



---

## Appeal Decisions

Site visit made on 6 January 2020

**by K R Saward Solicitor**

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

**Decision date: 24<sup>th</sup> January 2020**

---

**Field NW of Mosklyns Farm, Chelmsford Road, Purleigh, Essex**

**Appeal A: APP/X1545/C/19/3224453**

**Appeal B: APP/X1545/C/19/3224454**

- 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 Mr R Strathern (Appeal A) and Mrs M Strathern (Appeal B) against an enforcement notice issued by Maldon District Council.
- The enforcement notice was issued on 8 February 2019.
- The breach of planning control as alleged in the notice is the unauthorised material change of use of the land to store building materials, containers and equipment etc.
- The requirements of the notice are: -
- a. Cease the unauthorised use of the Land for storage of building materials, containers and plant equipment.
- b. Remove any associated items from the Land, including all materials, machinery, containers, equipment etc. and restore the Land to its condition before the breach took place.
- The period for compliance with the requirements is 28 calendar days.
- Appeal A is proceeding on the grounds set out in section 174(2)(a),(d),(f)&(g) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.
- Appeal B is proceeding on the grounds set out in section 174(2)(d),(f)&(g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

**Summary of Decisions: Appeal A is allowed on ground (a), the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision. No further action is taken on Appeal B.**

---

### Procedural Matters

1. Since the date of issue of the enforcement notice, the National Planning Policy Framework has been updated on 19 February 2019. Should the appeals on ground (d) fail and the ground (a) falls to be considered then it will be the updated national policy document that applies.
2. The allegation and requirements should match. In this case, the allegation refers to "storage of building materials, containers and equipment etc" whereas the requirement refers to "storage of building materials, containers and *plant* equipment". It is important the allegation is correct because the terms of the deemed planning application arising under the ground (a) appeal is derived from its wording. From observations at the site visit, the parties agreed that

the requirements should refer to “plant *and* equipment”. This should be reflected in the allegation. For precision and to reconcile the differences the words “plant and equipment” should appear in both the allegation and requirements. This widens the scope of the allegation, but the appellants clearly knew that plant was among the items stored on the land and for which planning permission is sought in Appeal A. In the circumstances, I am satisfied that no injustice arises to either party from the correction.

3. The allegation should also be sufficiently clear and precise so that the appellants can see on the face of the notice what the Council considers to be the breach of planning control. The inclusion of “etc” at the end of the allegation and corresponding requirement indicates that there are other items stored on the land which have not been identified. This introduces uncertainty and so the word should be deleted from both places.
4. It became evident at the site visit that the alleged storage use relates only to the part of the site which is enclosed. For accuracy the area concerned should be marked on the plan accompanying the notice. The appellants invite me to reduce the extent of the notice to the enclosed area. Whilst it is possible for a notice to be drawn more widely to reflect the land ownership, in this case the wider area identified is in agricultural use where storage could legitimately be undertaken for those purposes. Had the notice been properly directed at the whole area as shown on the plan then the appropriate allegation would have been for a mixed use. As the Council does not argue that any unauthorised use is being undertaken other than on the eastern part of the site, there would be no injustice caused by correction of the plan in the manner requested.
5. The appellants assert that the containers are operational development rather than involving a material change of use of land as alleged. They say the notice is defective in consequence. These arguments are raised under ground (d) on the basis that the containers have been in situ for over 4 years and as operational development they are now immune from enforcement action. Whilst the reasons for issuing the enforcement notice refer to the breach either occurring in the last 10 years (for a material change of use) or 4 years (for operational development), no operational development is alleged.
6. Having consulted the main parties, the appellants replied that an appeal under ground (b) was not made as the ‘use’ of the land alleged in the notice is taking place. However, if the containers are operational development as claimed, then the allegation is wrong to include them as a component of the alleged change of use. This raises issues more pertinent to ground (b) which is where it is argued that those matters alleged in the notice have not occurred. It can cover an argument that there is not a material change of use in respect of the containers. This must be established before considering the case on ground (d) because the immunity period depends on the outcome. I shall deal with those arguments as though raised under ground (b) rather than (d). Should that argument succeed, I would then consider whether the allegation can be corrected in order to proceed to determine the ground (d) appeal.
7. The appeal on ground (a) assumed success on ground (d) in relation to the storage of containers which were not mentioned in the submissions or draft conditions. The appellant subsequently confirmed that the ground (a) appeal is intended to include the retention of the containers and produced a draft condition in this respect.

