



Appeal Decision

Site visit made on 15 September 2020

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 30 September 2020

Appeal Ref: APP/C3240/C/20/3252614

Land to the south east of Barrack Lane, Lilleshall, Newport, Telford

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mrs Lorraine Jones against an enforcement notice issued by Telford and Wrekin Council.
- The enforcement notice was issued on 16 April 2020.
- The breach of planning control as alleged in the notice is without planning permission, the unauthorised change of use of the land from a nil planning use to the storage and distribution of trailers, vehicles and storage container units (Use Class B8), the laying of hardstanding and the formation of earth bunds.
- The requirements of the notice are:
 1. Cease the use of the land for the storage and distribution of trailers, vehicles and storage container units.
 2. Remove from the land all trailers, vehicles, storage container units and any other items and paraphernalia associated with the unauthorised use.
 3. Restore the land to its previous condition by removing from the land all stone, brick and any other hardcore laid to create hardstanding on the site, and by removing from the land the earth bunds from the areas shown marked blue on the attached plan.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (d), (f) and (g) of the 1990 Act as amended.

Summary of Decision: The appeal succeeds in part and the enforcement notice is upheld with corrections and variations in the terms set out below in the Formal Decision.

Preliminary Matters

1. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as 'legal' grounds of appeal is the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.
2. For the avoidance of doubt, the planning merits of the alleged development are not before me since there is no ground (a) appeal and related deemed planning application.

3. I note the concerns expressed by interested people and their representative groups that the use as alleged is not storage/distribution falling within Use Class B8 of the Town and Country Planning (Use Classes) Order 1987 but is, in fact, a mixed use. However, in this type of appeal I must consider the matters alleged in the notice.
4. The notice alleges both a material change of use and operational development. Section 171B of the 1990 Act as amended provides time limits whereby no enforcement action may be taken. Whereas the relevant time period is ten years for a breach of planning control concerning a material change of use, as stated in the notice, it is four years for operational development. This should also be stated since separate breaches are alleged. I am satisfied I can make this correction without injustice as the relevant time periods have been referenced in evidence by the main parties.

The appeal on ground (b)

5. The appeal on ground (b) is that the matters alleged in the notice have not occurred as a matter of fact.
6. The appeal land, as identified in the plan attached to the notice, is an irregular-shaped parcel within the village of Lilleshall. It includes the access from a track leading to Barrack Lane at the northern end. The appellant explains that they operated elements of their business from the site, including the storage of containers, machines and lorry chassis. The alleged use for the storage, distribution of trailers, vehicles and storage container units (Use Class B8) is not contested. The dispute primarily concerns the previous use of the land; the appellant's case being that there has not been a change of use from a nil planning use¹ as it is not accepted that there has been a nil use of the land.
7. A notice alleging a material change of use need not recite the previous use², although it is better if it does so as it will be more obvious why the Local Planning Authority considers there has been a material change. Where the notice does recite the previous use, this should be correct but is open to correction on appeal, including omission where there is uncertainty. I consider this matter could be addressed if I were to correct the allegation to delete reference to nil use.
8. The Courts encourage a very wide-ranging use of the power to correct notices under Section 176 of the 1990 Act as amended, provided there would be no injustice to the appellant or the local planning authority. In this case, the dispute concerns the wording of the allegation in respect of the stated previous use. The appellant is seeking to demonstrate that the alleged storage/distribution use is lawful, either because it did not amount to development or because the use is immune from enforcement action due to the passage of time. While the previous use is critical to making this assessment, which I make later in this decision, it is not critical to the ground (b) appeal. This is because the appellant accepts the allegation insofar as it refers to the storage/distribution use of the land, which is the use that the notice requires to cease.
9. Consequently, I am satisfied that no injustice would arise were I to delete the stated previous use, so the allegation would read "the material change of use

¹ The situation in which a nil use can arise includes processes by which lawful rights may be lost.

² *Westminster CC v SSE & Aboro* [1983] JPL 602; *Ferris v SSE* [1998] JPL 777.

of the land to the storage and distribution of trailers, vehicles and storage container units (Use Class B8), the laying of hardstanding and the formation of earth bunds". The nature of the allegation remains unchanged and I am able to properly consider the appellant's principal arguments under grounds (c) and (d) below.

