

Appeal Decision

by Brian Cook BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 06 January 2022

Appeal Ref: APP/Q3820/X/20/3259803

Blackcorner Wood Smallholdings, Balcombe Road, Crawley RH10 3NL

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Stan Clark against the decision of Crawley Borough Council.
 - The application Ref CR/2020/0086/191, dated 9 February 2020, was refused by notice dated 29 April 2020.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is airport related parking at Blackcorner Wood Smallholdings. The area as covered by Enforcement Notice ENF/2002/0013.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is considered to be lawful.

Applications for costs

2. An application for costs has been made by the Council against the appellant. This application is the subject of a separate Decision.

Procedural matter

3. The determination of this appeal turns on legal matters and particularly the interpretation of the notice issued in 2002. No site visit was necessary and none took place.

Main Issue

4. The appellant argues that at the LDC application date of 9 February 2020 the use of the land for airport related parking was lawful by virtue of planning permission being granted through s173(11) and s180(1) of the principal Act. The main issue for the determination of this appeal is whether or not that contention is correct.

Reasons

The Facts

5. The relevant history at the site is not in dispute between the parties and is therefore set out only briefly for context.

6. An officer report advises that in 1985 an enforcement notice was issued alleging 'A material change of use of the land to a mixed use agricultural use for agricultural purposes and the open storage of property and vehicles not ancillary to agricultural use.' That notice required the recipient to 'Discontinue the mixed use of the land by ceasing the use for the open storage of property and vehicles not ancillary to agricultural use' (emphasis added). The Council states that this notice has not been withdrawn and still applies to the site.
7. An enforcement notice and a stop notice were issued in March 2002. The breach of planning control alleged was 'the use of land hatched black for airport related parking without planning permission.' There was a single requirement namely 'within 28 days of the date on which this notice takes effect: Remove all airport related vehicles from the land.' The notice therefore included the period for compliance within the stated requirement.
8. It is common ground that all airport related vehicles were removed as required.
9. Planning applications for the temporary use of the land for airport parking for up to 80 cars (Ref: CR/2002/0508/COU) and the retrospective change of use of the land to airport related parking for up to 150 cars (Ref: CR/2015/0103/FUL) were refused planning permission. An appeal against the first of these was dismissed.
10. From at least 2015 through to 2019 the site has been used for airport related car parking as confirmed by Council surveys.
11. In February 2017 an application (Ref: CR/2017/0131/191) was made for a LDC. The use for which the LDC was sought was 'land being used for airport related parking.' The Council failed to make a decision on the application. An appeal (Ref: APP/Q3820/X/17/3183634) was dismissed in June 2018. The case made by the appellant was that since the 2002 notice failed to require airport related parking to cease, planning permission was granted by virtue of S173(11) of the principal Act.
12. In March 2020, shortly after the application that is the subject of this appeal was made, the Council successfully prosecuted the appellant in Horsham Magistrates' Court for a breach of the 2002 notice. An appeal against this conviction succeeded at an appeal hearing in July 2021. The Council has provided its transcript of the judgement made in Hove Crown Court.

Appraisal

13. The only material difference between this application and the one dismissed at appeal in 2018 is that the appellant additionally argues that s180(1)(a) applies. The dispute between the parties is simple. The appellant's case is that the 2002 notice does not require the use alleged to cease and therefore s173(11) and s180(1)(a) combine to grant planning permission for airport related parking. The LDC should therefore be issued since the use is lawful in accordance with s191(2)(a). The Council's position is that the notice is not discharged by compliance with the requirement and that by virtue of s181(1) it continues to have effect. This view was supported by the previous Inspector on appeal.
14. The determination of this appeal turns on the interpretation of the notice. Put at its simplest, the question is whether the requirement of the notice sets out a step which requires to be carried out once only (the appellant's position) or

whether it imposes a continuing obligation to comply with the notice in perpetuity (the Council's position). Material also is the order in which the relevant sections of the Act are set out.

15. The very well-known *Miller-Mead* judgement established the principle that the recipient of a notice must be able to find out from within the four corners of the document what he is required to do or stop doing. When quashing the appellant's conviction, the court reminded itself of this principle.
16. In my view, bearing that principle in mind, the interpretation of the notice, on its face, is quite straightforward. It alleges the use of land (I believe it reasonable to read into the allegation the words 'material change of use to') for airport related parking, it does not require that use to cease but it does require all airport related vehicles to be removed from the land within a defined period. It seems to me perfectly reasonable for the recipient to interpret that as meaning the notice has been complied with once the airport related vehicles have been removed.
17. Indeed, although it is an extraneous document, there having already been a 'use' notice from the Council in 1985 which *did* require the use to cease (see above), the appellant may have been reinforced in that view. I would add in passing that it is no part of the Council's case that the 1985 notice bites on use of the land for airport related parking. Indeed, if it could be so construed, issuing the 2002 notice would have been unnecessary.
18. In these circumstances, s173(11) is quite clear. Where a notice could have required an activity to cease but does not do so (s173(11)(a)), when all the requirements have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of s73A in respect of the carrying out of the activities (s173(11)(b)).
19. In this case, the Council could have explicitly required the use alleged to cease by the inclusion of a requirement to that effect but did not do so. All the requirements (that is the single one) have been complied with. Therefore, planning permission for airport related parking is treated as having been granted by virtue of s73A of the Act.
20. Turning to s180(1)(a), where, after the service of a notice, planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission.
21. In this case, the material change of use to airport related parking (the development) was carried out before the grant of permission. The development was being carried out when the notice was issued. Given the way the notice was framed, the permission itself derives from the operation of s173(11). By requiring the removal of airport related vehicles from the land when planning permission for that use of the land has been granted obviously renders the notice inconsistent with the permission. The notice must therefore cease to have effect.
22. The Council relies on s181(1)(b) to argue that the appeal cannot succeed. There are two problems with this approach. First, s181(1)(b) states that compliance with an enforcement notice in respect of the discontinuance of any use of land shall not discharge the notice. As explained above, the notice does