## Appeals A & B - ground (b)

8. In order to succeed on this ground, it would need to be demonstrated that the containers do not involve a material change of use of land, as alleged. There is no dispute that the land was previously in agricultural use.
9. The appeal site shown on the corrected plan is occupied by a local building company. There are six containers on the land which are utilised for the storage of materials, tools and equipment associated with its business.
10. Section 55(1) of the 1990 Act says that 'development' includes the carrying out of building or other operations. A 'building' is defined by section 336 of the 1990 Act as including any structure or erection and any part of a building, but not plant or machinery comprised within a building.
11. In *Cardiff Rating Authority v Guest Keens*<sup>1</sup> it was held that it is not possible to construct an exhaustive test of what 'is or is in the nature of a building or structure', but the main characteristics of a building are: (1) that it is of a size that it would normally be constructed, as opposed to being brought ready-made onto the site; (2) it would cause a physical change of some permanence; and (3) there would be physical attachment to the ground.
12. These three primary factors to ascertain whether there is a building operation were endorsed by the Court of Appeal in *Skerritts of Nottingham Ltd v SSETR (No.2)*<sup>2</sup> and applied by the courts in other cases. It is clear that no one factor is decisive. It is possible that a container stood on land could be part and parcel of the storage use alleged. On the other hand, it could amount to a building.
13. From their physical appearance, there is nothing to indicate that the containers would need to have been assembled on the premises. It appears most likely they were brought onto the land in their current form.
14. With reference to *Cardiff Rating* the Council quotes Justice Jenkins who in considering the characteristics of a building stated 'It further suggests some degree of permanence in relation to the hereditament, i.e. things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces'.
15. As the containers appear to have been brought onto the site in their current state it would be anticipated they would be removed in the same way rather than requiring dismantling. This could indicate a use of land rather than a building operation, but it is not by itself a decisive factor.
16. The containers are described by the Council as 'standard size'. At the time of my visit five containers were grouped in a row alongside the southern part of the enclosure which were of a size and type typically used as shipping containers to transport goods. The Council points out that a primary design function is for a storage container to be easily moved potentially across the entire world. As reasonably large metal structures each one is undoubtedly considerably heavy even when empty. They would not be capable of being moved readily without some form of special lifting apparatus.
17. A sixth container of smaller size was positioned away from the others towards the eastern boundary. It was propped up at one end with blocks wedged

---

<sup>1</sup> [1949] 1 KB 385

<sup>2</sup> [2000] 2 PLR 102

beneath indicating that it can be lifted without too much difficulty. Whilst there were materials inside, it appeared as though discarded with a temporary appearance. Indeed, it can be seen in different positions on photographs produced by the Council from site visits undertaken in February and November 2018. Quite clearly, given its move-ability this container cannot properly be regarded as a building and it illustrates that there is at least one container stored on the land which forms part of a material change of use.

18. From the appellants evidence, the containers have all been on the site since 2013. If that is so, they have not been present for a short spell. However, the Council's photographs show not only that the smaller container has been in different positions, but also that a rusted container in the north-east corner was moved between the two dates in 2018. Copies of aerial images said to date from April 2017 and June 2018 also appear to show a brown coloured container in different positions. Moreover, there appear to be blue coloured containers in the 2018 image which are not apparent in the 2017 copy.
19. A row of five containers can be seen in both aerial images from 2017 and 2018 along the southern boundary, but it cannot be gleaned if they are the same ones I saw. There is clear evidence that containers have in fact been moved within the site with new containers appearing at different times.
20. The changes and moveability of the containers are indicative of a temporary use of land rather than permanent features. If there were services connected to the containers then it could be indicative of a building, but there are none. The character of the site is one of a multitude of items being stored of a transient nature, some of which are containers.
21. The containers are not attached to the land other than by their own weight and they do not require foundations. Some appeared to be stood on timber. Affixation through their own weight may suffice for there to be physical attachment, but in this case, there is evidence that at least some containers have been moved which is inconsistent with there being physical attachment to the ground.
22. As a matter of fact and degree, I consider that when assessed against the tests of permanency and physical attachment, the containers would not be a building operation for the purposes of section 55(1) of the 1990 Act. They constitute a material change of use of land. Accordingly, I find that those matters as alleged have occurred and the appeal on ground (b) fails.

