



Appeal Decision

Inquiry held on 22-24 May and 7 June 2019

Site visit made on 23 May 2019

by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI

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

Decision date: 12 July 2019

Appeal Ref: APP/V4630/C/18/3197762

Land at 86 Lichfield Road, Shelfield, Walsall WS4 1PY

- 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 Paul Merrick against an enforcement notice issued by Walsall Metropolitan Borough Council.
 - The enforcement notice was issued on 5 February 2018.
 - The breach of planning control as alleged in the notice is the use of the site for: a) Commercial sales and fitting of motor vehicle tyres, including wheel balancing and alignment; b) Storage and distribution of vehicle tyres; c) Tyre jetting and washing; d) Offices and customer reception incidental to the sale and fitting of vehicle tyres; and e) Parking of customer and staff cars incidental to the sale and fitting of tyres.
 - The requirements of the notice are 1. Permanently cease all unauthorised uses at the premises including the sale and fitting of tyres, tyre storage and distribution and use of the premises for offices and customer reception and sales; 2. Remove all tyres, wheels, associated tyre fitting equipment, compressors, wheel balancing machines and associated plant and equipment from the building; 3. Remove all storage facilities including tyre racks and tool storage containers; 4. Remove all vehicles and vehicle parts; 5. Remove all office equipment, including computers, telephones, printers, chairs, desks, files and storage facilities; 6. Remove all furniture and vending machines from the reception area and any other areas; and 7. Leave the site in a clean and tidy condition, disposing of any waste materials generated from the above works to a suitable facility licensed to accept those items.
 - The period for compliance with requirement 1 is 1 month and with requirements 2-7 is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c) and (d) of the Town and Country Planning Act 1990 as amended (the Act).
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Decision

1. The enforcement notice is varied by the deletion of 'a) Commercial sales and fitting of motor vehicle tyres, including wheel balancing and alignment; b) Storage and distribution of vehicle tyres; c) Tyre jetting and washing; d) Offices and customer reception incidental to the sale and fitting of vehicle tyres; and e) Parking of customer and staff cars incidental to the sale and fitting of tyres' in section 3 and the substitution instead of 'the sale and fitting of motor vehicle tyres, including wheel balancing and alignment'.

2. Subject to this variation the appeal is allowed, the enforcement notice is quashed, and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely 'the sale and fitting of motor vehicle tyres, including

wheel balancing and alignment' on land at 86 Lichfield Road, Shelfield, Walsall, subject to the conditions set out in a Schedule attached to this decision.

Procedural matters

3. Prior to the Inquiry an application for costs was made by Mr Paul Merrick against the Council. This application is the subject of a separate Decision.

4. The enforcement notice was issued to Mr Paul Merrick and copies were served on Lichfield Properties Ltd, Select Number Plates Ltd and Tyre City Walsall Ltd. Lichfield Properties Ltd are the owners of the land but Mr Merrick has power of attorney (Inquiry Document (ID) 8) to act on behalf of the owner.

5. All witnesses at the Inquiry, except Mr Worrall, gave evidence under oath.

Reasons

Background information

6. The enforcement land has an east frontage to Lichfield Road and a rear west boundary to an area of public open space. To the north and south are residential properties. The Appellant purchased the enforcement land in 2007. On the rear part of the land, at that time and abutting three boundaries, was a garage building in a state of disrepair. At the front of the land was a two storey building that had most recently been used as a TV repair shop at ground floor level with storage at first floor level. Connecting the two buildings was a single storey element that had been in use as a studio flat. Between the flat and the two storey building, and the south boundary, was a driveway access to the garage building.

7. The Appellant proceeded to develop the land, mainly by improving the garage building, with the intention of establishing a tyre fitting business. The two storey building and the single storey element were demolished and works were commenced on the garage building in 2008 without the benefit of planning permission. The Council wrote to the Appellant requesting a planning application, which was submitted in March 2009, and an accompanying letter indicated that the application was part retrospective and part prospective. Planning permission 10/0211/FL was granted on 20 August 2010, subject to nine conditions, for 're-roofing, repair and alterations to rear element of existing garage building, minor extensions to front of building, formation of car parking area fronting Lichfield Road and formation of hard standing and access at the rear'.

