



Appeal Decision

Site visit made on 13 January 2022

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 January 2022

Appeal Ref: APP/B1605/C/21/3284424

Land at 156 Hesters Way Road, Cheltenham GL51 0RY

- 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 Miroslaw Michalecki against an enforcement notice issued by Cheltenham Borough Council.
- The enforcement notice was issued on 9 September 2021.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of the land to the front of 156 Hesters Way Road, Cheltenham, GL51 0RY for the operation of a hot food takeaway business from a catering trailer.
- The requirements of the notice are to cease trading of the hot food takeaway business and remove the trailer from which the business is operating from (*sic*) at land known as 156 Hesters Way Road, Cheltenham GL51 0RY.
- The period for compliance with the requirements is six weeks.
- The appeal is proceeding on the grounds set out in section 174(2)(b) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections in the terms set out below in the Formal Decision.

Preliminary Matters

1. The enforcement notice alleges a material change of use of land to a hot food takeaway. The attached plan shows an area of hardstanding at the front of a terraced dwelling, not including the dwelling or its rear garden. However, it is highly likely that the area shown on the plan is also in use for purposes associated with the dwelling; the appellant confirmed that this was the case and the Council did not seek to argue otherwise.
2. There is little physical separation between the area allegedly used as a takeaway and the rest of the land occupied by the appellant. In my view, as a matter of fact and degree, use as a hot food takeaway is materially different in character to a use as a dwelling. This is because of the probable nature and scale of a takeaway use and the resulting significant increase in the number and frequency of comings and goings. It is highly likely therefore that any use as a takeaway is not ancillary to the use of the dwelling but is a primary use. Relevant case law has established that there is a mixed use where two or more primary uses are within the same planning unit and the uses are not ancillary to one another.
3. Therefore, if the alleged takeaway use has occurred the land shown on the plan is not in one primary use but forms part of a larger area of land occupied by

the appellant and in a single mixed use comprising both primary uses as a dwelling and a takeaway. Where an alleged breach of planning control is a material change of use and more than one primary use is taking place within a planning unit, the allegation should specify all the components of that use, even if it is considered expedient that only one of its components should cease. The Courts have held that where there is a mixed use, it is not open to the Council to decouple elements of it¹. The use will be a single mixed use with all its component activities.

4. At s176(1)(a), the Act provides for correcting a defect, error or misdescription in an enforcement notice. The power is wide, the only test being whether injustice would be caused to the appellant or the Council. After seeking the views of both main parties, I shall correct the notice to include the residential component of the mixed use in the allegation. In addition, I shall substitute the plan with one which properly reflects the unit of occupation, also making a consequential correction to paragraph 2. As the notice would not be more onerous, no injustice would be caused by making these corrections.
5. There is no deemed planning application arising from a ground (a) appeal. Therefore, planning merits considerations are not before me.

Ground (b) appeal

6. The ground of appeal is that the matter alleged in the notice has not occurred as a matter of fact. It is for the appellant to show that their appeal should succeed on this ground, the relevant test of the evidence being on the balance of probability.
7. A mobile catering trailer is stationed on part of the hardstanding. The available evidence, which includes extracts from Council records as well as representations from interested local residents, clearly shows that the trailer was used at the appeal site for the preparation, cooking and sale of hot food which is taken away by customers and consumed off the premises, prior to the issuing of the notice. The trailer was not simply parked or stored at the site. Although it appears that the appellant has recently started operating their business from another location, that does not change the fact that the use as a hot food takeaway has occurred at the site.
8. Therefore, the available evidence does not support the appellant's case and the ground (b) appeal fails.

Conclusion

9. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice as corrected.

Formal Decision

10. It is directed that the enforcement notice is corrected by:
 - Substitution of the plan attached to the enforcement notice by the plan attached to this decision.
 - Substitution of the words "*edged red*" by the words "*edged and cross-hatched in grey*" in paragraph 2.

¹ *R (oao) East Sussex CC v SSCLG & Robins & Robins* [2009] EWHC 3841.

- Substitution of the allegation in paragraph 3 with the following allegation: "*Without planning permission, the material change of use of the land to a mixed use as a dwelling and a hot food takeaway*".

Subject to these corrections, the appeal is dismissed and the enforcement notice is upheld.

Stephen Hawkins

INSPECTOR

Plan

This is the plan referred to in my decision dated:26 January 2022

by Stephen Hawkins MA MRTPI

Land at: 156 Hesters Way Road, Cheltenham GL51 0RY

Reference: APP/B1605/C/21/3284424

Scale: Not to scale

