



Appeal Decisions

Site visit made on 25 May 2021

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 June 2021

Appeal A Ref: APP/F2415/C/20/3266005

Land South West of Gumley Road, Laughton, Leicestershire

- 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 James Tate against an enforcement notice issued by Harborough District Council.
- The enforcement notice was issued on 4 December 2020.
- The breach of planning control as alleged in the notice is: Without planning permission, the erection of two kilns and associated fixtures and fittings on the Land.
- The requirements of the notice are: Remove the 2 kilns and associated fixtures and fittings from the Land.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) and (c) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under section 177(5) of the Act as amended.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out in the formal decision.

Appeal B Ref: APP/F2415/W/20/3266004

Land South West of Gumley Road, Laughton, Leicestershire

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr James Tate against the decision of Harborough District Council.
- The application Ref 20/01212/FUL, dated 29 July 2020, was refused by a notice dated 3 December 2020.
- The development proposed is installation of external kiln driers in association with existing wood yard.

Summary of Decision: The appeal is allowed, and planning permission is granted in the terms set out in the formal decision

Applications for costs

1. Application for costs were made by Mr James Tate against Harborough District Council. These applications are the subject of a separate Decision.

Clarification

2. The enforcement notice and the development the subject of the planning application and section 78 appeal, both refer to the installation of kiln driers. It is clear from the evidence before me and the observations on my site visit, that

the kilns referred to are the biomass boilers that have been installed. I have dealt with the appeal on that basis.

Appeal A on ground (c).

3. The ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control. The appellant considers the biomass boilers/kilns to be portable in nature and not a permanent fixture on the site such that they do not constitute a building for the purposes of Section 55 of the Town and Country Planning Act, 1990 (the Act).
4. Section 55(1) of the Act includes in the definition of the word "*development*" the carrying out of building, engineering, mining or other operations in, on, over or under land.
5. The appellant refers to tests for what may constitute a "building" as set out in the case of *Cardiff Rating v Guest Keen and Baldwin's Iron and Steel Co. Ltd* [1949] 1KB 385. This decision and the need for three specific tests (as to what constituted '*a building*' for the purposes of the Act) was reinforced by the case of *Skerritts of Nottingham and the Regions* [2000] 2 P.L.R. 102.
6. In terms of '*permanence*', whilst accepting that the boilers/kilns are freestanding units with no attachment to the ground, it is clear that the appellant wishes for them to be a permanent fixture on the site and they are an integral part of the wood yard business. A concrete base has been laid for them to sit on and construction works in the form of connecting pipes to the water tank, which is heated by the boilers and pumped into heat exchangers inside the connected drying rooms. Furthermore, the boilers/kilns have been on the land for approximately four years. In addition, in its planning context the boilers have an impact that would be significantly noticeable (in terms of their physical presence) if they remain in this location. I appreciate that in terms of '*fixation*' the boilers are not bolted to the ground. However, the courts have held that a unit can, simply by its own weight, be considered to be fixed to the ground.
7. With regard to the three tests, I consider that because of their size, physical presence and degree of permanence, a building operation has occurred within the meaning of development under s55 (1) of the Act. The boilers/kilns are buildings rather than mere chattels or moveable structures placed on the Land and they are not temporary structures.
8. My conclusion is that there has been development for which no planning permission was granted by the local planning authority. This building operation is not permitted development under any provision of the Town and Country Planning (General Permitted Development Order) (England), 2015, including Class N, Part 14 of that Order. A breach of planning control has occurred and the appeal on ground (c) fails.

Appeal A on ground (a), deemed planning permission and Appeal B.

Background

9. The appeal site comprises a logging and wood yard which has been in use in some form on the Land since 1996. In 2017 the appellant installed two biomass boilers to assist in the drying of logs. The boilers utilise waste arising from logging operations at the yard to generate heat to kiln dry their logs. The

section 78 appeal (Appeal B) and the deemed planning application (Appeal A) seek planning permission for these two biomass boilers/kilns. The use of the site as a wood yard is not a matter for my consideration in this appeal.

Main Issue

10. The main issue is the effect of the biomass boilers on the living conditions of the occupants of nearby properties, with particular regard to emissions.

