The Planning Inspectorate

Appeal Decisions

Inquiry held on 3 August 2021

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 September 2021

Appeal A Ref: APP/N4720/C/19/3243181
Appeal B Ref: APP/N4720/C/19/3243342
Land at Leeds Road, Lofthouse, Wakefield WF3 3LR

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Marsh Investments Wakefield Limited (Appeal A) and Searchagain Limited (Appeal B) against an enforcement notice issued by Leeds City Council.
- The enforcement notice was issued on 14 November 2019.
- The breach of planning control as alleged in the notice is, without planning permission, the material change of use of the land to a mixed use as a café building and land where commercial/industrial uses are taking place and the erection of storage containers, portable cabins, caravans, a canopy structure, outdoor storage and boundary fencing and gates.
- The requirements of the notice are:
    1. Cease the use of the land for storage and vehicle repairs.
    2. Remove the storage containers from the land.
    3. Remove all vehicles stored on the land.
    4. Remove all caravans from the land.
    5. Remove the hydraulic ramp from the land.
    6. Remove all equipment and material stored on the land associated with the vehicle repairs and storage.
    7. Cease the use as a scaffolding business from the land.
    8. Cease the storage of scaffolding from the land.
    9. Remove the green paladin fencing within the site (shown on attached photo reference AU1).
    10. Remove the galvanised 2.4 metre high metal palisade fence from within the site (shown on attached photo reference: AU2).
    11. Remove from the land all the scaffolding and any fixtures and fitting racking connected with the scaffolding business.
    12. Remove all structures from the land such as scaffolding racking, poles.
    13. Remove all vehicles/trailers and machinery stored on the land.
    14. Remove the cabins/offices from the site.
    15. Cease the use of the land for parking and storage of coaches.
    16. Remove the coaches from the land.
    17. Remove the canopy structure erected to the front of the site.
    18. Cease the unauthorised use as a stone cutting business from the land.
    19. Cease the unauthorised storage of stone from the land.
    20. Remove from the land all stone and vehicles connected to the stone cutting business.
    21. Remove the green paladin and heras style fencing along with the gates and large gate posts installed on the land adjacent to the stone cutting business (shown on attached photo reference: AU3).
    22. Remove all pallets stored on the land.

23. Remove any materials and detritus from the land resulting from compliance with the above steps.

- The period for compliance with the requirements is 3 months.
- Appeal A is proceeding on the grounds set out in section 174(2)(c), (d), (a), (f) and (g) 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.
- Appeal B is proceeding on the grounds set out in section 174(2)(c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decisions: No further action is taken.

Decision

1. Since the notice is found to be a nullity, no further action will be taken in connection with the appeals. In light of this finding the Local Planning Authority should consider reviewing the register kept under section 188 of the 1990 Act as amended.

Application for costs

2. At the Inquiry an application for costs was made by Marsh Investments Wakefield Limited and Searchagain Limited against Leeds City Council. This application is the subject of a separate Decision.

Procedural Matters

3. The Inquiry was scheduled to sit for four days to hear two appeals against a single enforcement notice. Prior to the Inquiry, I wrote to the main parties on 19 July 2021. Within that note, I indicated concern regarding the clarity and precision of the enforcement notice, raising the primary question as to whether or not the notice was a nullity. Written submissions were sought from the parties ahead of the Inquiry. Submissions were received by the Inspectorate from both parties by 26 July 2021, after which I indicated that I would seek fuller oral submissions at the Inquiry.

4. I opened the Inquiry as planned at 10:00 on 3 August 2021. Following my opening remarks, I determined, after consultation with both advocates, that it would be best to hear submissions on the nullity point and to make a ruling on the matter before proceeding any further with the Inquiry, since a finding that the notice was a nullity would render if it unnecessary to hear evidence on any of the grounds of appeal.

5. I heard legal submissions from both parties which took until around 12:00. I adjourned until 14:00 to consider my ruling. The Inquiry resumed at 14:00, at which point I ruled that I found the notice to be a nullity. The parties thereafter agreed with my approach that there was no need to proceed to hear any evidence on the grounds of appeal. I then heard an application for costs from the appellants, to which the Council responded. The Inquiry then closed around 14:40. At no point during the Inquiry were any witnesses called to give evidence, nor did any interested parties speak at the Inquiry.

Reasons

6. Section 173(1)(a) of the Town and Country Planning Act 1990 sets out that an enforcement notice shall state the matters which appear to the local planning authority to constitute a breach of planning control. Section 173(2) of the Act

states that a notice complies with Section 173(1)(a) if it enables any person on whom a copy of it is served to know what those matters are. If an enforcement notice does not comply with section 173(1)(a) of the 1990 Act, it is null and it cannot be saved by the powers of correction available under section 176(1).

