



Appeal Decisions

Inquiry Held on 26 – 28 February 2019

Site visit made on 26 February 2019

by Katie Peerless Dip Arch RIBA

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

Decision date: 8 April 2019

2 Appeals at Sarnia Nursery, Avey Lane, Waltham Abbey, EN9 3QH

Appeal A: APP/J1535/C/17/3182654

Appeal B: APP/J1535/C/17/3181749

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Giuseppe Fantozzi (Appeal A) and G B Plant Hire and Groundworks Ltd (Appeal B) against an enforcement notice issued by Epping Forest District Council.
 - The enforcement notice, numbered DGIRR/LEG/394/A was issued on 13 June 2017.
 - The breach of planning control as alleged in the notice is the use of the Land for a mixed use of the temporary deposit and sorting of waste, pending re-use or disposal on and/or off-site, the disposal of waste by burning in an incinerator, the storage of scrap metals, general waste, land waste, building materials, the storage of skips and skips containing waste, the storage of scaffolding associated with scaffolding businesses, the storage of plant and machinery and building materials associated with a ground works construction business, the stationing of metal storage containers, the stationing of portable buildings, the storage of motor vehicles, vehicle parts, tyres, lorry bodies and lorry trailers, concrete slabs and a caravan and; operational development comprising the erection of a bund to form part of a permanent boundary, the stationing of metal storage containers and the erection of fencing to form part of a permanent boundary, internal divisions and compounds, the laying of hard core and concrete slabs to form hardstandings.
 - The requirements of the notice are (i) Cease the use of the Land for the temporary deposit and sorting of waste, pending re-use or disposal on and/or off-site, the disposal of waste by burning in an incinerator, the storage of scrap metals, general waste and waste building materials, the storage of skips and skips containing waste (not used in connection with the reclamation of building materials), the storage of scaffolding associated with scaffolding businesses, the storage of plant and machinery and building materials associated with a ground works construction business;
(ii) Remove the incinerator and all metal storage containers (not including any metal storage containers in the areas hatched black on the attached Plan), portable buildings, all motor vehicles parked on the Land (except any vehicles parked in connection with a concrete pumping business), all vehicle parts, tyres, lorry bodies and lorry trailers, concrete slabs and the caravan;
(iii) Remove the bund and fencing erected to form part of a permanent boundary to the Land and all fencing erected to form internal divisions and compounds on the Land;
(iv) Remove the hardstandings on the parts of the Land hatched red on the attached Plan and its constituent materials from the Land, reinstate the Land to the condition before the development took place and seed the Land with grass seed;
(v) Remove all resultant debris from the Land.
 - The period for compliance with the requirements is three months.
 - The appeals are proceeding on the grounds set out in section 174(2) (b) [Appeal B only] (c), (d), (e) (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decisions

1. It is directed that the enforcement notice be varied by deleting the allegations and substituting them with the following wording:

The breach of planning control is the use of the Land (excluding those areas cross-hatched black) for a mixed use for the temporary deposit and sorting of waste pending re-use or disposal on and/or off-site; the disposal of waste by burning in an incinerator; the storage of scrap metals, general waste, land waste and building materials; the storage of skips and skips containing waste; the storage of scaffolding associated with scaffolding businesses; the storage of plant and machinery and building materials associated with a ground works construction business; the storage of motor vehicles, vehicle parts, tyres, lorry bodies and lorry trailers, concrete slabs and a caravan; the stationing of metal storage containers and portable buildings associated with the unauthorised mixed use; operational development facilitating the unauthorised mixed use comprising the erection of a bund to form part of a permanent boundary, and the erection of fencing and the use of metal storage containers to form part of a permanent boundary, internal divisions and compounds.

2. It is also directed that the notice be corrected by the deletion of requirement (iv) and by the substitution of the plan annexed to this decision for the plan attached to the enforcement notice.
3. The appeal is allowed on ground (g), and it is directed that the enforcement notice be varied by the deletion of 3 months and the substitution of 6 months as the period for compliance. Subject to these corrections and variations the appeals are dismissed and the enforcement notice is upheld.