Reasons

11. The biomass boilers have been in situ since 2017. They are located within the wood yard on the edge of the village of Laughton and outside of the village's conservation area. The boilers are partially enclosed by an open fronted timber clad building, and each boiler has a chimney/flue extending to approximately 5/6m in height. From the evidence I have before me, I understand that only one boiler is lit on any one day and they are lit alternately. The boiler is lit in the morning and burns for about 4/5 hours. However, at my request on my site visit, which took place in the late morning, I was able to see one of the boilers which had been lit earlier that morning in operation and burning at capacity, and the other boiler was fired up in my presence.
12. The appeal site does not lie within or adjacent to an Air Quality Management Area (AQMA) or a Clean Air Zone. The Council's validation check list for the registration of applications for planning permission confirms that air quality assessments are only required where development is proposed inside or adjacent to an AQMA and it is likely that the proposal will affect or be affected by local air quality conditions. It is therefore clear that the appellant was not required to provide an AQMA to accompany his application. In addition, the Council advise that their Environmental Health Team have been monitoring the effects of the development since its installation and have not found the development to be a statutory nuisance under the terms of the Environmental Protection Act, 1990.
13. Taking into account the evidence and complaints received from local residents since their installation, the Council consider that the emissions generated from the boilers give rise to significant harm to the living conditions of nearby residential properties.
14. It is clear from the significant number of representations received from third parties in response to the retrospective planning application and appeals, that there is considerable concern over the development and the effect it is having on the living conditions of a number of residents within the village. Residents express concerns relating to, and amongst other things, smoke and acrid smells, and allege that the boilers are releasing pollutants that could cause harm to their health and well-being and have a harmful effect on their living conditions.
15. Third parties have produced photographic evidence of smoke being emitted from the flues associated with the boilers. In addition, they complain of acrid smells and a tightness in their chests which they believe to be as a direct result of emissions from the boilers. Evidence has been submitted to support these concerns, including: a report from the Air Quality Expert Group, on the potential harm to health from long term exposure to fine particulate matter; a

report prepared by Dr Peter Greave¹; and, an air quality report detailing the potential for adverse impacts from the biomass boilers on amenity and living conditions in Laughton Village². I have had regard to all of those submissions in my consideration of these appeals.

16. Paragraph 183 of the National Planning Policy Framework (the Framework) advises that the focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively.
17. The boilers that have been installed have the benefit of a Renewable Heat Incentive Emissions Certificate which indicates that their make/model, as well as the fuel to be used, would meet current air quality requirements. In recognition of that, the appellant has confirmed that he receives renewable heat incentive payments. Consequently, having regard to the requirements set out by the Department for Environment, Food & Rural Affairs and by Ofgem, and taking into account the Council's confirmation that there has been no evidence since their installation that the boilers have caused any statutory nuisance, such that their emissions unreasonably and substantially interfere with the use or enjoyment of a home or other premises, or injure health or be likely to injure health, I consider that the level of gas emitted by the boilers, including Particulate Matter and Nitrogen Oxide, is unlikely to have exceeded limits set out within relevant legislation.
18. The appellant's appeal submissions recognise that for the biomass boiler to operate effectively and efficiently they must burn the correct fuel. Indeed, to qualify for subsidy under the RHI payments the boiler must emit no more than 30g/GJ of particulate matter. However, the appellant accepts that there may have been, on the odd occasion, times when smoke has been emitted due to technical difficulties or when the boilers are first fired up. I noted on my site visit that it took approximately 10/15 minutes from the boiler being first lit for it to cease smoking and when it was first lit, I was able to detect some odours. However, the smoke and smell soon dissipated, although I appreciate that depending on the wind direction nearby residents would be aware of the smoke and smell during start up.
19. Residents have submitted some photographs which show the boiler flues emitting smoke, however, I do not have any substantive evidence that this is a regular and continual occurrence. It seems to me that it would not be in the interests of the appellant to burn unsuitable materials, including wet wood, as this would be an inefficient operation and there would be no financial incentive to do so. Furthermore, the appellant has provided a Statutory Declaration which clearly sets out how he fuels and operates these boilers.
20. I have had regard to third party evidence and concerns regarding the potential harm to health from long term exposure to fine particulate matter. However, there is no evidence that would demonstrate to me that the boilers in this case are emitting harmful pollutants. Indeed, if that were to be the case, the matter would be dealt with by separate pollution control legislation. However, I appreciate that nearby residents have real concerns regarding the operation of

¹ Health hazards from wood-yard, Laughton

² Air Quality Report, Prepared by Stephen Peirson, 13 April 2021.

the boilers. Therefore, having had regard to the tests for conditions as set out in the Framework and Planning Practice Guide, I consider that to safeguard the living conditions of nearby residents it is reasonable and necessary to impose the conditions suggested by the Council to control hours of operation, require an assessment of the efficiency of the boilers, and to implement any recommendations suggested to improve efficiency. Maintaining the efficient operation of the boilers would ensure the living conditions of neighbouring residents are safeguarded. However, the condition suggested by the Council to require evidence of compliance with the report's recommendations is imprecise and unnecessary.