### **Appeals A & B - ground (d)**

23. In a ground (d) appeal, the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is the balance of probabilities. The ground of appeal is that at the time the notice was issued it was too late to take enforcement action.
24. Given my findings on ground (b), I am satisfied that the enforcement notice correctly alleges a material change of use, including for the storage of the containers.
25. Under section 171B(3) of the 1990 Act where there has been a material change of use of land no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. Therefore, to succeed on

this ground the appellants must demonstrate that the use (including for the stationing of the containers) has continued since at least 8 February 2009.

26. By the appellants' own evidence, the containers were not brought onto the site until 2013. In a letter from a company of building contractors, they confirm having undertaken remedial works to the existing hard standing in early 2013 'for material storage'. They go on to confirm that along with the land owners they "have used the yard for plant and material storage *prior* and from this date." When that storage began prior to 2013 is not stated.
27. There is no evidence before me that the change of use from an agricultural use to the storage of building materials, plant and equipment had occurred as early as 2009. Indeed, by the Council's account aerial photography images showed only a small amount of farm machinery stored on the land in 2011.
28. On the balance of probabilities, it was not too late for enforcement action and the ground (d) appeal fails.

### **Appeal A only - ground (a) and the deemed planning application**

#### **Main Issues**

29. The main issues are: -

- the effect of the change of use on the character and appearance of the surrounding area;
- the effect on the living conditions of neighbouring occupiers with particular reference to potential noise and vibration; and
- the effect of vehicular traffic movements generated by the use and whether sufficient on-site parking is available.

#### **Reasons**

30. In its reasons for issuing the notice the Council makes clear that it "*considers that planning permission may be granted as planning conditions may overcome these objections to the change of use. However, to date no planning application to regularise the breach has been submitted.*"
31. It is evident that the Council has no objection to the alleged material change of use in principle, subject to the imposition of conditions.

#### *Character and appearance*

32. The appeal site lies beside the access leading to Spar Mill Farm where there is a farmhouse as well as agricultural operations. On the other side of Chelmsford Road there is Mosklyns Farm where the appellants dwelling is located, and another residential property is to the north. More housing is under construction immediately opposite the access point. The appeal site is outside any development boundary and is therefore in the countryside for the purposes of planning policy. Policy S8 of the Council's Approved Local Development Plan 2014-2029 ('LDP') provides that outside settlement boundaries, development will only be permitted where the intrinsic character and beauty of the countryside is not adversely impacted upon.
33. Part of the field has been enclosed by hoarding and large double gates. Hard surfacing has been laid within the site. The Council acknowledges that these

have all been in situ for in excess of 4 years to be immune from enforcement action. All these features would remain regardless of the enforcement notice. The appellants suggest that the containers could also stay for use in connection with the agricultural business. That might be a legitimate fallback position but only once there is compliance with the notice and the site is returned to agricultural use. It is possible that containers could be placed on the site in future as part of a lawful agricultural use. However, the same does not apply for the storage of building materials and other items.

34. These give the appeal site an untidy appearance internally as items are spread across the site. However, the interior is screened from the highway and the use is taking place in the context of the farm operations on land immediately behind the appeal site where there is a large agricultural structure.
35. If the hedgerow frontage within the same ownership as the appeal site is maintained to ensure the site is not exposed to wider public view and the type of storage is controlled, I accept that the level of harm to the character and appearance of the surrounding area would not justify withholding planning permission. Subject to the imposition of appropriate conditions there would be no material conflict with LDP Policy S8, as aforesaid or Policies D1 and S1 which seek development that respects and enhances the character and local context and maintains the rural character of the district. Nor would there be material conflict with Paragraphs 127 and 170 of the National Planning Policy Framework ('the Framework') insofar as they seek to protect the natural and local environment.