Main Issues

4. I consider that the main issues in these cases are:

Firstly, whether the notice is a nullity or invalid through uncertainty and, if not; on ground (e), whether the notice was properly served on all those with an interest in the land and, if not, whether they have been prejudiced by this; on ground (b), whether the alleged breach of planning control has occurred as a matter of fact;

on ground (c), whether the development requires a grant of planning permission to authorise it and, if so;

on ground (d): whether the development is immune from enforcement action through the passage of time and, if not;

on ground (f), whether the requirements of the notice exceed what is necessary to remedy the breach of planning control.

if all these grounds fail then, on ground (g), whether the time for compliance is reasonable.

Site and surroundings

5. The appeal site includes a former nursery in Green Belt countryside on the outskirts of Waltham Abbey and is close to another similar site known as Providence Nursery that is in the same ownership. The site has been cleared of the former glasshouses that formed part of the previous use but the area on which they once stood remains largely clear of development.

6. The area to the south of the site, beyond the original boundary hedge seen in photographs dating up to around 2007 - 8, was acquired after the area to the north and was not covered by the earlier enforcement notices. This area now accounts for roughly ¼ of the total area enforced against.
7. The operations on the site are taking place mainly adjacent to the northern, eastern and southern sides where individual plots have been divided off and, in many instances, surrounded by metal fencing or containers placed along the boundaries. There are 4 distinct plots alongside the southern boundary which include the plot used by the appellant in appeal B, in the south west corner, a plot occupied at the time the notice was served by James Lally contractors, a plot where a wood burning incinerator was sited but which has now been removed and the plot occupied by East Herts Machinery.
8. To the north of these 4 plots are 7 smaller areas that were variously occupied at the time the notice was issued by (from west to east) Pearsons Scaffolding, (scaffold hire), Rubbish Uncut (waste), Pure Scaffolding (scaffold hire), Brinsdown Metals (roll-on, roll-off skips with metal reclamation), Projunk Ltd (waste) Downton & Son (scaffold hire) and Think Waste (waste recycling).
9. At the time of the site inspection there was a business, Barhams, adjacent to the boundary with Avey Lane that, I am told, exports used cars. 2 of the compounds further into the site contained stacks of tyres. I also saw that, around the site and outside the compounds, there were a number of shipping containers, vehicles in various states of repair, lorry box bodies, stacks of reclaimed building materials, pallets, items of plant and machinery and a caravan.

Planning history

10. The site, together with Providence Nursery has a long planning history and there are 2 extant enforcement notices covering part of the site and preventing its use for the storage and sale of second hand timber and the storage of derelict vehicles (1972) and the breaking of motor vehicles (1974).
11. In 2002 other enforcement notices were issued and appealed and, in 2003, the appeal Decisions found that the authorised use of the site was a mixed use comprising agriculture, the reclamation of building materials, the repair, storage and sale of pallets and the parking of up to 4 haulage vehicles. It was concluded at that time that vehicles parked in connection with the concrete pumping business lying within the hatched area excluded from the enforcement notice subject of this appeal were also authorised. It was also found that the stationing of containers associated with the identified mixed use was authorised. At the site visit in 2002, the Inspector noted that, amongst other things, there was a vehicular track running around the site of the former glasshouses.

Reasons

Nullity and invalidity claims

12. The appellants submit that the enforcement notice is a nullity or should be quashed for invalidity for a number of reasons. They claim that it combines allegations of an unauthorised material change of use with those of unauthorised operational development but cites a 10 year period for all the allegations and that the correct time scale for immunity from enforcement is consequently unclear.