21. I conclude that subject to the imposition of the conditions set out in the paragraph above, the biomass boilers/kilns would not have a significant harmful effect on the living conditions of nearby occupants, in terms of emissions. There is no conflict with the Framework or the development plan and in particular with Policy GD8(e),(ii) which seeks to resist development that results in unacceptable harm to neighbouring amenity, through an overlooking or overbearing impact, or resulting in noise, odour or light pollution or disturbance unless the harm can be overcome through suitable planning conditions.

Other Matters

22. I have had regard to local resident's concerns regard the levels of activity associated with the wood yard and how its operations have changed over the years. However, these appeals relate solely to the biomass boilers/kilns which have been installed. General concerns regarding noise, delivery vehicles and wood dust from the operation of the yard are not therefore matters for my consideration in these appeals.
23. I have had regard to the visual impact on the boilers/kilns on the local landscape, having regard to views from local footpaths and the setting of the conservation area. The boilers are visible from the adjoining lanes and footpaths. However, from my own observations on my site visit and taking into account their modest size, screening by existing vegetation and buildings, and their position within an established yard on the edge of a village, they are not visually intrusive or harmful to the setting of the conservation area. It would not be unusual for agricultural machinery or plant such as this to be found within a working rural environment and the boilers do not appear incongruous in this location.

Conclusions

24. For the reasons given above and taking into account all other matters raised, I conclude that Appeal A should succeed on ground (a) and planning permission will be granted for the development described in the notice, subject to conditions set out in the formal decision. The enforcement notice will be quashed. For the same reasons, I conclude that Appeal B should be allowed and planning permission granted subject to conditions set out in the formal decision.
25. The purpose of condition 2 in Appeal A and condition 3 in Appeal B below is to require the appellant to comply with a strict timetable for dealing with the efficiency of the biomass boilers/kilns which needs to be addressed in order to make the development acceptable. The conditions are drafted in this form

because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matter because the development has already taken place. The conditions therefore provide for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority ("LPA") or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the conditions not be met in line with the strict timetable, then the use would have to cease and the boilers/kilns would have to be removed.

Formal Decisions

Appeal A

26. The appeal 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 erection of two kilns and associated fixtures and fittings on Land South West of Gumley Road, Laughton, Leicestershire referred to in the notice, subject to the following conditions:

1. The kilns shall only be operated between the hours of 0800hours and 1800hours Monday to Friday and at no time on weekends or Public and Bank Holidays.
2. The kilns hereby permitted, and all fixtures and fittings associated with their use shall be removed within three months of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i) Within 3 months of the date of this decision a report from a suitably qualified person confirming the findings of an assessment of the efficiency of the kilns and the smoke emitted from such shall be submitted to the Local Planning Authority for approval and should make reference to the following: - Details on fuel type to be used (if wood, to include moisture content); - Height of flues & efficiency of dispersion; - Temperature of kilns (including start up) and how this affects smoke emissions; and - Maintenance and servicing. The report shall include a timetable for the implementation of any recommendations.
 - ii) If within 6 months of the date of this decision the local planning authority refuse to approve the report or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted report shall have been approved by the Secretary of State.
 - iv) The approved report and any recommendations contained within it shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the recommendations specified in the report in this condition, those recommendations shall thereafter be maintained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

Appeal B

27. The appeal is allowed and planning permission is granted for the installation of external kiln driers in association with existing wood yard at Land South West of Gumley Road, Laughton, Leicestershire in accordance with the terms of the application, Ref 20/01212/FUL, dated 29 July 2020 and subject to the following conditions:

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans: 1586 – P04 Proposed Ground Floor Plan and Elevations; 1586 – P03 Proposed Site Plan; 1586- P02 Existing Site Plan; 1586 – P01 Site Location Pan.
- 2) The kilns shall only be operated between the hours of 0800hours and 1800hours Monday to Friday and at no time on weekends or Public and Bank Holidays.
- 3) The kilns hereby permitted, and all fixtures and fittings associated with their use shall be removed within three months of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i) Within 3 months of the date of this decision a report from a suitably qualified person confirming the findings of an assessment of the efficiency of the kilns and the smoke emitted from such, shall be submitted to the Local Planning Authority for approval and should make reference to the following: - Details on fuel type to be used (if wood, to include moisture content); - Height of flues & efficiency of dispersion; - Temperature of kilns (including start up) and how this affects smoke emissions; and - Maintenance and servicing. The report shall include a timetable for the implementation of any recommendations.
 - ii) If within 6 months of the date of this decision the local planning authority refuse to approve the report or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted report shall have been approved by the Secretary of State.
 - iv) The approved report and any recommendations contained within it shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the recommendations specified in the report in this condition, those recommendations shall thereafter be maintained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the

time limits specified in this condition will be suspended until that legal challenge has been finally determined.

Elizabeth Pleasant

INSPECTOR