8. The permission includes the 'formation of hard standing and access at the rear'. This element of the development would have created a one-way system for vehicles through the building with access from Lichfield Road, and egress through a roller shutter door in the rear elevation of the building and across a public open space to the public highway. The hard standing was laid before the planning application was submitted and in April 2010 the Council's Estates Department, having previously stated otherwise, agreed to support an application for a licence for vehicle access over the open space. However, in July 2011 the Estates Department resolved not to grant a licence and later asked the Appellant to remove the hardstanding; which he has done.

9. In 2012 the Council considered, on two occasions, whether to take enforcement action against what was deemed to be unauthorised development on the land, but on both occasions decided not to do so. Instead they required the developer to enter into a Section 106 Agreement to control the use of the land.

This agreement required the prior approval and erection of a boundary wall and the implementation of refuse storage facilities, and the painting of the roller shutter door in the front elevation in an approved colour. It also restricted the use of the forecourt parking area and the hours of operation of the business operations, and limited noise from plant and machinery to a rating level of no more than 5 dB as determined in accordance with the methodology in BS 4142:1997. The agreement remains in effect.

10. In March 2013 the Local Government Ombudsman (LGO) issued a report on an investigation into complaints made by two local residents about the development of the land. The LGO criticised the Council for incorrectly treating the planning application as being for an existing use of the land as opposed to being for a new development, and for therefore failing to consider the application against relevant planning policies. The LGO found that the complainants were caused injustice through uncertainty and that they were put to unnecessary time and trouble in pursuing their complaints. The LGO also found that there was an unacceptable delay in the Council carrying out an enforcement investigation and in seeking restitution of public open space which was developed without permission.

11. A single building, larger than the original garage building, now stands on the rear part of the site with a parking area at the front. The Appellant has fitted out the building to be a tyre fitting business and the main parties agree that the use has begun, even though the premises are not yet open for business.

The ground (b) appeal

12. The Appellant does not dispute that the principal use alleged in the notice, the sale and fitting of motor vehicle tyres, has occurred. He also does not dispute that the alleged incidental uses have also occurred. He does, however, dispute that the storage and distribution of vehicle tyres, and tyre jetting and washing, have occurred.

13. With regard to the storage and distribution of tyres, the Council relies on a website for Citytyre.co.uk, which advertises tyres for sale. The webpages identify the appeal address as being the location of the business. The Appellant explained at the Inquiry that orders are placed online or by phone and that tyres are stored at, and despatched from, a facility in Erdington. This is plausible because the building on the appeal land is not large enough to store all the sizes and grades of tyres produced by the many manufacturers listed on the webpage. Also, the webpage has a link to a directory of tyre dealers and offers, for tyres purchased, to "...deliver them to your local fitter". There is no evidence that tyres have been distributed from the appeal building, and the storage of tyres in the building is incidental to the sale and fitting of those tyres. There is no substantive evidence to indicate that the storage and distribution of tyres has occurred.

14. There is photographic evidence of tyre jetting and washing having occurred on the land. But this has not been associated with any commercial use of the premises and there is no evidence to indicate that this activity has occurred anything other than infrequently. Any tyre jetting and washing that has occurred does not constitute a material use of the land that was occurring on the date of issue of the enforcement notice.

15. The breach of planning control includes, probably for the sake of completeness, incidental uses to the principal alleged use of the land, the sale and fitting of motor vehicle tyres. There is no requirement for a Council to do so in

such a case as this and the listing of incidental uses only serves to elongate the alleged breach.

16. The main parties agreed at the Inquiry, if there was to be partial success under ground (b), that the breach of planning control could be varied without causing injustice to either party. For reasons given above the sale and distribution of tyres, and tyre jetting and washing, have not occurred, as a matter of fact, and these uses shall be deleted from the breach of planning control. Also, reference to incidental uses in the breach is unnecessary, as is the reference to sales being commercial sales. To this extent the ground (b) appeal succeeds and the breach of planning control has been varied to be the 'sale and fitting of motor vehicle tyres, including wheel balancing and alignment'.