13. The Council submits that the operational development enforced against is facilitating the unauthorised uses and, because of this, the enforcement notice can require removal of these items even if they have been on site for more than the 4 years that would otherwise grant them immunity.
14. I agree that the wording of the notice is not particularly clear and I consider that it should be amended to clarify that the operational development is enforced against because, as the Council has explained, it facilitates the alleged change of use. I consider that the allegations can be reworded in this way because it would have no impact on the time scale quoted in the notice which, at 10 years for a material change of use is correct, and would not, therefore, prejudice the appellants. I shall therefore make these variations.
15. It is also suggested that the notice is invalid because, by not specifying the lawful uses of the land, it is unclear to the appellant as to what he had to do to comply with the requirements. However, the 2003 appeal Decision sets out which uses were found to be authorised and there is no requirement for the Council to repeat this in the latest notice. The last appeal was jointly made by the current appellant for Appeal A who would therefore have been aware of its findings. The appellant for Appeal B did not move his business fully onto the site until 2016 but the notice sets out that such a business is not authorised and that the use of the site for this use should cease. I do not consider that this wording is unclear or that the notice is invalid in this respect.
16. There is also an omission on the notice, acknowledged by the Council, in that the area 'hatched red' on the plan attached to the notice and referred to in the requirements has not actually been identified. The Council considers, however, that the notice is correctable, either by omitting the reference to the hatching, describing the area it was intended to cover or amending the plan to include it. The appellants submit that this would cause injustice and claim that some areas are immune through the passage of time and would want to include them in their ground (d) appeal.
17. In respect of the hardstanding, whilst the Council explained at the Inquiry which areas it considered should be covered, there was no alternative plan submitted for me to substitute and no precise indication of which areas are considered to be unauthorised. There are various parts of the site which have some form of man-made material laid on them and it is clear from the photographs submitted that some, specifically those on the southernmost 'strip' beyond where the original boundary hedge was located, are relatively new. As noted above, the previous Inspector also referred to a track running around the site. However, without specific details before me, I agree that the enforcement notice is unclear as to which areas of hardstanding the Council seeks to have removed.
18. I shall therefore vary the notice to remove references to the hardstanding although this would, of course, not prevent the Council from taking further enforcement action against this operational development if it considered it appropriate and expedient.

Ground (e)

19. The appellants claim that the notice was not properly served on all those with an interest in the land. Although this claim was made in respect of Mr Gino Fantozzi, the brother of the appellant in Appeal A and the co-owner of the site, at the Inquiry it was accepted that the evidence produced by the Council was sufficient to show that they had made proper efforts to serve him with the notice.

20. However, it does appear that the owner of East Herts Machinery was not served with the enforcement notice along with the other owners and tenants on the site on 13 June 2017. At the time, the Council officers appeared to be under the impression that his site was part of the adjacent plot on which the incinerator was sited. Having served a notice on that plot, they believed that the tenants on the East Herts Machinery plot had also been served.
21. Although the owner and his son gave evidence to the Inquiry, they had not made one of the numerous appeals against this notice, (or against a second enforcement notice served against the adjacent strip of land to the west of the main site, that were subsequently withdrawn). Therefore, there is a clear possibility that they have been prejudiced by the non-service through not having been able to make their own appeal, for instance on ground (a).
22. Although the plot was included in the land shown on the original plan attached to the enforcement notice, I shall amend that plan to omit the East Herts Machinery plot which lies in the south east corner of the site. Once again, the Council would still be able to take separate enforcement action against that particular site, should it be deemed expedient.

Ground (b)

23. At the Inquiry the appellants for appeal B made no substantive case to support an appeal on ground (b). The owner of the company originally claimed that, as a tenant, he had not been involved with activities on the wider site, but there is no doubt that he does have a groundworks business operating from the site. The appeal on ground (b) consequently fails.

