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## Appeal Decision

Site visit made on 18 May 2021

**by Paul Freer BA (Hons) LLM PhD MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 21 July 2021**

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**Appeal Ref: APP/A4710/C/20/3262951**

**Land known as Providence Works, Queens Road, Halifax HX1 3NS**

- 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 Mohammed Saleem against an enforcement notice issued by Calderdale Metropolitan Borough Council.
  - The enforcement notice was issued on 14 October 2020.
  - The breach of planning control as alleged in the notice is, without planning permission, the material change of use of the land by:
    1. The erection of a building on the Land for use as a MOT Test Centre/Station; and
    2. The creation and use of a vehicular access to and from the MOT Test Centre/Station.
  - The requirements of the notice are:
    - (i) Cease the use of the Land as an MOT Test Centre/Station
    - (ii) Cease the use of the vehicular access to and from the MOT Test Centre Station; and
    - (iii) Close the vehicular access by erecting a fence or wall of not more than 1m height along the approximate alignment marked 'A-B' on the digital photograph attached to the notice.
  - The period for compliance with the requirements is two months.
  - The appeal is proceeding on the grounds set out in section 174(2) (b) and (f) of the Town and Country Planning Act 1990 as amended.
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### **Summary Decision; the enforcement notice is quashed**

#### **Reasons**

1. The breach of planning control as alleged in the notice is, without planning permission, *the material change of use* of the land by (1) the erection of a building on the Land for use as a MOT Test Centre/Station; and (2) the creation and use of a vehicular access to and from the MOT Test Centre/Station (emphasis added). The requirements of the notice reflect that allegation insofar as they require, in part, the *use* of the land as an MOT Test Centre/Station to cease and the *use* of the vehicular access to cease (again, emphasis added). It is therefore apparent that the notice seeks to attack a material change in the use of the land.
2. In considering this key point, it is first necessary to set out the meaning of development as defined in section 55(1) of the 1990 Act, which is defined there as meaning:

*....the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.*

3. It is apparent from this definition that there are two limbs to the meaning of development. The first limb may be summarised as comprising the carrying out of building, engineering, mining or other operations or, in shorthand, as 'operational development'. The second limb comprises the material change of use of in the use of any buildings or other land or, in shorthand, as 'a material change in use'. It is significant that these two limbs are separated within Section 55(1) by the word 'or'. The construction of section 55(1) is therefore such that the two limbs must be considered to constitute separate entities.
4. This distinction between operational development and the use of land is buttressed by Section 336(1) of the 1990 Act. It is stated in terms in this section that "use", in relation to land, does not include the use of land for the carrying out of any building or other operations on it.
5. The Courts have confirmed that, in principle, there is no reason why allegations of operational development and of a material change of use should not be combined in one notice, provided they relate to connected matters and the time period within which each element of the development is alleged to have taken place is made clear. But that is not the case here.
6. The breach of planning control as alleged in the notice is, without planning permission, *the material change of use* of the land by (1) the erection of a building on the Land for use as a MOT Test Centre/Station; and (2) the creation and use of a vehicular access to and from the MOT Test Centre/Station (emphasis added). It therefore conflates the two limbs of Section 55(1) by alleging that the erection of the building on the Land for use as a MOT Test Centre/Station (the first limb) constitutes a material change of use of the land (the second limb). Similarly, the notice conflates the two limbs by alleging *the material change of use* of the land by the creation and use of a vehicular access to and from the MOT Test Centre/Station: the term "creation" connotes the carrying out of building or engineering operation rather than a material change in use of that land.
7. That is not permissible: the erection of a building is operational development under the first limb of Section 55(1) and not a material change of use under the second limb. The allegation in the notice is therefore directly at odds with Section 55(1) of the 1990 Act and the interpretation of that Act set out in Section 336(1).
8. The distinction between operational development and a material change of use is important, not least because of the provisions is set out in Section 171B of the 1990 Act. This section of the Act specifies different time limits for taking enforcement action: namely four years for operational development (Section 171B(1)) and ten years for a material change of use of any buildings or other land (Section 171B(3))<sup>1</sup>. Conflating the two limbs of Section 55(1), as the notice does, means that the clear distinction between the different time periods for the immunity from enforcement action is blurred.