- not require the discontinuance of the use of the land; it requires only the removal of airport related vehicles within a defined period.
23. Second, the commentary in the Encyclopedia of Planning Law and Practice says, at P181.02, that 'By virtue of s.181, and assuming that s.180 is not engaged, the requirements of an enforcement notice automatically revive if the unauthorised development resumes or is carried out after compliance with the notice' (emphasis added). In this case, as explained above, s180 *is* engaged; s181 does not therefore apply.
24. The Council has also argued in support of its case that the LDC should not be granted since the appellant cannot show a 10-year period of continuous use of the land for airport related parking prior to the LDC application date. That may be so, but the appellant's case is that at the LDC application date, the Council was barred from taking enforcement action against such a use because there has been a planning permission in place, curtesy of s173(11), for the use since compliance with the requirement of the 2002 notice.
25. My conclusion therefore on the question posed above is that the appellant's understanding of the notice is correct. The appeal must therefore succeed.
26. I am aware that this is at odds with the conclusion reached by the previous Inspector on what was essentially the same matter. I do therefore need to consider the previous decision.
27. The relevant paragraphs in the earlier decision are 10 to 15. These are set out in full by both the Council in its statement and by the appellant in final comments. The whole decision letter has been provided in evidence.
28. Paragraph 10 sets out the appellant's case and acknowledges that where a particular use has not been specifically required to cease, s173(11) can apply. Paragraph 11 sets out the Council's position and records it as being 'It is stressed that in considering the allegation and the requirement together, it is clear that there should not be airport related vehicles on the land and that the appellant's action of continuing to do so is a continuation of the breach set out in the enforcement notice.'
29. Although paragraph 12 starts by saying 'in all the circumstances of this case I agree with the Council' the Inspector does not explain why. The rest of the paragraph states the law that would apply having come to that conclusion.
30. Paragraph 13 restates the essence of the problem. The notice was clear to the recipient of the notice, but the Council does not accept that the recipient's understanding is what the Council intended.
31. Paragraphs 14 and 15 flow from and are consistent with a finding that the requirement of the notice has an enduring effect. That, however, is the nub of the appeal and the Inspector has not set out the deliberations that lead to his conclusion. In that light and recognising my decision is at odds with the previous Inspector, I have set out in detail why I consider the Council's interpretation of the notice to be wrong.
32. Finally, and briefly, I refer to the stop notice. A stop notice ceases to have effect when the period for compliance with the notice expires (s184(4)(b)). In this case, that was 28 days after the 2002 notice came into effect. The stop notice therefore has no further effect on the use of the land.

Conclusion

33. Included in the Council's transcript of the proceedings in Hove Crown Court is this statement: 'And we remind ourselves that these are criminal proceedings dealing with penalty sanction and we must therefore construe any potential ambiguity on the face (of the notice) in the appellant's favour. Albeit with a degree of hesitation applying, the appellant was required to remove all airport related vehicles within 28 days. The SN (stop notice) which was served alongside would no doubt prohibited from resuming but he is charged with failing to comply EN not with failing to comply with SN. In our judgment therefore, as he did comply with the precise wording consequently inevitable, the appeal must be allowed. That is the ruling we would make.'
34. I do not know if the sitting Judge was experienced in planning law, but I have explained that the stop notice would, in fact, have ceased to have effect. The court refers to a potential, not an actual, ambiguity although the court notes that the appellant did comply with the precise wording. For the reasons set out above, I do not consider the notice to be ambiguous at all. I appreciate that it may not reflect the Council's intention in issuing it but that is a different matter.
35. For the reasons given above I therefore conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of 'airport related parking at Blackcorner Wood Smallholdings. The area as covered by Enforcement Notice ENF/2002/0013' was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Brian Cook

Inspector

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 9 February 2020 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Planning permission was granted by virtue of s173(11) of the Act upon compliance with the single requirement of the notice issued on 28 March 2002 alleging the use of land hatched black for airport related parking without planning permission.

Signed

Brian Cook
Inspector

Date 06 January 2022
Reference: APP/Q3820/X/20/3259803

First Schedule

Airport related parking at Blackcorner Wood Smallholdings. The area as covered by Enforcement Notice ENF/2002/0013

Second Schedule

Land at Blackcorner Wood Smallholdings, Balcombe Road, Crawley RH10 3NL

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Plan

This is the plan referred to in the Lawful Development Certificate dated:

by Brian Cook BA (Hons) DipTP MRTPI

Land at: Blackcorner Wood Smallholdings, Balcombe Road, Crawley RH10 3NL

Reference: APP/Q3820/X/20/3259803

Scale: not to scale