Grounds (c) and (d)

24. The appeals on ground (c) are based on the claim that the activities that are currently taking place on site fall within the same use classes as those agreed by the Inspector in the 2003 appeal Decision to be the lawful use of the land. The appellants consider that these fall within Use Classes B2 and B3 and consequently submit that, in respect of any other uses enforced against within these classes, there has not been a material change that would require a grant of planning permission to authorise them.
25. In the previous case, the Inspector found that the lawful uses were agriculture, a concrete pumping business and a business that comprised the repair, storage and sale of pallets and the parking of up to 4 haulage vehicles, with the agricultural use remaining dominant although smaller areas were devoted to other activities. The Inspector also declined to issue a Certificate of Lawful Use for the mixed use suggested by the appellant due to a lack of clarity about the intensity, limits or areas of land occupied by the various uses that had been taking place on the land in the previous 10 years.
26. Since that finding, there is no dispute that other uses have been undertaken on the site, and I consider that these have changed the character of the original mixed use as documented in 2003. For example, at the time of the service of the current notice there was a wood burning incinerator present and a number of companies were importing waste onto the site. Although the appellants claim that this material was intended for reclamation, there is no doubt from what I saw at the site visit and the photographic evidence submitted to the Inquiry, that general waste was brought onto, and stored on, the site.

27. These uses do not fall within Use Classes B2 or B8 as defined in the Town and Country Planning (Use Classes) Order 1987 (as amended) even if it were to be accepted that these form the current authorised use. S.55(2B)(3)(b). of the Town and Country Planning Act 1990 (TCPA) also notes that the deposit of refuse or waste materials on land involves a material change in its use.
28. It is also the case that the site area has changed since the appeal Decision in 2003 as it has expanded onto the land to the south of the area considered by the previous Inspector. These facts lead me to conclude that there has been a material change of use of the land now included in the latest enforcement notice plan and that planning permission would be required to authorise this, unless it can be shown that the change of use was immune through the passage of time. The appeals on ground (c) consequently fail.
29. Nevertheless, the appellants appear to want to retain the uses that they now claim either fall within what they say are the previous use classes recognised in 2003 or are immune through the passage of time. These comprise all the storage uses listed in the notice and the groundworks and machinery hire businesses.
30. However, I consider these arguments are flawed for a number of reasons. Firstly, the previous Inspector did not make a finding on whether the mixed use on site at the time of his Decision fell into the Class B2 and B8 use categories now claimed by the appellants but confined himself to setting out a defined combination of particular named uses that were found to be lawful. That mix has now changed significantly and includes uses that are *sui generis* as well as some that could be considered to fall within Use Classes B1, B2 and B8.
31. Secondly, the planning unit enforced against is now different. Whilst the area to the south of the site may have been used for some years for various low key uses, these uses have now been overtaken by others that are different and which are situated in more formalised compounds. The compounds have been hard surfaced and contain separate, unrelated businesses whereas, previously, the southern section remained undivided and was largely laid to grass with the only surface material being some reinforcing membrane to prevent vehicles becoming stuck in the mud. One of the witnesses at the Inquiry confirmed that he carried out electrical repairs to the vehicles on this area and this appears, from the aerial photographs, to have been the only type of activity taking place on this part of the site until about 2014.
32. Even if the East Herts Machinery site is excluded from the areas now enforced against, the remainder of the southern strip has been merged into the remainder of the site from which it can no longer be readily distinguished. The aerial photographs demonstrate that until at least 2014, this land remained without sub-divisions but by 2016¹, it had been, or was being, laid to hard surfacing and fencing was erected.
33. In respect of the claim that some of the uses have been established for more than 10 years prior to the issue of the notice, the previous Inspector noted that there had been '*more fleeting or transient uses*' during the period prior to the issue of the enforcement notices that he was considering but these had not become immune from enforcement and it seems to me that the same situation has continued since then.

¹ Photo set A

34. Even if there have been components of the mixed use on site for the relevant period, the current site would only be immune from enforcement if the overall *sui generis* mixed use had remained the same since 13 June 2007 (i.e. 10 years prior to the issue of the notice). In this case it has not, with some witnesses confirming that their site tenure has been less than 10 years. Also, the activities on the site have fluctuated and moved around the site and new uses have been introduced within the last 10 years.
35. I consider that the creation of the extended planning unit containing a mix of uses that differs from those present in 2002/3, and indeed 2007, has commenced a new chapter in the planning history of the land involved and brought about a material change of use of that land. The planning unit enforced against and the mix of uses contained within it have not existed for 10 years prior to the issue of the enforcement notice and the appeals on ground (d) consequently fail.