#### *Living conditions*

36. According to the appellant most of the materials are left over from building contracts and so they are usually longer-term storage that may be useful for future projects. Nonetheless, it is acknowledged that there is daily activity at the site. Generally, this involves flat bodied trucks and vans arriving between 0700-0900 hours to collect plant, equipment, tools and some materials. The process is repeated at the end of the working day between 1530-1800 hours. It is claimed that only very occasionally does a vehicle need access between these times.
37. The appellants live near to the site and if there was an issue with noise or pollution, they say the use would have ceased to protect their own amenity. This argument is unpersuasive because it may be anticipated that they would be more tolerant of disturbance than other residents who have nothing to gain from the arrangement. Several residents who have complained including ones living in close proximity to the appeal site.
38. When security fencing and scaffolding is being moved it is accepted by the appellant that noise is generated, but it is claimed to be occasional and time limited. The noise of metal on metal will undoubtedly be loud and reverberate. Without controls, all manner of activities associated with the building storage use could take place at any time of night or day over any given period.
39. Quite clearly, if left uncontrolled the use will have a significant adverse effect on the living conditions of neighbouring occupiers from noise and disturbance arising from activities at the site and associated with the unauthorised use. However, with appropriate controls on the hours and the extent of use, the use can be brought within acceptable tolerances appropriate for the locality to

avoid conflict with the provision within Paragraph 127 which promotes health and well-being.

*Vehicular traffic & parking*

40. The enforcement notice says there is insufficient information to enable the Council to fully consider the impact of the movement to and from the site and whether the site can accommodate the 10 parking spaces required by its Vehicle Parking Standards Supplementary Planning Document ('SPD').
41. Traffic will undoubtedly be generated by the builder's storage use of as materials, equipment and suchlike are deposited and collected from the site. Inevitably, and by its very nature, this will include trucks and other commercial vehicles. Photographs have been supplied by a local resident showing heavy goods vehicles (HGV's) at the site entrance and manoeuvring in the narrow road. It is unclear if all of these relate to the appeal site rather than neighbouring farm activities. Nevertheless, they demonstrate the risks posed to highway safety if particularly large vehicles access the highway at this point which are unable to exit the site in a single manoeuvre.
42. There is consistency among objectors concerned over the impact of increased traffic movements, particularly HGV's, along the narrow road through the village. The number of vehicular movements varies but are estimated by the appellant to be ten vehicles entering the site on a daily basis.
43. Whilst there is a speed limit in place, the site access is not far from a bend in the road and the narrowness of the road appears unsuited to large manoeuvring vehicles which could give rise to potential highway safety implications. The appellant argues that the HGV's and articulated lorries using the road do not relate to the appeal site and has offered a planning condition so that no such vehicles may enter the site. With an appropriately worded condition the type of traffic movements and associated impacts from vibration and on highway safety can be suitably controlled.
44. The SPD provides that for development comprising open air storage, 1 space per 150m<sup>2</sup> is required. It is guidance only. The size of the site clearly can accommodate the requisite amount of parking. The nature of the storage use indicates there is unlikely to be many cars at the site at any one time. The corrected appeal site is also set back from the highway where there is other land where cars would be more likely to park. There is insufficient reason to prompt legitimate concern over parking in the highway to necessitate a specific condition for parking bays to be allocated.
45. Through the imposition of conditions, I am satisfied that there would not be unacceptable or significant impacts on the transport network or on highway safety contrary to LDP Policies T1 and T2, the SPD or Paragraph 108c) of the Framework.

*Conclusion on ground (a) and the deemed planning application*

46. For the reasons given above, and having had regard to all other matters raised, I conclude that the appeal on ground (a) and the application for deemed planning permission should succeed. I shall grant planning permission for the change of use as described in the notice, as corrected. In view of that decision, the enforcement notice shall be quashed and the remaining grounds of appeal

in Appeal A do not need to be considered and I shall take no further action in respect of Appeal B.

