



Appeal Decisions

Inquiry Held on 10, 11, 12 May and 4 July 2022

Site visit made on 10 May 2022

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5 August 2022

Appeal A: APP/X0360/C/20/3264827

Land to the rear of 6 Johnson Drive, Finchampstead RG40 3NW

- 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 Kevin Brant against an enforcement notice issued by Wokingham Borough Council.
 - The enforcement notice was issued on 16 November 2020.
 - 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 including the external storage of builder's materials, plant and equipment, fencing, builder bulk bags, shipping containers, general/assorted waste products, inert waste and the like and the storage of motor vehicles, vehicle breaking, vehicle disassembly and the sale of vehicle parts.
 - The requirements of the notice are: 1) Cease using the Land for the unauthorised mixed use including but not limited to the storage of builder's materials, plant and equipment, fencing, builder bulk bags, shipping containers, general/assorted waste products, inert waste and, vehicle breaking, vehicle disassembly, the storage of motor vehicles and the sale of vehicle parts. 2) Remove all items, equipment, plant and tools from the Land associated with the unauthorised use including but not limited to: vehicles, vehicle parts, all builders plant, materials and waste, builder's bulk bags, fencing materials, timber pallets, structures including shipping containers and portable buildings, traffic cones, general and inert waste and green waste. 3) Lawfully dispose of all items resulting from steps 1 and 2, including reducing the height of the inert waste mound to the surrounding ground level.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (c) and (f) 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.
-

Appeal B: APP/X0360/C/20/3264819

- The enforcement notice was issued on 16 November 2020.
- The breach of planning control alleged in the notice is failure to comply with condition No 3 of a planning permission Ref F/2003/9103 granted on 15 October 2003.
- The development to which the permission relates is proposed erection of 2 storage buildings to replace 7 existing storage buildings and open storage area. The condition in question is No 3 which states that: No materials, containers or equipment shall be stored on the site outside buildings except for waste materials contained within suitable and sufficient waste containers for removal. The notice alleges that the condition has not been complied with in that there is the storage of items, equipment, plant and tools outside of the buildings.

- The requirements of the notice are: 1) Comply with condition 3 of F/2003/9103. 2) Remove all items, equipment, plant and tools (other than those stored within the two buildings) from the Land.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.
-

Summary of Decisions

Appeal A

The appeal is dismissed, and the enforcement notice is upheld with corrections.

Appeal B

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

Preliminary Matters

2. During the opening of the Inquiry, I raised several points with the parties, two of which are pertinent to deal with from the outset.
3. In 1999 a certificate of lawfulness (the LDC) was issued on appeal¹ for use of part of the site for the storage of motor vehicles. That being so, a storage use was certified, and there was very little compelling evidence before me that this use falls within anything other than use class B8 of the Order, or then the storage of building materials and the like would be materially different and so not fall within the same. However, this cannot extend to the storage of waste products or inert waste, as based on the evidence before me this resulted in the burning of waste and creation of an inert waste mound, the onsite and offsite effects of which are materially different to a B8 storage use.
4. I also raised the implications of s173(11) of the Act. In 2017 an enforcement notice was issued (the 2017 notice) directed at the unauthorised storage of building materials and scaffolding. The land affected, as edged red on the attached plan, related to the entirety of both appeal sites now before me. However, the requirements of that notice were merely to cease the use of part of the site (as hatched black, which is then broadly consistent with that of the LDC) and remove those materials. The evidence of both parties was that the 2017 notice had then been complied with.
5. Accordingly, there was under-enforcement as on the face of the 2017 notice a breach of planning control was identified and that breach is then not addressed in the requirements of the notice as having to be remedied, in respect of the remaining area of the land affected. The notice therefore could have required the activity to cease across all the land affected to ensure it did not simply move from one part of the land to another but chose not to do so; it only requires cessation of the area hatched in black. I therefore do not accept there is a symmetry in terms of the allegation and requirements.
6. I appreciate this was because the 2017 notice sought to cease an activity where it was more precisely taking place. However, in interpreting the notice on its face, s173(11) has become firmly engaged as where an enforcement notice in respect of any breach of planning control could have required any

¹ Ref APP/X0360/C/99/1028620/1

activity to cease, but does not do so, and, all the requirements of the notice 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. This involves no assumption and whilst the 2017 notice effectively identifies two planning units, being the hatched and non-hatched areas, the notice nevertheless could have been drafted to avoid the engagement of s173(11).