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<sup>1</sup> Except for the change of use of any building to use as a single dwellinghouse, where the time limit is four years (Section 171B(2)).

9. It follows from the above that the notice cannot stand as drafted. The question then arises as to whether the notice is a nullity or whether the defects are capable of being corrected under the powers set out in s176(1)(a) of the 1990 Act. In respect of the latter, the sole test is whether the notice can be corrected and/or varied without causing injustice.
10. The modern approach to the question of nullity is to be found in the judgment of the High Court in *Oates v SoCLG and Canterbury*<sup>2</sup>, which drew extensively upon the preceding case law on the subject. A number of principles emerge from this judgment, including that the test in relation to nullity is best understood not as one of 'hopeless ambiguity' but rather as a failure to tell the recipient with 'reasonable certainty' what the breach of planning control is and what must be done to remedy it. The judgment in *Oates* also indicates that a degree of uncertainty does not necessarily render it non-compliant with statute and that the notice should be read as a whole. Overall, the judgment in *Oates* indicates that the question of nullity should not be approached in a way which is unduly technical or formalistic.
11. Looking at the notice in the round, I am satisfied that it contains all the essential components set out at Section 173 of the 1990 Act. By reading the alleged breach of planning control and the steps required to comply with the notice in conjunction, together with the reasons for issuing the notice, it is reasonably certain that the notice is purporting to attack a material change of use of the land and/or of a building on the land. I acknowledge that the notice contains some significant errors across the piece. However, when read as a whole and adopting the principle advocated in *Oates* that the question should not be approached in a way which is unduly technical or formalistic, I do not go so far as to say that the notice is a nullity. But it is invalid as it stands.
12. The problems arise when attempting to correct and/or vary the notice. As indicated above, the Courts have confirmed that in principle there is no reason why allegations of operational development and of a material change of use should not be combined in one notice. Consequently, in principle I could correct the notice to allege both operational development and a material change of use of the land.
13. The difficulty in that respect is the provision set out in Section 171B of the 1990 Act. As indicated above, this section of the Act specifies different time limits for taking enforcement action: namely four years for operational development (Section 171B(1)) and ten years for a material change of use (Section 171B(3)). By correcting the notice to allege operational development, the shorter (4 year) time period set out in section 171B(1) would then apply. I therefore cannot discount the possibility that the appellant may then wish to appeal on ground (d) as set out in section 174(2) of the 1990 Act as amended: namely that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters.
14. Neither can I discount the possibility that the appellant may then wish to appeal on other grounds, or to re-cast his appeals on the grounds already pleaded. In the interests of fairness, the appellant would need to be afforded a reasonable opportunity to make his case on those new/re-cast grounds.

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<sup>2</sup> *Oates v SoCLG and Canterbury* [2017] EWHC 2716

15. The latter becomes particularly important in respect of any appeal on ground (a): namely that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. Unlike the other grounds of appeal against an enforcement notice, an appeal on ground (a) requires the payment of a fee within a specified time period. That time period has expired, such that the appellant is not now able to make an appeal on ground (a). It follows that the appellant would be caused injustice should I attempt to correct the notice to allege both operational development and a material change of use, insofar as they would be denied any opportunity to seek planning permission for the breach of planning control then alleged in the notice.

### **Conclusion**

16. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control or the steps required for compliance, either as originally drafted or as now proposed by the Council to be revised. It is not open to me to correct the errors 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. The enforcement notice is invalid and will be quashed. In these circumstances, the appeals on the grounds set out in section 174(2) (b) and (f) of the 1990 Act as amended do not fall to be considered.

### **Formal Decision**

17. The enforcement notice is quashed.

*Paul Freer*

INSPECTOR