7. In the case of *Miller-Mead*[1] it was held that the test is namely whether the enforcement notice tells the recipient fairly what they have done wrong. The enforcement notice must inform the recipient with *reasonable certainty* what the breach of planning control is.

8. In *Oates*[2] the High Court helpfully set out relevant principles in respect of the matter of nullity. Some degree of uncertainty or other defect in the relevant section of the notice does not mean there is non-compliance with section 173(1). Whether a defect renders the notice null must be viewed in the context of: the importance or otherwise of that particular part of the enforcement notice; whether the defect is bound up with the remainder of that section; and, whether the enforcement notice would be valid in the absence of that defect. It is open to me to conclude that whilst part of the relevant section of the notice is uncertain, the notice as a whole complies with the statutory requirements and the offending part can be deleted without rendering the remainder of the notice null. Finally, *Oates* established that the Inspector should approach the exercise in a way which is not unduly technical or formalistic.

9. In this case, the notice sets out the alleged breach as, "without planning permission, the material change of use to a mixed use as a café building and land where commercial/industrial uses are taking place and the erection of storage containers, portable cabins, caravans, a canopy structure, outdoor storage and boundary fencing and gates."

10. The construction of the wording indicates that the notice attacks both a material change of use and separate matters of operational development. In respect of the material change of use element, the notice simply refers to commercial/industrial uses without specifying what those uses actually are. Moreover, it is not clear whether the oblique between the words 'commercial' and 'industrial' sets out that the alleged uses are both commercial and industrial, or whether the uses are commercial or industrial, either collectively or individually.

11. In submissions at the Inquiry, the Council drew the distinction that a commercial use is an enterprise with the primary intention of making money whereas an industrial use is a process where raw materials go in and an end product comes out. It was put to me that that many things can be considered as either commercial or industrial uses, so in construing the intention of the notice the recipient must take a common-sense approach. In doing so, the Council says one would deduce that those commercial/industrial uses referred to in the notice are those which were taking place on the land at the time the recipient received the notice.

12. However, the recipient of an enforcement notice should not need to rely upon their own knowledge of what is taking place on the land at that time. Rather,

[1] *Miller-Mead v MHLG* [1963] 2 WLR 225
[2] *Oates v SSCLG v Canterbury CC* [2018] EWCA Civ 2229

they should be able to understand from the four corners of the notice what it is which appears to the LPA to be a breach of planning control. Indeed, there will often be circumstances where an alleged use of land in a notice is different to the recipient's understanding of what the use of the land was at that time, hence the provisions of an appeal on ground (b) under section 174(2) of the Act.

13. At the Inquiry, the Council referred to the appellants' previous submission of an application for a lawful development certificate which described the use of the land as commercial/industrial. However, that application does not form part of the enforcement notice and does not assist the recipient in understanding the alleged breach from within the four corners of the notice.

14. The Council set out at the Inquiry what it considered to be the commercial uses the notice attacks. They were a café use, a car washing use, a tyre fitting use, open storage use connected with the tyre use, a coach depot, a scaffolding business. The industrial use was identified as stone cutting and dressing use with ancillary storage. However, those uses are not actually specified within section 3 of the notice in respect of the matters which appear to constitute a breach of planning control. It is necessary nevertheless to look at the notice as a whole to ascertain its intentions.

15. Looking at section 5 of the notice, the requirements specify a number of uses, including stonecutting, parking and storage of coaches, a scaffolding business and storage and vehicle repairs. However, section 5 only tells us those uses which are required to cease. It leaves open the possibility that there could be uses taking place on the land at the time the notice was issued which the Council does not consider it expedient to cease.

16. In submissions, the Council did not refer to vehicle repairs, only a coach depot, the cessation of which sits under a separate step in section 5. There is no reference in the requirements to the café use, car washing use, tyre fitting use or open storage connected with the tyre fitting use.

17. Section 4 of the notice sets out the reasons for issuing the enforcement notice. It states that the uses of the land as a café and vehicle/tyre repair workshop are unlawful and, although the wording is somewhat confusing, one can ascertain that the Council has chosen to effectively underenforce against those uses by not requiring them to cease. However, despite that, the requirement to cease vehicle repairs is the first step of section 5.

18. The Council nevertheless submitted that overall, it can be deduced from the notice that the mixed use comprises those uses which are required to cease under section 5 and those uses which are unlawful but not required to cease under section 4, part 4.

19. Reasons 1 and 2 of the notice refer to the storage of large coaches and materials *such as* scaffolding and stone. The reasons also refer to an expanse of hardstanding and vehicles, neither of which are referred to in the allegation. Thus, it is unclear if those elements amount to part and parcel of an unlawful element of the mixed use or not. There is, as such, no clarity from reason 1 or 2 as to the entirety of uses which comprise the alleged mixed use.

