
Appeal Decision

Site visit made on 19 January 2021

by **P H Willows BA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 6 April 2021

Appeal Ref: APP/Z2505/C/20/3260320

**Land to south of Tall Trees, Waste Green Lane, Algarkirk, BOSTON
PE20 2AP**

- 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 A Hobson against an enforcement notice issued by Boston Borough Council.
 - The enforcement notice, numbered PENF0112/19, was issued on 3 September 2020.
 - The breach of planning control as alleged in the notice is, without planning permission, the material change of use of land to use class B1 for the repair of refrigerated units and the siting of a storage container.
 - The requirements of the notice are:
 - i) Cease the use of the land for all vehicle related maintenance
 - ii) Remove the storage container from the land
 - iii) Remove all vehicle related parts from the land
 - iv) Restore the land to its former state and retain the land as open paddock.
 - The period for compliance with the requirements is 28 days.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The enforcement notice is quashed.

The Notice

2. The notice identifies the alleged use as falling within 'use class B1'. However, on 1 September 2020, 2 days prior to the issuing of the notice, *The Town and Country Planning (Use Classes) Order 1987* was amended by *The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020*. One effect of this was to remove Class B1. Former B1 uses now fall within Class E(g). The notice therefore cannot remain as issued and it is necessary for me to consider whether it can be corrected.
3. The notice could potentially be changed to refer to the new Class E. However, to do so I would need to be sure that the use alleged falls within E(g), which is concerned with:
 - (i) an office to carry out any operational or administrative functions,
 - (ii) the research and development of products or processes, or

- (iii) any industrial process, being a use, which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.
- 4. The use alleged in the notice plainly does not fall within E(g)(i) or E(g)(ii). While the use might be said to amount to an industrial process, to fall within E(g)(iii) it would need to be capable of being carried out in any residential area without detriment to the amenity of that area by reason of noise. In my view that is not consistent with the claim in the notice that there is potential for noise disturbance.
- 5. I raised this matter with the Council and the appellant and sought their views regarding which use class, if any, the use falls into. Both responded to the effect that they regarded it as a use within Class E(g)(iii). However, I am not persuaded of this. The particular requirement for such a use to be capable of being carried out in any residential area (my emphasis) without detriment to the amenity of that area by reason of noise etc is difficult to reconcile with a use which entails bringing refrigerated HGV trailers to the site, running them for significant periods of time in the open air, carrying out repair works to them and making occasional use of a telehandler to load a skip. On its face, it appears to me to be a use highly unlikely to be capable of being carried out in a residential area without detriment to the amenity of that area by reason of noise.
- 6. Evidence on noise has been submitted by the appellant and a neighbour. These reports relate to the specifics of this site rather than the question of the use class. Moreover, different conclusions are reached about the effect of the use on neighbours. With those very significant limitations in mind, I have considered whether this evidence has a bearing on the question of the use class.
- 7. However, even taking the more optimistic findings of the appellant's noise evidence, it still appears to me that the use is capable of generating significant noise of an extent that would be detrimental in a residential area. The report identifies the potential in this rural location for the use to generate a rating level 5dB above the background level at the nearest residential receptor. This is a residential property on the other side of Cowhams Lane and not, therefore, immediately next to the appeal site. The report finds that the noise increase at this property 'is likely to be an indication of a "adverse impact"'. While the report concludes that this is an acceptable noise situation, the clear potential of the use to cause an adverse impact does nothing to alter my view that this is not a use which could be introduced to any residential area without detriment to the amenity of that area by reason of noise.
- 8. Moreover, the report recommends that only 1 refrigeration unit be run at any one time and that no other noise-generating activity should be undertaken during that period. However, I cannot see that it would be practical to monitor and enforce such detailed operation of the business and I am therefore not persuaded that it could be adequately controlled with a planning condition. Thus, it seems to me that the use has the potential to have a greater noise impact than accounted for. I understand that the business is currently operated by one person, but I cannot assume that that would always be the case.

9. None of the above means that I have reached a view as to whether the use being carried out is acceptable in this particular location; I have considered the evidence before me only to the extent necessary to decide the question of the use class. Whatever the merits of the use on this site, the noise evidence available does not alter my view that this is not a use within Class E. Since there is agreement that this is an industrial activity, it appears probable to me that it falls within Class B2.
10. I have the power to correct the notice, but only provided doing so would not cause injustice to the Council or the appellant. In this case, changing the allegation to refer to a use class other than that referred to in the notice or anticipated by the parties could change the cases that the parties would wish to put. Consequently, correcting the notice would cause injustice to both parties.
11. Moreover, reference to a different use class could have significant implications for the deemed planning application arising from this appeal. The nature of the deemed planning application derives from the allegation and so would be changed by reference to a different use class in the notice. This would have implications for the potential for other uses within the same use class to take place on the site in the event of the appeal being allowed and planning permission granted, adding to the potential for causing injustice to the Council.
12. I have considered whether the notice could be changed to make no reference at all to the relevant use class, but that would leave an unacceptable level of uncertainty in my view. This could cause injustice, given that the Council has approached the matter on the basis that the use falls within a particular use class, with all the implications and limitations that flow from that in terms of alternative future uses. This is clear from the Council's suggestion of a condition limiting use of the site to a Class E use in the event of planning permission being granted. Plainly, I would not be able to impose such a condition, given my view that this is not a Class E use.
13. For these reasons, I am unable to correct the notice.
14. I have other concerns about the notice. It includes reference to the siting of a storage container. It is perhaps thought by the Council that this is used in connection with the business use alleged, but that is not clear from the notice.
15. Moreover, the notice includes a requirement to retain the land as open paddock. Section 173(4) of the Act sets out the purposes an enforcement notice can seek to achieve, which are:
 - (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
 - (b) remedying any injury to amenity which has been caused by the breach.
16. In my view, an ongoing requirement to retain the land for a specific use (paddock) goes beyond either of these purposes.
17. Had I been otherwise minded to uphold the notice, it is likely that these additional concerns could have been clarified and corrected without causing

injustice. As things stand, however, I will quash the notice. This leaves open to the Council the option of issuing a further, corrected notice.

Conclusion

18. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the 1990 Act as amended, since injustice would be caused were I to do so. Consequently, the enforcement notice is invalid and will be quashed.
19. In these circumstances, the appeal on the ground set out in section 174(2)(a) of the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered.

Peter Willows

INSPECTOR