balance of probability that the breach occurred and continued uninterrupted for a period of 10 years prior to 1 December 2017.

17. The appellant has submitted a statutory declaration dated 22 December 2017 stating that the site has been used continuously for storage of vehicles and materials/plant since at 2004[2].

18. Notwithstanding this, it is clear from the evidence and particularly the 2013 planning permission referred to in my reasoning in the ground (c) appeal above, that any continuity in the B8 use of the land has been broken by the parking of cars for cruise ship and airport passengers. Additionally if, as the appellant considers[3], the site is currently being used for B1/B8 use, it has not been shown that a mixed B1/B8 use has occurred uninterrupted on the site for 10 years.

19. The appellant considers that continuity of use led to immunity from enforcement action 10 years after 20 September 2004 and that subsequent continuity of use is no longer required. However in *Panton and Farmer v SSETR & Vale of White Horse DC [1999] JPL 461* it was held that lawful use rights could only be lost by evidence of abandonment, by the formation of a new

[2] Appendix RC1 of the appellant's statement – statutory declaration of Russel Clarke, managing Director of Lainston Ltd, landlord of the appeal site.
[3] Paragraph 8 of appendix RC1 of the appellant's statement

planning unit or by being superseded by a further change of use. In this appeal a new chapter in the planning history of the site occurred through the material change of use that led to the retrospective 2013 application for the car park use.

20. Accordingly the appellant has not shown on the balance of probability that the use has continued uninterrupted for a period of 10 years and is not, therefore immune from enforcement action.

21. The Council has invited me to consider whether intensification has brought about an identifiable change in the character of the use made of the land such that a material change of use has occurred. However, as I have concluded that car parking for cruise ship and airport passengers is a *sui generis* use that is materially different to the B1 use, it is not necessary for me to consider this issue further.

22. The appeal on this ground fails.

**The appeal on ground (f)**

23. An appeal on this ground is that the steps are excessive and lesser steps would overcome the objections.

24. The appellant considers that the requirement to cease the use of the land to be far in excess of what is or may be necessary to remedy any injury to amenity that may have been caused by the breach and has requested that I consider this in the context of possible conditions or imposing a lesser remedy such as the imposition of regulated hours/days, although such limitations on operational use have not been specified by the appellant.

25. However, the appellant has not appealed on ground (a) - that planning permission should be granted for what is alleged. In the absence of such an appeal, I cannot consider the planning merits or impose conditions.

26. The purpose of the requirements of a notice is to remedy the breach by discontinuing any use of the land or by restoring the land to its condition before the breach took place or to remedy an injury to amenity which has been caused by the breach. In this case it is evident that the purpose of the notice is to remedy an injury to amenity caused by the need for significant vehicle movements through an otherwise quiet residential street, which the Council considers cannot be overcome through conditions attached to any planning permission.

27. A statement dated July 2018 submitted by John Foster, Head of Operations for the site, states that a revised operational regime has been introduced which has led to a reduction in the operational use of the site for 6 months prior to the statement. Whilst this may well be the case, this is a matter for consideration in a ground (a) appeal. Furthermore, there is no evidence before me to indicate at what level of operational use would need to be reduced to in order for the injury to amenity caused by the breach to be reduced to an acceptable level. Even if specific limitations had been identified which could have represented lesser steps, I note the Council's concern over the ability to monitor and enforce a restricted use of the site. There is no obvious alternative that has been put to me which would overcome planning difficulties, at less cost and disruption than cessation of use.

28. It is necessary for the requirements to match the matters alleged and therefore I consider that the requirements of the notice in this case do not exceed what is necessary to remedy the breach. The requirements do not preclude the appellants doing what they are lawfully entitled to do in the future once the notice has been complied with.

29. The appeal on this ground fails.

**The appeal on ground (g)**

30. An appeal on this ground is that the compliance period is too short. The appellant requests a period of 12 months for compliance to enable an appropriate and available site to be found and to relocate the business without interruption.

31. On the other hand, the Council indicate that if 3 months is considered to be insufficient as a period of compliance, then a compromise of 6 months would be reasonable in the circumstances.

32. I acknowledge that the highway network is such that use of residential roads by traffic accessing the appeal site has an effect on residential amenity. It is also the case that there have been commercial uses on the site for many years although the 1996 permission was restricted as a result of concerns over the effect of traffic on residential amenity. In view of the stated reduction in the operational use of the site by the Head of Operations it may be the case that the effect on residential amenity has also reduced although I have no evidence before me to substantiate this assumption. However, the continuation of an unauthorised use should not continue longer than is reasonably necessary. Notwithstanding this, in order for the appellant to have a reasonable period to relocate the business to an alternative site I consider that a compliance period of 9 months would be reasonable. Furthermore this period could also provide time for the appellant to discuss with the Council whether there is any reasonable prospect of planning permission being granted subject to conditions that would overcome the harm to residential amenity, should the appellant chooses to do so, despite the Council's previous views on the matter.

33. I therefore allow the appeal on ground (g) and I will vary the requirements of the notice accordingly.

**Conclusion**

34. For the reasons given above I conclude that a reasonable period for compliance would be 9 months, and I am varying the enforcement notice accordingly, prior to upholding it. The appeal on ground (g) succeeds to that extent.

**Formal Decision**

35. It is directed that the enforcement notice be varied by the substitution of 9 months for the period for compliance with the requirements instead of 3 months as set out in the notice. Subject to this variation the appeal is dismissed and the enforcement notice is upheld.

*P N Jarratt*

**Inspector**