20. Reason 3 alleges harm from the alleged breach deriving from activities associated with scaffolding equipment, vehicles and the comings and goings of

people. However, again it does not specify which uses result in the harm, referring only to commercial/industrial uses. No part of the notice refers to the use of the land as a car wash. I understand from submissions that the car wash use of the land is lawful but that is not set out within the four corners of the notice.

21. Ultimately, the notice alleges a material change of use to a mixed use. It is agreed between the parties that the land is a single planning unit in a mixed use, that being several primary uses where one is not ancillary to the other. In mixed use cases it is necessary for the allegation to refer to all the components of the mixed use, even if all are not required to cease. It was held in the case of *R(oao) East Sussex CC v SSCLG [2009]* that where there is a mixed use it is not open to the LPA to decouple elements of it, the use is a single mixed use with all its component activities.

22. Overall, neither the requirements nor the reasons tell us with reasonable certainty what all of the uses are which comprise the mixed use to which a material change has said to have taken place. Nor does the notice tell us which of those uses required to cease are primary uses which form part of the mixed use, or ancillary activities associated with the mixed use which have facilitated the alleged breach. As such, the recipient would not have been able to tell with reasonable certainty what uses comprised the alleged mixed use which appeared to the LPA to have taken place on the land.

23. There are also discrepancies in the wording of the operational development element of the alleged breach. Namely, as the Council accepts, storage containers and outdoor storage tend to be uses of land rather than operational development. The same could also be said of portable cabins and caravans. Nevertheless, that aspect of the alleged breach appears to be good on its face and it can only be on the proof of the facts for submission in evidence that one can come to a conclusion whether those matters are operational development, or a material change of use.

24. To that end, the second limb of the allegation in reference to operational development is not hopelessly ambiguous and uncertain such that, in isolation, it renders the notice a nullity. However, that aspect of the breach is bound up with the remainder of that section of the notice as the wording, punctuation and construction of the breach suggests those aspects are directly related to the alleged material change of use.

25. The alleged breach of planning control is of critical importance in the construction of the enforcement notice, in particular since the deemed planning application on the appeal on ground (a) derives directly from the allegation. Without an alleged breach of planning control, a notice is not a notice. In this case, the defects in the alleged breach are such that their removal would render the notice in non-compliance with section 173(2) of the 1990 Act.

26. In terms of the requirements of the notice, Step 2 requires the removal of storage containers from the land whilst Step 3 requires the removal of all vehicles stored on the land. Step 4 requires the removal of all caravans and Step 12 requires the removal of all structures from the land such as scaffolding racking, poles. Step 13 requires the removal of all vehicles/trailers and machinery and Step 22 the removal of all pallets stored on the land.

27. However, there is no indication within any of those requirements which of the unauthorised uses the removal of those items relate to. Thus, the recipient is left uncertain as to what it is they are required to remove from the land and thus what they are required to do to remedy the breach.

28. Failure to comply with the requirements of an enforcement notice is a criminal offence and any misunderstanding from the recipient's point of view to what is alleged to have taken place and what needs to be done to remedy it has significant ramifications.

29. I note the Council's submissions that the matter of whether or not the notice is a nullity is not one that was raised by the appellant in their initial written submissions to the appeals. I also appreciate the time that has elapsed since the notice was issued.

30. However, the notice was served on several of companies, not just the appellants. In any event, none of those factors absolve the responsibility of the decision maker to determine whether or not the enforcement notice complies with the statutory provisions in ensuring that what is before them is in itself an enforcement notice for the purposes of the Act.

31. I have had full regard to the need to not reach a finding of nullity too readily since it is in the public interest not to set the test of nullity too low. Likewise, I am conscious of the need to consider the matter in a manner which is not unduly technical or formalistic. However, having regard to the submissions of the main parties, I find the allegation and requirements of the notice to be so hopelessly ambiguous and uncertain that the recipient would not have been able to tell with reasonable certainty what they had done wrong and what they needed to do to remedy it.

32. As a result, I find the notice does not meet the tests laid down in *Miller-Mead* and overall fails to comply with section 173(2) of the 1990 Act. In this instance I find the deficiencies in the notice are such that the notice is not able to be corrected.

Conclusion

33. I conclude that the notice is a nullity. In these circumstances, the appeal on the grounds set out in section 174(2)(c), (d), (a), (f) and (g) of the 1990 Act and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act in respect of Appeal A; and, the appeal on the grounds set out in section 174(2)(c), (d), (f) and (g) of the 1990 Act as amended in respect of Appeal B, do not fall to be considered.

J Whitfield

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

John Barrett	Of Counsel, instructed by Walton and Co.

FOR THE LOCAL PLANNING AUTHORITY:

Timothy Leader	Of Counsel, instructed by Matthew Hills, Solicitor, Leeds City Council

DOCUMENTS

1 Council's Opening Statement
2 Appellant's Opening Statement
3 Correspondence between the parties and Wakefield Council