



Appeal Decision

Site visit made on 12 November 2020

by Simon Hand MA

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

Decision date: 27 November 2020

Appeal Ref: APP/B1930/C/20/3255305

The Yard, 105 Luton Road, Harpenden, Herts, AL5 3BB

- 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 Mrs Karen Benton against an enforcement notice issued by St Albans City & District Council.
 - The enforcement notice was issued on 22 May 2020.
 - The breach of planning control as alleged in the notice is the installation of tubular stainless steel flue to North West elevation.
 - The requirements of the notice are 1. Remove the unauthorised flue; 2. Remove all materials as a result of compliance with step 1. 3. Make good any openings/holes left by the flue removal and replace with like for like materials (as existing).
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is allowed and the enforcement notice is quashed.

The Appeal on Ground (d)

2. This ground is that at the time the enforcement notice was issued it was too late to take enforcement action. The notice was issued on 22 May 2020 and the matters alleged are the installation of a flue. S171B of the Act sets out the time limits for taking action. S171B(1) says that "*where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed*". Two other time limits are also described in s171B; that at s171B(2) deals with a material change of use of a building to a dwelling and so is not relevant. S171B(3) is a catch all that says "*in the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach*". Essentially s171B(1) deals with operational development and applies a 4 year rule and s171B(3) deals with material changes of use and applies a 10 year rule.
3. The works to install a metal flue are undeniably, in my view, operational development. They are '*building works*' in the language of s171B(1), and thus they have to have been '*substantially completed*' before 22 May 2016 for success on ground (d).

4. The history of the site is not disputed. In 2015 a prior approval application was made to change the use of the building to a 'lifestyle café' with no fried foods and no flue. In May 2016 the pizza restaurant began and the flue was in place by then. A retrospective planning application was made on 30 March 2017 to regularise the situation, which states the "building works or use were started" on 25 May 2016, which I note was a Wednesday. The Council supply a social media extract that says the restaurant re-launched in May 2016. A complaint about the flue was received on 17 June 2016. So there is no doubt the flue was in place and restaurant use had begun sometime in May or early June 2016. The crucial issue is when.
5. The appellant provides evidence from PURE Stoves. A quotation for the installation of the flue is dated 6 May 2016. An extract from the appellant's bank account shows the amount for the flue was paid out on 12 May 2016, and a later e-mail from PURE Stoves confirms "*I have looked up the date of the invoice for the supply of flue system at The Yard, which was installed by Premier Stoves, this was 13 May 2016*". I note that Premier Stoves seem to be the installer for PURE Stoves.
6. I agree with the Council that this is not definitive proof the flue was installed by 13 May as the appellant claims, but it is strongly suggestive of that. One would not normally pay an invoice until the works had been completed. However, further evidence comes from the landlord who confirmed he visited the property on the 14th and saw the flue in place. There is also evidence for the actual opening of the restaurant. A flyer for the re-opening says it will be on 21st May. That is a Saturday. The flyer is in an email sent on 13 May 2016 in response to a question as to when the re-opening would be. Finally there is facebook message from 22 May suggesting the restaurant has opened. This all seems pretty conclusive to me that the restaurant had re-opened the day before the 22 May 2016. As the pizza oven cannot operate without a flue, and as the evidence suggests the flue was installed on the 13th May then on the balance of probabilities I find it hard to reach any other conclusion that that the flue was installed more than 4 years before the enforcement notice was issued. I don't think the later date of 25th May, entered on the application form nearly a year later is of any great weight. It is unlikely the restaurant did open on a Wednesday, but even if it did, the flue would still seem to have been installed on the 13th.
7. The Council argue that even if the flue was installed on the 13th it was not '*substantially complete*' until the pizza restaurant was opened, because the flue is intrinsically linked to the restaurant. I admire the Council's ingenuity in advancing this argument, but it is a complete nonsense. The operational development is a thing in itself which is substantially complete when the works are finished. The references to Somak Travel¹ and Murfitt² do not help as these deal with the linkage between operational development and a change of use, when it is the material change of use that is the subject of the notice, not, as in this case, the other way around. In any event, it is my view the pizza restaurant did open before the 4 year period began.
8. The appeal succeeds on ground (d) and I shall quash the notice. There is no need to consider the other grounds.

¹ Somak Travel Ltd v Secretary of State for the Environment (1987).

² Murfitt v Secretary of State for the Environment (1980) 40 P. & C.R. 254

Simon Hand

Inspector