10. In addition, it is argued that the earth bunds along the eastern and southern boundaries were in situ when the land was purchased. The appellant accepts that surface levelling was undertaken and excess soil was moved onto the existing bunds to level them out and make the gradient from inside the site more regular. Whether or not this work amounted to a breach of planning control, which was undertaken on behalf of the appellant or at some earlier date, is considered under grounds (c) and (d) below. For the purposes of the ground (b) appeal, the formation of earth bunds has occurred as a matter of fact.
11. For the reasons given above, and on the basis of the corrected allegation, the appeal on ground (b) must fail.

The appeal on ground (c)

12. In order to succeed on a ground (c) appeal, the appellant must show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.
13. Under section 57(1) of the 1990 Act as amended, *planning permission is required for the carrying out of any development of land*. Section 55(1) of the 1990 Act as amended says that "*development, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land*".
14. For there to be a material change of use, there needs to be some significant difference in the character of the activities from what has gone on previously. To make this judgement, it is necessary to establish the planning unit and consider its current and previous uses.
15. The planning unit is described by the appellant as the property owned by them which, I understand, corresponds with the land identified in the notice. In relation to the previous use, the appellant relies on an Established Use Certificate and the evidence submitted in support of that application, which it is claimed evidences a longstanding storage use that has continued since at least 1964.
16. In 1981, an application was submitted under Section 94 of the Town and Country Planning Act 1971 to establish the use of land off Barrack Lane, Lilleshall as a "Builders Yard". An Established Use Certificate (EUC) as a "Builders Yard" was issued for site³. Hence, in 1981 the established use of the site, as identified in the EUC plan, was as a "Builders Yard". The Council considers this would have been a 'sui generis' use because a builder's yard would not have fallen within the defined use classes of the Schedule to the Town and Country Planning (Use Classes) Order 1972, as amended. The appellant argues that, on the basis of the supporting evidence which gave rise to the 1981 EUC, the use was as a storage facility albeit one associated with a builder's yard.

³ Ref W81/0655 dated 30 September 1981.

17. In 1987, the Town and Country Planning (Use Classes) Order 1987 introduced Use Class B8 – indoor and outdoor storage uses. The appellant argues that the use at that time would have fallen within B8 as opposed to being 'sui generis', and the B8 storage use has continued thereafter without significant interruption.
18. In order to understand the nature of the use operating prior to the issue of the 1981 EUC, I have examined sworn evidence that was submitted in support of the application. The use was described as "a builder's yard with storage for materials"; "a dumping ground for surplus materials in connection with the building trade"; "a builder's yard for the storage of building materials and infill material" and "storage of builder's materials". The Officer report which assessed the application described the site as being in use for the "storage of builder's materials" at the time of the site visit. The conclusion of that report was that an EUC be issued for the storage of builder's materials. Nonetheless, the actual wording of the EUC, as issued, was a Builder's Yard in line with the original application.
19. In 2019, the Council refused to issue a Lawful Development Certificate (LDC) under Section 191 of the 1990 Act as amended for the use of the land for storage and distribution (Use Class B8)⁴. In supporting submissions, it is explained that the land was owned by the Edwards family from 1979, including a period of ownership by the family business Bevid Ltd 2014-2017, up to 31 March 2017 when it was sold to Bishopsgate Land Developments Ltd. It was acquired by the appellant on 16 August 2018. PA Edwards' submission states that the land was used as a yard to store building materials, sheds, machinery and scaffolding between jobs. It was never a primary yard and usage was irregular. Whilst the intensity of the use fluctuated, and the site could become overgrown, it was in continuous use as builder's yard and there has never been any intention to abandon that use. It is acknowledged that there was a period after November 2014 when the level of storage was reduced in anticipation of a residential planning permission. However, the use was not suspended during this period and planning permission was refused. It is also stated that the land was used by local builders at various times for the storage of materials, plant and equipment. A declaration from the director of Bishopsgate Land Developments Ltd confirmed the land continued to be used as a storage yard/builder's yard during their period of ownership.
20. I have also had regard to representations from interested people submitted in response to that application and this appeal, which state that there was no storage use and the land was abandoned, overgrown and unkempt. Some of the objectors acknowledge that there was building material on the land but this was dumped as opposed to being stored. The appellant argues that the objectors could not see the land sufficiently to make such judgements. I appreciate that the land was/is not highly visible but neither was/is it completely screened. Moreover, people living and working in the local area would be aware of activity on the land hence their descriptions cannot be discounted. In any event, the appellant's own evidence is crucial. It is accepted that the intensity of use fluctuated and the site could become overgrown. Usage was irregular or significantly reduced and the level of activity was generally low.

⁴ Ref TWC/2019/0293 dated 16 December 2019.

