



Appeal Decision

Site visit made on 15 September 2020

by S Hanson BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 November 2020

Appeal Ref: APP/W1850/C/20/3249024

Land forming part of Overton Farm, Overton Lane, Orleton, Herefordshire SY8 4HZ

- 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 Jon Lewis against an enforcement notice issued by Herefordshire Council.
 - The enforcement notice numbered EN2020/003072/ZZ, was issued on 12 February 2020.
 - The breach of planning control as alleged in the notice is without planning permission the change of use of caravan storage building, marked with an X on the attached plan, to a building used for the purposes of electricity generation with combined heat and power units and wood chip dryer.
 - The requirements of the notice are: 1). Cease the use of the site for the generation of electricity. 2). Remove the equipment associated with the generation of electricity including the wood chip dryer. 3). Remove from the land all materials, equipment and rubble arising from compliance with requirement 2.
 - The period for compliance with the requirements is: 1). 7 days from the date this notice becomes effective. 2). 120 days from the date this notice becomes effective. 3). 150 days from the date this notice becomes effective.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (c) and (f) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
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Decision

1. The enforcement notice is quashed.

Matters concerning the enforcement notice

2. Section 173(1) of the 1990 Act requires an enforcement notice to state the matters which appear to the Council to constitute the breach of planning control. Established case law¹ says that a notice must tell a recipient fairly what he has done wrong and what must be done to remedy the breach.
3. The notice alleges development without planning permission and the reason for issuing the notice is because the development has not been carried out in accordance with the details approved by planning application reference 160431 dated 15/7/16 (the 2016 permission). No further explanation is provided to tell the recipient what he has done wrong. The appellant's statement demonstrates the uncertainty of the notice as he could not tell in what respect it was alleged that he had developed the land without permission.

¹ *Miller-Mead v Ministry of Housing and Local Government* [1963] 1 All ER 4592

4. There is uncertainty with the notice because the allegation is imprecise in that it is directed at the material change of use of the building for purposes of electricity generation for which planning permission is required. However, the development has been approved subject to conditions that it be constructed in strict accordance with approved plans and designed and constructed in accordance with specifications contained within the Noise Assessment Report².
5. I wrote to the Council suggesting that the notice was wrongly framed and that a breach of condition would be the correct allegation. The Council did not agree, and their position remained that as the development had not been carried out in accordance with the details approved by the 2016 permission, the use of the building did not benefit from planning permission. The relevant details were subject to conditions attached to the permission.
6. Established case law³ has determined that if the development contravenes conditions, it cannot be properly described as commencing that authorised by the permission. However, it is necessary for the condition both to be expressly prohibitive of commencement of development and to go to the heart of the permission; only when both tests are satisfied is it a 'condition precedent' to which the Whitley principle applies⁴. If the development carried out contravenes a condition which is not a true pre-commencement condition and which does not go to the heart of the permission, that development can be regarded as having implemented the permission; the breach of planning control would in that case be a breach of condition, rather than development without permission.
7. The first condition attached to the 2016 permission states, as is normally the case, that the development should be commenced before the expiry of 3 years from the date of the permission. It was therefore necessary for a material commencement of the approved development to be made by 15 July 2019. There is no dispute between the appellant and the Council that works had been undertaken which involved the material change of use of the building for the purpose of the generation of electricity. When I visited, these physical works were still evident although the use had ceased some two years earlier.
8. There are no further conditions attached to the 2016 permission which required action to be undertaken before the development was commenced. Therefore, subject to the provisions of s56 of the 1990 Act, development of the land is taken to be initiated. The planning permission is not invalid and the matters which appear to constitute the breach of planning control should be directed to the breach of condition, with the relevant conditions referred to within the allegation.
9. In determining an appeal there is provision under s176(1) of the 1990 Act to correct any defect, error or mis-description in the notice, but only where no injustice would arise to either party. If the notice was corrected to reflect the breach of planning as it appears to me, the corrections would be radical, for example, changing the allegation to the failure to comply with the terms of the 2016 permission and the requirement to allow for the option to comply with the terms and limitations of the conditions attached to the 2016 permission, which

² Issue 5 by John Waring acoustic Consultant dated 11 July 2016

³ *F G Whitley & Sons v SSW and Clwyd CC* [1992] JPL 856; *R (oao Greyfort Properties Ltd) v SoS CLG* [2011] EWCA Civ 908

⁴ There are some exceptions to this general principle, but they do not apply here.

I consider remains extant. Consequently, the notice cannot be corrected without causing injustice and I cannot be certain that the appellant would not have chosen to appeal under different or additional grounds.

10. Accordingly, I find that the notice is fundamentally flawed and beyond correction. Consequently, the notice is invalid and should be quashed.
11. Should the Council wish to continue to pursue enforcement action, it may consider doing so by means of a replacement notice framed in the proper terms, having regard to the 'second bite' provisions of section 171B(4)(b) of the 1990 Act.

S Hanson

INSPECTOR