7. The effects of the 2017 notice were to have granted planning permission for a storage use on the remainder of the site (that not hatched in black) and to render the land that benefited from the LDC that of a nil or agricultural use, because, in the absence of an appeal against the notice on ground (c), the 2017 notice took away that storage certification by requiring cessation of storage in the area hatched black.

Appeal A

The ground (b) and (c) appeals

8. For the appeal on ground (b) to succeed the onus is on the appellant to demonstrate, on the balance of probabilities, that the alleged breach of planning control has not occurred as a matter of fact. For the appeal to succeed on ground (c) the onus is on the appellant to demonstrate, on the balance of probabilities, that there has not been a breach of planning control. This could be because the matters alleged do not constitute development, planning permission has already been granted for the matters alleged in the enforcement notice or they are permitted development.
9. The Council has enforced against a mixed use across the entirety of the appeal site. It is therefore first necessary to ascertain the correct planning unit, and the present and previous primary (as opposed to incidental) uses of that unit.
10. The appellant contends that the site comprises two planning units: the area the subject of the LDC and the remainder of the land enforced against. The appellant asserts that the primary use of the LDC area is for the storage of motor vehicles, with only incidental works to cars taking place. It is then accepted that the storage of building materials and waste was taking place on the remainder of the land.
11. The Council asserts there is one planning unit because there is no physical or functional separation on the ground or in terms of the activities taking place.
12. There was some evidence before me that the area the subject of the LDC had been used for the storage of builder's materials, albeit for short periods. Rather, this had substantively been taking place on the remainder of the land, predominantly to the north, and no vehicles had been stored there. The storage of building materials and waste then largely arose from activities taking place in connection with the appellants business, being that of a building company.
13. The use taking place in the area the subject of the LDC was said to be the storage of motor vehicles in connection with the appellants hobby, banger racing. He did so predominantly with a friend who was also employed by and managed a scrap yard. The evidence was of approximately 120 cars on the site.

14. The appellant denies there has been vehicle breaking, vehicle disassembly and the sale of vehicle parts taking place. During my questioning of the appellant, I then focussed on two vehicles.
15. The appellant had already stated that convertible vehicles were not permissible for banger racing. During my site visit I observed an MGB vehicle, being a convertible. It was therefore not suitable for banger racing and given the appellants evidence was motor vehicles were being stored only for his hobby, its presence was unaccounted for. During his oral evidence, the appellant appeared to not be aware of this vehicle on his land, despite me parking close to it upon my arrival at the site. He then offered no compelling answer concerning the vehicle.
16. I then focussed on an estate vehicle shown in video footage. A large number of videos had been taken by a neighbouring resident in order to capture the activities taking place. In respect of the estate vehicle, the footage showed the removal of the engine from a car that had already been partially stripped, but otherwise appeared to contain minimal body damage. It therefore appeared to be an ideal candidate for banger racing, and so why would the engine be removed? Again, the appellant did not offer a compelling answer.
17. I found the video footage, when taken as a whole, compelling. It demonstrated on the balance of probabilities that vehicles were taken to the site and then parts were removed. I accept this can then best be described as vehicle breaking and/or vehicle disassembly, as vehicles do not need to be completely disassembled on the site to trigger a material change of use.
18. Whether the appellant was aware of the full extent of activities taking place I am unclear, but the relationship with his friend who appeared to have ready access to the site, and who ran a scrapyard, casts further light on the activities taking place in the video footage. The evidence concerning the sale of vehicle parts was however very limited, and I do not accept the Council's inference from the video footage that sales have taken place.
19. Even if I am wrong and there was no vehicle breaking, in light of the 2017 notice there is no longer a lawful use for storage in the area where the vehicles have been situated. Therefore, any works taking place to vehicles, whatever they may be, could not be incidental to a lawful use.
20. I therefore conclude, as a matter of fact and degree, that there has been physical and functional separation between two primary uses. Whilst the appeal site is within the same ownership, the unit of occupation then comprises two physically distinct and therefore separate areas which are occupied for different and unrelated purposes. Each area therefore has a different primary use and so ought to be considered as a separate planning unit.
21. Moreover, in considering the evidence in the round, at all stages during the sites relevant planning history it has on the balance of probability, been two planning units. First, arising from the 1999 LDC, later arising from the 2017 notice and more recently the appellants use for the mixed use for storage of building materials and inert waste and the mixed use for the storage of motor vehicles and vehicle breaking.
22. Accordingly, the notice can be corrected without injustice to identify two breaches of planning control, relating to two mixed uses, along with the

