The Planning Inspectorate

Appeal Decision

Site visit made on 6 July 2021

by S A Hanson BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 July 2021

Appeal Ref: APP/C4615/C/20/3261339
Land at Waterside Business Park, Brettell Lane, Brierley Hill, West Midlands

- 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 Alvin Lindley (Clearwater PLC) against an enforcement notice issued by Dudley Metropolitan Borough Council.
- The enforcement notice was issued on 10 September 2020.
- The breach of planning control alleged in the notice is: *failure to comply with condition No 11 of a planning permission Ref 97/51613 granted on 8 January 1998.*
- The development to which the permission relates is: *part demolition of existing industrial buildings to allow extension formation of staff parking and trailer park area*. The condition in question is No 11 which states that: *Roller shutter doors and other points of access to the building shall be kept closed except when people or vehicles are gaining access or exit to and from the building*. The notice alleges that the condition has not been complied with.
- The requirements of the notice are: *To comply/secure compliance with condition 11 of the planning permission by ensuring that roller shutter doors and other points of access to the building shall be kept closed except when people or vehicle are gaining access or exit to and from the building.*
- The period for compliance with the requirements is *one month*.
- The appeal is proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended.

Decision

1. It is directed that:

   The enforcement notice be corrected by substituting "171A(1)(a)" with "171A(1)(b)".

2. Subject to this correction, the appeal is dismissed and the enforcement notice is upheld.

Preliminary matter

3. The breach of planning control in this case is alleged to be failing to comply with any condition or limitation subject to which planning permission has been granted, and therefore the breach is one within section 171A(1)(b) of the 1990 Act rather than section 171A(1)(a) as set out in the notice.

4. I have a duty to get the notice in order if I am able to do so. The appellant is clear as to what it is that the Council has alleged, and therefore no-one would be prejudiced by my correcting the notice accordingly.

5. Section 3 of the notice sets out the matters that appear to constitute the breach of planning control. The text of condition 11 attached to the planning permission is given. The reason for the condition is "*in order to safeguard the amenities of occupiers of the dwellings within the vicinity*". There is no explanation of how the Council contends the condition has been breached, just that the matters are alleged to have occurred, and this has resulted in a failure to comply with the condition. The reason for issuing the notice is "*the failure to comply with condition 11 of the Planning Permission is considered to be causing undue noise, disturbance and significant consequent harm to the amenity of surrounding residents contrary to Dudley Borough Development Strategy Policies D2 – Incompatible Land Uses and D5 – Noise Pollution*."

6. Nevertheless, it is clear from the appellant's submissions that he understands that the matters which constitute a breach are that the roller shutter doors and other points of access to the building are remaining open longer than deemed necessary to allow vehicles and pedestrians in and out of the building.

Background

7. The appeal building was first granted planning permission in 1978[1] with subsequent extensions being permitted in 1997[2]. The premise is currently occupied by Midland Structures Ltd which manufactures structural steelwork, architectural metal work and welded fabrications, and has occupied the site for four years.

The appeal on ground (b) and Ground (c)[3]

8. In pursuing an appeal on these legal grounds, the onus firmly rests with the appellant to show, on the balance of probabilities, that the matters stated in the notice have not in fact occurred and, if they have, do not constitute a breach of planning control. The breach of planning control refers to the non-compliance with Condition 11 of 97/51613 which was alleged when the notice was issued. The planning merits of the matter alleged do not fall to be considered.

9. The appellant advises that the doors are closed "two or three minutes after the movement across the threshold has occurred" but due to the frequency of use and nature of those movements, doors can invariably be open for a "significant length of time". The statement continues to advise that whilst the roller shutter doors and other external doors are in frequent use, they have not been left open unreasonably beyond the time required for people or vehicles to access or exit the building. Notwithstanding these slightly contrary statements, it is claimed that this mode of operation is permissible within a fair and reasonable interpretation of the wording of Condition 11 and accordingly does not constitute the condition being breached.

10. The Council provide that complaints had been received in late 2018 regarding doors to units 4, 5 and 6 being left open and thus causing a noise issue for some residents near to the site. The Council's Environmental Health and Trading Standards department issued a letter to the business premise on 2 October 2018 with concerns of noise disturbance by virtue of doors being left open for long periods. In February 2019, following a period of a reduction in

[1] Planning Permission Ref: CC/78/1569
[2] Planning Permission Ref: 97/51613
[3] There is significant overlap between arguments advanced on grounds (b) and (c) therefore I will combine them.

noise levels, complaints were raised again about prolonged periods of noise disturbance. Evidence was collected by a complainant between February 2019 and April 2019 and the Council undertook a monitoring exercise between 11 April 2019 and 21 May 2019[4] during which time vehicle movements and the position of the roller shutter doors were recorded.

11. From the Council's statement, it seems that there have been periods of protracted discussions to attempt to resolve noise concerns; periods of monitoring; and periods when it "appeared that the operators were continuing to comply with the condition". However, in March 2020 complaints were again raised concerning the duration of time that doors were being left open, and this was reported as being a "worse situation" than previously reported. Following letters from the Council in July 2020 improvements were reported by the complainants. However, it was noted that these improvements began, once again, to decline.

12. The Council accepts there will be occasions where the operators will use a door for access and not immediately close it if persons or vehicles intend to use the same door again in relatively short succession. However, it also considers that it is reasonable to interpretate the meaning of the condition to be that the doors should be kept closed at all other times.

13. It was evident at my site visit that some shutter and pedestrian doors were left open beyond the time that they were reasonably required to be open to allow for access. I acknowledge that my site visit was only a snapshot in time lasting approximately 20 minutes during which time I saw no vehicle movements into or from the building but saw roller shutter doors, as well as pedestrian doors, that remained open. In this respect it is highly likely that this was occurring at the time the Council issued the enforcement notice. In these circumstances, and without any further cogent evidence to substantiate the appellant's claim that the doors are not left open longer than necessary and that the breach of condition has not occurred, I find that on the balance of probability, the matters alleged by the notice have occurred and are a breach of planning control, as a matter of fact and degree.

14. The appeal on grounds (b) and (c) therefore fail.

Other matters

15. The appellant considers that the condition is "*vague, poorly worded, and therefore difficult to enforce, or indeed, comply with*". This is because "*it is not clear how soon after their use the doors must be closed"*. By not defining what might be considered a reasonable amount of time to complete any movement in or out of the building before the doors must be closed, the condition is said not to meet the relevant 'tests'[5].

16. Nevertheless, factors relating to the how relevant and necessary the condition are is not applicable to an appeal made on grounds (b) and (c). Those factors are more relevant as to whether planning permission should be granted to comply with the original panning permission without complying with the condition. However, no appeal is made on ground (a) that planning permission

[4] Results of monitoring (11 April 2019 11:35 - 12:05; 24 April 2019 10:30 – 11:00; 15 May 2019 15:56 – 16:30; 21 May 2019 11:21 – 11:55) provided within the Council's appeal statement at paragraph 15
[5] Defined in paragraph 55 of the National planning Policy Framework as necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.

should be granted, and so I cannot take that option into account in reaching my decision.

S A Hanson

INSPECTOR