The ground (c) appeal

17. The Appellant maintains that development of the land has been carried out in accordance with the planning permission and that the permission includes the continued use of the land as a garage (the application committee report states that the use 'is a use established over a number of years'). He maintains that the established garage use and the use of the premises for the sale and fitting of motor vehicle tyres both fall within Class A2 of The Town and Country Planning (Use Classes) Order 1987 as amended, and that, therefore, the latter use has the benefit of planning permission. The Council maintains that the development constituted the erection of a new building, that the works were not completed in accordance with the permission, and that, therefore, the use of the land for the sale and fitting of motor vehicle tyres does not benefit from planning permission.

18. The Appellant obtained Counsel's opinion, prior to submission of the appeal, on the applicability of ground (c). His conclusion was that it was applicable because, amongst other things, "...the works could properly be described...both as repair and alterations to, or partial reconstruction of, the building". The Council also sought Counsel's opinion, in 2011, to inform their considerations at that time and his view, as reported by the LGO, was that "...the building works undertaken by the developer amounted to a new building on the site". There is no evidence to indicate that either Counsel visited the site and, in any event, this decision is not bound by either opinion. This decision has been informed by a site visit and it is a matter of fact and degree whether the works complied with the terms of the planning permission, or constituted the erection of a new building.

19. The substantive part of the development for which planning permission was granted is 're-roofing, repair and alterations to rear element of existing garage building, minor extensions to front of building'. The building that now stands on the land has a roof structure that does not include any part of the former roof. The roof structure, in fact, has a gable form whereas the main part of the former roof had a butterfly form. It cannot, furthermore, be claimed that the former building has been re-roofed, because that building had a timber roof structure supported by external side walls whereas the current roof is supported by a steel portal frame that is built off new concrete pad foundations. The stanchions are cut into the masonry walls and the foundations have been installed specifically for the steel frame. The building has an entirely different roof structure to the former building.

20. The 'extensions to the front of the building', facilitated by the demolition of the two storey building and the single storey link element, extended the original building by about 3.5 metres and created a reception/office/toilet area that is about 3.5 metres wide and 9.5 metres long. The south walls of the extensions are

almost wholly new blockwork whilst the north wall, about 13 metres long, is largely the brickwork boundary wall to the neighbouring residential property; though this has been built up by about one metre in new blockwork for a length of about 10.5 metres. Most importantly, however, the rear wall of the building, to the public open space, is wholly new blockwork and only about 23% of the original brickwork of the side walls of the original workshop building has been retained.

21. The extent of new blockwork to the side and rear walls of the original building far exceeds what could constitute 'repair and alterations' of the building and the wholly new roof structure did not constitute 're-roofing'. The works were carried out incrementally but if all works of demolition had been completed before reconstruction works began the retained works, notwithstanding the retention of the concrete floor, would not have constituted an 'existing garage building'. The construction works carried out did not include 're-roofing, repair and alterations to rear element of existing garage building' and, as a matter of fact and degree and together with the 'extensions to the front of the building', constituted the construction of a new building.

22. Development of the land, both before and after submission of the planning application, has not been carried out in accordance with the planning permission, though the Council accepts that the building is immune from planning permission through the passage of time. The building on the land is a new building which is not permitted development and for which planning permission has not been granted. Case law and all other matters put forward by the Appellant have been taken into account but do not alter the conclusion that the use of the land for the 'sale and fitting of motor vehicle tyres, including wheel balancing and alignment' is not permitted development and does not have the benefit of planning permission. The ground (c) appeal therefore fails.

The ground (d) appeal

23. The Appellant claims that the use of the rear part of the site that he purchased in 2007 still subsists because the construction of a new building does not necessarily constitute a new chapter in the history of the land and that the previously established Class B2 use of the land has not been abandoned. He has created a facility for the use of the land, however, that takes up all of the land; in this regard the use of the rear part of the land cannot be separated from the use of the front part of the land because that use, for parking and office/reception use, is ancillary to the intended use of the rear part of the land for the 'sale and fitting of motor vehicle tyres, including wheel balancing and alignment'.