21. If I were to rely on the appellant's evidence alone in relation to the previous use, it is clear that any materials stored were all associated with the building trade. This is a specific use of the land and is consistent with the description as a builder's yard, which is likely to have a strong storage focus. The fact that other activities which may occur within a builder's yard, such as fabrication or mixing of materials, were not routinely taking place does not indicate that the use was as general storage. While a B8 use would not exclude storage by a builder, it does not follow that the use of land for the storage of builder's materials in connection with an established use as a builder's yard would translate to a general B8 use. Therefore, I do not accept the argument that the previous and historic use of the land was storage that would have fallen Use Class B8 when it was introduced in 1987.
22. In deciding whether a material change of use has occurred, it is necessary to look at the character of activities and make a judgement based on a fact and degree assessment.
23. The appellant explains that the land was purchased in August 2018 for use in connection with their business of exporting trailers, plant and containers for storage pending export. It is stated that the site was cleared, hardcore was laid and the bunds to the east and south were levelled. Due to the nature of the work, goods were bought when they became available, often in bulk, hence items remained in storage for months or even years before being sold for export. On average, a single stack of trailers was exported once or twice a month. Ancillary uses in the storage yard would be to secure goods for transit, maintaining equipment such as the generator, upkeeping the site and making tea and coffee.
24. The use of the land as set out by the appellant, which occurred on or shortly after their purchase of the site has, in my judgement, resulted in a significant difference in the character of activities from what had gone on previously. Bulk buying and the long term storage of what could amount to a relatively large number of containers on the land is not comparable to the intermittent storage or deposit of building materials. The activity associated with the appellant's business would be much greater due to the stated frequency of imports/exports and maintenance requirements⁵. In contrast, it is apparent that the builder's materials were deposited and untouched for long periods, such that the site became overgrown. Moreover, it is accepted that the nature of the storage activity undertaken by the appellant "might create a different visual impression to that which preceded it and may be construed as an intensification of that use".
25. I saw that the containers are numerous, sited at various locations and are visible from public and private viewpoints. The area of hardstanding is extensive which has visual implications⁶. In addition, there are likely to be off-site effects, including increased activity, which could impact on the living conditions of neighbouring occupiers and potential conflict with other road users. Thus, the introduction of the current use has brought about a change in the definable character of the site that has planning consequences. I find, therefore, that the alleged use of the land as B8 storage/distribution use is materially different from the previous use. It constitutes development falling

⁵ Summary of Diary 29 January 2019 to May 2019, M Jones.

⁶ Council's photographs dated 6 April 2020.

- within section 55(1) of the 1990 Act as amended requiring express planning permission.
26. Due to the extent of the hardstanding and volume of material used to create the stable surface, it is clear that the works have been carried out using plant and machinery. Also, the hardstanding provides vehicular access to the containers and it would have required compaction to withstand wear and tear. This suggests that an element of pre-planning was involved and a degree of skill was necessary to carry out the works.
27. Similarly, the appellant's evidence alone shows that the bunds detailed in the allegation have been significantly altered and levelled. This was carried out using plant and machinery, which would have required a level of skill and pre-planning to achieve the required uniformity. Therefore, I take the view that the works to lay the hardstanding and create the bunds in their current form amounted to an engineering operation within the meaning of development in s55(1).
28. There is no evidence of any planning permission for the works alleged, hence, the matters alleged in the notice constitute a breach of planning control and the appeal on ground (c) must fail.
29. For the avoidance of doubt, I have noted the lengthy submissions from various parties about supervening uses and the concept of abandonment. This matter would be critical were I to conclude that the previous use of the land was storage and the associated activities were of the same character as the current use, such that a material change of use has not occurred. However, as I have concluded to the contrary, due to the nature of the appellant's storage/distribution use, it is not necessary to examine whether a lawful B8 use has been abandoned or otherwise lost by virtue of supervening uses.

The appeal on ground (d)

30. In order to succeed in an appeal on ground (d), the appellant must show on the balance of probability that the alleged use occurred on or before 16 April 2010 and continued after the date of change without significant interruption, such that it would be too late to take enforcement action. In relation to the engineering operations, it is necessary to show that the works were substantially completed on or before 16 April 2016⁷.
31. As set out above, I have concluded that the material change of use to that alleged occurred on or shortly after 16 August 2018 when the appellant purchased and cleared the land. The use has not acquired immunity from enforcement action by virtue of Section 171B(3) of the 1990 Act as amended.
32. I have also concluded that the bunds identified in the notice were significantly altered such that an engineering operation took place towards the end of 2018. Thus, the operations were not substantially completed four years or more prior to issue of the notice and the operations have not acquired immunity from enforcement action by virtue of Section 171B(1) of the 1990 Act as amended. There is no dispute about the formation of the hardstanding.
33. The appeal on ground (d) must fail, therefore.