Ground (f)

36. It was suggested at the Inquiry that some of the operational development, such as the erection of fencing, would be development permitted under the Town and Country Planning (General Permitted Development) Order 2015. However, the fencing I saw on site was all over 2m high which would exceed the permitted development limit.
37. It has also been claimed that it is not for the appellant for Appeal A to be made responsible for the removal of items owned by his tenants and that it excessive to require him to do so. However, the notice has been served on all the occupants of the site, apart from East Herts Machinery whose plot, as previously noted, will be removed from the enforcement notice plan. They will all therefore be responsible for complying with the notice and the Council would be able to take action against any who fail to remove their items when they are required to do so by the notice.
38. The matter of whether it is reasonable to require the removal of the hardstanding has already been dealt with in previous paragraphs. Otherwise, the appeals on ground (f) fail.

Ground (g)

39. The appellants ask for 12 months rather than 3 to comply with the notice, to allow them and the other tenants more time to relocate their businesses. Some of the occupants have already left but I consider that 6 months would be a reasonable period for compliance, given that there are still several businesses that would need to find new premises. I will vary the notice accordingly and the appeals on ground (g) succeed to this extent.

Katie Peerless

Inspector

APPEARANCES

FOR THE APPELLANT:

Andrew Gore	Of Counsel instructed by Mr G Fantozzi
He called	
Mr Howard Green	Business associate of Mr Fantozzi
Mr Robert Fairley	Realm Premium Scaffolding Ltd.
	Tenant on Sarnia Nursery enforcement site
Mr Frank Downie	Tenant on land outside enforcement notice
Mr Giuseppe Fantozzi	Appellant for Appeal A
Mr Mohammed Ibrahim	Former tenant on Sarnia Nursery enforcement site
Mr Daniel Dormer Snr	East Herts Machinery Ltd
	Tenant on Sarnia Nursery enforcement site
Mr Wayne Berry	GB Plant Hire & Groundworks Ltd
	Appellant for Appeal B
Mr Daniel Dormer Jnr	East Herts Machinery Ltd
Oliver Leonard	Former tenant on Sarnia Nursery enforcement site

FOR THE LOCAL PLANNING AUTHORITY:

Richard Banwell	Of Counsel instructed by the Legal department of Epping Forest District Council
He called	
Ms Clare Munday	Post Grad
Dip TP	
Mr Jeremy Godden	MRTPI
	Principal Planning Officer (Enforcement)
	Epping Forest District Council

INTERESTED PERSONS:

Mr Siraj Karbhar	Local resident
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DOCUMENTS

- 1 Letter of notification and circulation list
- 2 1972 Enforcement notice
- 3 1973 Enforcement notice
- 4 Copy memo of those served with 2017 enforcement notice
- 5 Proof of delivery of notice to GB Groundworks
- 6 Mr Gardiner's proof of evidence (witness not called)
- 7 Mr Gore's opening statement
- 8 Mr Banwell's opening statement
- 9 Rules on service of notices
- 10 Notes of Mr Karbhar's statement
- 11 Additional witness statement from Mr Fantozzi
- 12 Closing submissions for Epping Forest District Council
- 13 Bundle of authorities
- 14 Closing statement on behalf of Mr Fantozzi

15 Enforcement notices from 2002

16 Statement of Common Ground

PHOTOGRAPHS

A Photo set submitted by the Council taken in 2016

B Photos from 9/2006 and 2017

C Photo from April 2017 showing compounds/tenancies



Plan

This is the plan referred to in my decision dated: 8 April 2019

by **Katie Peerless Dip Arch RIBA**

Land at: Sarnia Nursery, Avey Lane, Waltham Abbey, EN9 3QH

References: Appeal A: APP/J1535/C/17/3182654

Appeal B: APP/J1535/C/17/3181749

Scale: NTS