24. The land is intended to be in a single use for the 'sale and fitting of motor vehicle tyres, including wheel balancing and alignment'. In closing it was stated that "There is common ground that there were two planning units...at the time that Mr Merrick acquired the whole of the premises in 2007". It is possible, in fact, that there were three planning units; the garage business, the two storey building in shop/storage use, and the studio flat, because there is no evidence to suggest that this was occupied ancillary to any other use. This factor notwithstanding, it is likely, given the chronology of events set out above, that the land was two or three planning units after 5 February 2008.

25. There was a change from two or three planning units to a single planning unit less than ten years before the date of issue of the enforcement notice. This constituted a material change in the use of the land which occurred less than ten years before that date. The ground (d) appeal thus fails.

The ground (a) appeal

26. The main issue is the effect of the use of the land for the 'sale and fitting of motor vehicle tyres, including wheel balancing and alignment' on the amenities of neighbouring residents.

27. The proposed use of the land for the sale and fitting of motor vehicle tyres, including wheel balancing and alignment, would possibly include noisy commercial activity that could cause disturbance to neighbouring residents. But it is a fundamental planning principle that if otherwise unacceptable development could be made acceptable through the imposition of conditions, then planning permission should be granted for that development. This principle is set out in paragraph 54 of the National Planning Policy Framework.

28. Condition two of the permission granted in this decision requires a noise survey to be undertaken, which would assess background noise levels at neighbouring noise sensitive properties, and the submission of a noise report that would assess the likely noise to be generated by the proposed use of the land, and that would detail mitigation measures to be undertaken to prevent noise disturbance. This would be required to be in accordance with BS 4142:1990, which describes a method of determining whether the level of a noise of an industrial nature, together with procedures for assessing whether the noise in question is likely to give rise to complaints from persons living in the vicinity. There is nothing unusual about the proposed use of the land to indicate that assessing the potential for noise disturbance against BS 4142 is not appropriate.

29. Other conditions imposed would prevent any activity outside the building other than the parking and manoeuvring of vehicles, and would restrict the hours of operation of the proposed use of the land to 0800 to 1800 hours on weekdays and 0800 to 1600 hours on Saturdays, and not at all on Sundays and Bank and Public Holidays. Lichfield Road is a busy main road carrying a high volume of traffic during the permitted hours of operation of the use. Traffic noise will be the major contributory factor to background noise levels and there is no evidence to indicate that the noise emanating from commercial activity at the premises could not be reduced to the limits required by BS 4142, by the introduction of mitigation measures, if this was deemed necessary. Furthermore, there would be no commercial activity at the premises at times when neighbouring residents can reasonably expect not to be disturbed by noise from adjoining uses of land. In this regard traffic noise will persist through Saturday afternoons and there is no reason to restrict the hours of operation on Saturdays to 0800 to 1300 hours.

30. The Council has suggested a condition that would require the roller shutter door to the workshop to be kept shut other than for the ingress and egress of vehicles. This is a matter that could be considered in the noise report and might not be necessary to protect neighbouring residents from noise disturbance, so the condition fails the test of necessity. Condition three of the permission granted requires the submission of a scheme for the storage of refuse. Whether this storage would be within or outside the building is a matter for negotiation between the Appellant and the Council and would be affected by negotiation on other matters, such as a scheme for car parking and manoeuvring required by condition five. Suggested conditions have been amended and/or combined in the interests of clarity and precision and in the light of tests set out in the National Planning Practice Guidance.

Other matters

31. There is limited space on site for the parking and manoeuvring of vehicles. However, the site is wide enough for vehicles to be manoeuvred to leave in forward gear thus alleviating concern for highway safety on Lichfield Road, and it is noted that the Highway Authority has not expressed any concern in this regard. With effective management there is sufficient space for parking and manoeuvring of vehicles on site. The proposed use of the premises does not thus conflict with policy TRAN2 of the Black Country Core Strategy or saved policies T7 and T13 of the Walsall Unitary Development Plan.

Conclusion

32. With the imposition of conditions, particularly that which would require the introduction of noise mitigation measures if deemed necessary, the proposed use of the land would not cause noise disturbance and thus be harmful to the amenities of neighbouring residents. The proposed use does not thus conflict with saved policies JP8, ENV10 and GP2 of the Walsall Unitary Development Plan. The ground (a) appeal succeeds and planning permission has been granted for the sale and fitting of motor vehicle tyres, including wheel balancing and alignment, on land at 86 Lichfield Road, Shelfield, Walsall, subject to conditions.

