



Appeal Decision

by **Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP**

an Inspector appointed by the Secretary of State

Decision date: 20th May 2022

Appeal Ref: APP/C1435/C/21/3278288

Langsett Industrial Estate, Rattle Road, Westham, East Sussex shown edged red on the plan attached to the notice ("the Land")

- 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 Carl Lynn (Intercon Scaffolding) against an enforcement notice issued by Wealden District Council on 3 June 2021.
 - The breach of planning control as alleged in the notice is without planning permission, change of use of Land from use as a commercial scaffolding business to a mixed use as a commercial scaffolding business and for the stacking of shipping containers for use as a self-storage facility.
 - The requirements of the notice are to: (i) Stop using the Land as a self-storage facility. (ii) Remove all single and double-stacked shipping containers from the Land. (iii) Remove all footings and bases upon which the shipping containers are located from the Land. (iv) Remove all equipment, tools, goods and services associated with the use of the Land as a self-storage facility from the Land. (v) Remove from the Land all materials, debris, tools, equipment and rubble and rubbish arising from compliance with the above requirements.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) (d) (f) (g) of the Town and Country Planning Act 1990 as amended (the Act). Since an appeal on ground (a) has been made, the application for planning permission deemed to have been made under section 177(5) of the Act falls to be considered.
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Decision

1. The appeal is allowed and the enforcement notice is quashed.

Procedural Matters

2. For the avoidance of doubt, and with reference to comments made by the appellant, it is not for me in determining this appeal to deal with the matter of alleged delay by the Council in deciding planning application WD/2017/2706/FA and against which refusal the appellant has unsuccessfully appealed (the dismissed appeal)¹.

"Hidden" Ground (c)

3. I have a duty to be alert to "hidden grounds" of appeal and to deal with them, where possible. Although the appeal was started on grounds (a) (d) (f) and (g), it is clear from the appellant's submissions that there are arguments that fall within ground (c).
4. As it was unclear from the Council's statement whether it had fully addressed the "hidden" ground (c) case in its submissions, I gave the Council additional time to specifically address the ground (c) arguments.

¹ APP/C1435/W/20/3251458; Decision date 10 February 2021

Ground (c)

5. For an appeal to be successful under this ground, I must be satisfied on the balance of probabilities that the matters stated in the notice do not constitute a breach of planning control.
6. The enforcement notice is explicit (paragraph 1) that it has been issued by the Council because there has been a breach of planning control under section 171A(1)(a) of the Act. This means that the matters stated in the notice are alleged to be **development** carried out without planning permission.
7. Under section 55 of the Act, a change of use will constitute development if it is material and accordingly the only reasonable construction of the notice (given that section 171A(1)(a) has been cited) is that the alleged change of use is unauthorised development through it being a material one without permission.
8. However, section 55(f) provides that land used for the purpose of any class specified in the Town and Country Planning (Use Classes) Order 1987 (as amended) does not involve development if used for a purpose within the same class. Accordingly, the alleged change of use within the B8 Storage and Distribution class does not constitute a material change of use and therefore does not constitute development with the resultant need for planning permission.
9. The Council, in response to my request for further comments on the "hidden ground", said:

"However, the issue here is not one of the same use class but rather a breach of a condition which prevents the use of the yard as anything other than for scaffolding. We can therefore confirm that it is our view that the use as a storage company is prohibited by way of the permission granted under condition 7 of WD/89/0985/P. We further confirm that this was also the Council's basis for taking enforcement action following a refusal of the planning application."
10. I understand the Council's point – and its intentions – but the allegation now set out in its response to the appeal is not the matter stated in the issued enforcement notice said to constitute a breach of planning control. It was open to the Council to take enforcement action by issuing a notice with the matter stated to be a failure to comply with any condition or limitation subject to which planning permission has been granted – under section 171A(1)(b) – but it did not do so. Indeed, the notice was entirely silent on the extant planning permission and the condition said to be breached.
11. Therefore, I find on the balance of probabilities that *the matters stated in the notice* do not constitute a breach of planning control.
12. Under section 176(1)(a) of the Act, I may correct any defect, error or misdescription in the notice where I am satisfied that doing so will cause no injustice to the appellants or the Council. I have considered whether I might use this discretionary power to correct the allegation and the relevant sub-section in line with the Council's intended basis for enforcement action as now understood.
13. However, to correct the notice in this manner would cause injustice to the appellant since the terms of the deemed planning application (DPA, for which

the required double fee has been paid) would stem from the corrected allegation. The resultant DPA would be for the carrying out of permission WD/89/0985/P without complying with condition 7 (similar to a retrospective application made under section 73A of the Act) and of course it is common knowledge that the dismissed appeal on essentially the same matter was dismissed on the basis of case law². To determine the ground (a) appeal on this basis would clearly cause an injustice to the appellant, who (as indicated by the Inspector in the dismissed appeal) might alternatively apply for a new planning permission.

Conclusion

14. For the reasons given above I conclude that the appeal should succeed on ground (c). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under the various grounds set out in section 174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.
15. The Council may wish in these circumstances to consider the applicability of section 171B(4)(b) of the Act.

Andrew Walker

INSPECTOR

² Finney vs Welsh Ministers & Others [2019] EWCA Civ 1868