### *Conditions*

47. The appellant initially provided a list of potential conditions in this eventuality to which the Council has suggested amendments and two additional conditions. The appellant subsequently added one further condition to address the containers. I have considered these conditions in accordance with Paragraph 55 of the Framework and the national Planning Practice Guidance. Where appropriate, I have adjusted the wording for greater clarity and precision.
48. In order to protect neighbouring living conditions, a condition is necessary to restrict the type of storage to that applied for and limit it to the area now occupied and marked on the corrected enforcement notice plan. The Council has sought a more detailed condition, but I do not consider it necessary to list examples of types of building materials. The PPG advises that conditions restricting the future use of permitted development rights or changes of use may not pass the test of reasonableness or necessity. The Council raises no objection to the reference to permitted development rights being deleted.
49. The limitation on use should correspond with the wording of the permitted use although I accept the need to exclude the storage or disposal of waste materials in the interests of visual impact/living conditions and loose scaffolding poles to avoid excessive noise. It is reasonable and necessary to restrict the use of the containers for storage purposes in connection with the use of the site. No more than the six containers already on the site should be added in order to avoid harm to the character and appearance of the area. For the same reason it is appropriate to restrict the height of any item on the site. With the other conditions in place it would be excessive to restrict the position of the containers within the site. Also, to protect character and appearance a condition should require retention of the section of hedgerow along the highway frontage as originally shown on the plan to secure sufficient screening of the appeal site.
50. The appellants seek hours of use on weekdays from 0700-1800 hours whereas the Council think they should be restricted to 0730-1700 hours. With dwellings nearby there is a need to protect living conditions from noise and disturbance. However, in the context of farming activities in the immediate surroundings which may well start earlier, I do not consider a 7am start as too early or 6pm as unreasonably late. The draft conditions as worded by both parties would only allow the storage use to take place between the prescribed hours. This cannot be what was intended. I have altered the wording to restrict activities at the site and deliveries/collections to the stated hours. A restriction preventing the use of machinery at the site other than for loading and unloading purposes and from HGV's entering the site will similarly serve to protect neighbouring living conditions.
51. There is no need for a condition preventing retail or wholesale sales operating from the site when the use is already restricted to the storage use. The parties agreed that the use should be confined to the eastern part of the site as originally shown on the enforcement notice plan. As the plan will be corrected, planning permission will only be granted for the use of the land already in use for storage purposes and a further condition is unnecessary.

52. A condition as requested by the Council to control external lighting is necessary and appropriate given the countryside location and need to protect neighbouring living conditions. The condition requires re-wording as the development has already commenced. There is no operative lighting currently on the site and the condition should be prohibitive in nature without provision for the Council to give approval in writing as this introduces uncertainty and circumvents the need for an application with third parties able to comment.
53. As discussed under the main issues, I see no need for 10 parking spaces to be accommodated within the site for a condition to be imposed.

## **Formal Decisions**

### **Appeal A**

54. It is directed that the enforcement notice be corrected by: -
- inserting a comma and the word "plant and" after "containers" in paragraph 3 and deleting the word "etc" from paragraphs 3 and 5.b.
  - deleting the word "green" and substituting it with the word "bold" in paragraph 2.
  - substituting the plan annexed to this decision for the plan attached to the enforcement notice
55. Subject to the corrections, Appeal A 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 material change of use of the land to store building materials, containers, plant and equipment at Field NW of Mosklyns Farm, Chelmsford Road, Purleigh, Essex as shown on the corrected plan attached to the notice and subject to the conditions set out in the Schedule at the end of this Decision.

### **Appeal B**

56. I take no further action on this appeal.

*KR Seward*

INSPECTOR

## **SCHEDULE OF 8 CONDITIONS**

- 1) The site shall only be used for the storage of building materials, containers, plant and equipment (which may include sealed packs of scaffolding poles but not loose poles that can be individually moved) and for no other purpose. No storage or disposal of waste materials shall take place.
- 2) No more than 6 (six) containers shall be kept on the site at any one time. Any containers positioned on the site shall be used solely for storage purposes in connection with the approved use of the site and for no other purpose whatsoever.
- 3) No activities shall take place at the site and no deliveries or collections shall be undertaken to or from the site except between the hours of 0700 and 1800 on Mondays to Fridays, and not at any time on Saturdays, Sundays or on Bank or Public Holidays.
- 4) No machinery, plant or equipment shall be operated on the site other than for loading and unloading purposes between the permitted hours in condition 3).
- 5) No heavy goods vehicle or articulated vehicle shall enter the site or deliver to or make any collections from the site.
- 6) No items shall be stored at the site at a height in excess of 3 metres above ground level (as measured from the highest ground level adjacent to any item).
- 7) The existing hedgerow fronting Chelmsford Road between points A and B on the corrected enforcement notice plan shall be retained at a height of not less than 2 metres. Any hedgerow dying or removed shall be replaced during the next planting season of a species and size as previously agreed in writing by the Local Planning Authority.
- 8) No external lighting shall be put in place or operated on the site at any time.

-END-



## Plan

This is the plan referred to in my decision dated: 24<sup>th</sup> January 2020

by **K R Saward Solicitor**

**Land at: Field NW of Mosklyns Farm, Chelmsford Road, Purleigh, Essex**

**References: APP/X1545/C/19/3224453 & 3224454**

Scale: NOT TO SCALE

ANNEX 2