John Braithwaite

Inspector

- 13 Council's letter of notification of the Inquiry and list of those notified.
- 14 R v Bassetlaw District Council, ex parte Oxby [1998] PLCR.
- 15 Peel Land and Prop. Invest. v Hyndburn B C and others [2013] EWCA Civ 1680.
- 16 R v Hyndburn B C and others [2012] EWHC 2959 (Admin)
- 17 Barnett v SoS for CLG [2010] 1 P & C R 8.
- 18 E H Hewlett v SoS for Env and Brentwood D C [1985] WL 311159.
- 19 Fidler v First SoS [2005] 1 P & C R 12.
- 20 Openings Submissions on behalf of Walsall M B C.
- 21 Second letter from Ms Bryan to PINS dated 19 June 2018.
- 22 Third letter from Ms Bryan to PINS dated 19 June 2018 plus attachments.
- 23 Petition against the development on the enforcement land.
- 24 SoS for ET&R and another v Thurrock B C [2002] EWCA Civ226.
- 25 Revised planning conditions.
- 26 LB of Lambeth v SoS for CLG and others [2018] EWCA Civ844.
- 27 Trump International and another v Scottish Ministers [2015] UKSC 74.
- 28 South Staffordshire D C v SoS for the Environment and others 55 P&CR.
- 29 SoS for CLG and another v Welwyn Hatfield B C [2011] UKSC 15.
- 30 Fidler v SoS for CLG and another [2011] EWCA Civ 1159.
- 31 Appellant's Application for an Award of Costs.
- 32 Council's Response to the Application for an Award of Costs.
- 33 Appellant's Final Comments for his Application for an Award of Costs.
- 34 Closing Submissions on behalf of the Council.
- 35 Closing Statement on behalf of the Appellant.

SCHEDULE OF CONDITIONS

1. The use of the land hereby permitted shall begin no later than three years from the date of this decision.

Reason: To comply with the requirements of Section 91 of the Act.

2. The use of the land hereby permitted shall not take place on the land until a noise survey has been undertaken and a noise report prepared, in accordance with a methodology set out in BS 4142:1997, and both the noise survey and the noise report have been submitted to the Local Planning Authority for their written approval. The noise report shall detail all findings and shall provide details of recommendations for mitigation measures to ensure that noise from commercial activities on the land shall not at any time exceed 5dB above background noise levels at nearby noise sensitive locations. The use of the land hereby permitted shall not take place until the noise report, noise survey and mitigation measures required by condition two have been approved in writing by the Local Planning Authority. The mitigation measures shall be carried out before the use hereby permitted commences and shall thereafter be retained.

Reason: To safeguard the amenities of local residents.

3. The use of the land hereby permitted shall not take place until a scheme for the storage of refuse has been submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be implemented, before the use of the land hereby permitted commences, and shall be maintained throughout the lifetime of the development.

Reason: To ensure that refuse is properly stored.

4. The use of the land hereby permitted shall not take place until the rear roller shutter door has been removed and the opening infilled with facing materials to match surrounding materials.

Reason: To ensure a satisfactory appearance for the development.

5. The use of the land hereby permitted shall not take place until a car parking and manoeuvring scheme has been submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be implemented before the use of the land hereby permitted commences, and the parking and manoeuvring area shall not be used for any other purpose at any time, and shall be maintained throughout the lifetime of the development.

Reason: To ensure satisfactory parking and manoeuvring is provided.

6. The use of the land hereby permitted, including collections and despatches from and deliveries to the premises, shall not take place outside the hours of 0800 to 1800 on Mondays to Fridays and 0800 to 1600 on Saturdays, and shall not take place on Sundays and Bank and Public Holidays.

Reason: To protect the amenities of neighbouring residents.

7. No jet washing of tyres or vehicles shall take place at any time. No machinery or equipment shall be operated outside the building and only for, or in relation to, the use of the land hereby permitted.

Reason: To protect the amenities of neighbouring residents.