⁷ Section 171B of the 1990 Act as amended provides time limits whereby no enforcement action may be taken.

The appeal on ground (f)

34. It is clear from the way the enforcement notice is drafted that its purpose is to remedy the breaches of planning control. What must be considered under the ground (f) appeal is whether the steps required by the notice exceed what is necessary to achieve that purpose. In relation to the unauthorised use, the appellant argues that the requirements of the notice should not prevent the storage use in connection with the builder's yard activity, in accordance with the principles laid down in *Mansi*⁸.
35. In order to remedy the breach and prevent the unauthorised use re-occurring, the notice must require that use to cease and all items associated with the unauthorised use to be removed. As operational development is also alleged, this should be removed and the land restored to its previous condition. The notice is not excessive with regard to these matters. However, I consider that the first requirement could be made more specific by the addition of the words "(Use Class B8)" in line with the allegation. I shall vary the notice accordingly.
36. The appellant also argues that the third requirement should be deleted as, in addition to the earth bunds, a significant amount of stone hardcore and other building materials were present on the site at the time when it was acquired by the appellant.
37. The Council acknowledges that earth bunds or mounds were in existence in some form⁹, primarily along the eastern boundary. Hence, the requirement to remove them in their entirety is excessive to remedy the breach. I shall vary this element of the requirement. Nonetheless, works to the bunds would still be necessary to restore the land to its previous condition and this should remain as part of the relevant requirement.
38. Similarly, I accept that packs of bricks and a stockpile of hardcore were present on the site prior to the unauthorised works. According to the statement of the contractor employed by the appellant to clear and level the site¹⁰, all of the stone or brick stored on site was used to create the hardstanding. Irrespective of where the material came from, the hardstanding is a breach of planning control. It should, therefore, be removed to restore the land to its condition before the development took place. The wording of the third requirement is not excessive in this respect.
39. I have found that the part of the third requirement that concerns the removal of bunds is excessive to remedy the breach and I shall vary the requirement accordingly. The first requirement should also be varied to detail the unauthorised B8 use, in line with the allegation.
40. The appeal on ground (f) succeeds to this limited extent.

The appeal on ground (g)

41. The appeal on ground (g) is that the period for compliance with the notice falls short of what should reasonably be allowed.

⁸ *Mansi v Elstree RDC* [1964] 16 P & CR 153 - requirements must always respect lawful use rights, including rights to revert to any lawful use.

⁹ Officer Report Ref TWC/2019/0293.

¹⁰ Statutory Declaration of B Meacham dated 11 September 2018.

42. I have had regard to the circumstances of the appellant and the difficulties arising from the COVID-19 pandemic, both of which will affect the appellant's ability to comply with the notice within the six months required. However, I consider the 24 months requested by the appellant to be unnecessarily long. I shall, therefore, vary the compliance period to allow nine months, which I consider to be reasonable and proportionate in the circumstances.
43. The appeal on ground (g) succeeds, therefore.

Conclusion

44. For the reasons given above, I conclude that the appeals on grounds (b), (c) and (d) should not succeed. I also conclude that the requirements of the notice are, in part, excessive to remedy the breach of planning control and the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeals on grounds (f) and (g) succeed to that extent.

Formal Decision

45. It is directed that the enforcement notice is corrected by -
- (i) the replacement of the words "the unauthorised change of use of the land from a nil planning use" with the words "the material change of use of the land" in paragraph 3 of the notice;
 - (ii) the replacement of the words "It appears to the Council that the above breach of planning control has occurred within the last ten years" with the words "It appears to the Council that the above breach of planning control consisting of a material change of use has occurred within the last ten years and the breach of planning control comprising operational development has occurred within the last four years";
and varied by -
 - (iii) the addition of the words "(Use Class B8)" to the end of the first requirement in paragraph 5.1 of the notice;
 - (iv) the deletion of the words "removing from the land the earth bunds from the areas shown marked blue" and their replacement with the words "altering the earth bunds in the areas shown marked blue" in paragraph 5.3 of the notice.

Subject to these corrections and variations, the enforcement notice is upheld.

Debbie Moore

Inspector