cessation of those mixed uses. However, the appellant can then rely upon s57(4) in respect of a storage use within the scope of that granted planning permission by virtue of s173(11) on the relevant land concerned, being that of the non-hatched land on the substituted plan which I shall attach to this decision.

23. The appeals on ground (b) and (c) therefore succeed to this extent.

The ground (f) appeal

24. The purpose of the enforcement notice is clearly to remedy the breach of planning control and it does not seek to under-enforce. Therefore, for an appeal on ground (f) to succeed it would be necessary for the appellant to explain why the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control and propose lesser alternatives steps.

25. To this effect the appellant contends that the vehicle storage area as defined by the LDC should be omitted from the requirements of the notice as the lawful use of the area has not been lost.

26. I have however considered the arguments raised in respect of the LDC area and the subsequent position arising from the 2017 notice. The ground (f) case adds very little evidence to those arguments. In light of my findings and the corrections arising, it follows that I need not consider the contention of the appellant again here given the 2017 notice.

27. As there are no other lesser steps before me, the appeal on ground (f) therefore fails.

Conclusion

28. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections in respect of the breaches of planning control, requirements of the notice and a substitute plan. In respect of the requirements, as the inert waste mound has since been removed, this reference can be omitted from the corrected notice. It is also not for the planning regime to direct how other laws are complied with, and so a notice cannot require the lawful disposal of items/waste elsewhere, only its removal from the land affected.

Appeal B

The ground (d) appeal

29. This ground of appeal is that at the date when the notice was issued, it was too late to take enforcement action against the matters stated in the notice. The burden of proof in an appeal on this ground lies with the appellant. As such, the appellant needs to demonstrate, on the balance of probabilities, that the storage use in breach of condition 3 of planning permission F/2003/9103 (the permission) began for a relevant period of ten or more years before the notice was issued on 16 November 2020. In addition, that breach of condition continued such that at any time during a continuous ten-year period the Council could have taken enforcement action.

30. Condition 3 of the permission reads:

"No materials, containers or equipment shall be stored on the site outside buildings except for waste materials contained within suitable and sufficient waste containers for removal".

31. The parties accept that the relevant planning unit is as defined on the plan attached to the notice that has been issued.
32. The appellant runs a building company known as KB & Sons Ltd. The site consisted of various sheds and storage buildings until 2004 when it was redeveloped for two storage buildings granted by virtue of the permission. The appellant asserts that outdoor storage in breach of condition 3 of the permission has taken place continuously since. This relates to storage undertaken by his own company as well as other builders.
33. The appellant's evidence is that he moved to the site in 1979 and joined the family business in 1998. He explained during his oral evidence the storage use taking place in respect of how this came about with different builders and the approximate areas concerned within the planning unit. It is accepted the frequency of movements associated with the storage use varied. It is however contended that the storage use has taken place without any break. A number of photographs and invoices were also before the Inquiry.
34. Mr Warner is the owner of East Berkshire Fencing. His evidence can be summarised as him having stored fencing materials along the north-eastern boundary from 1994 until 2019, when he re-located nearer the buildings. This enabled him to buy in bulk and so levels of materials fluctuated over time. He has stored his fencing materials continuously. He also described the use of the site by other builders.
35. Mr Streich is an employee of KB & Sons. His evidence can be summarised as him having seen very little change to the use of the land over a 26-year period and during his oral evidence that he was 100% sure there had been no break in the storage use under the trees. He also described the use of the site by other builders.
36. As Mr Reid did not attend the Inquiry, I afford his evidence less weight, and so will not summarise it here.
37. The evidence is therefore that most of the storage has been focussed under the canopy of trees along the boundary. This makes corroborating with aerial photographs problematic, although material storage is demonstrated in the majority of the aerial photographs before me, and around the buildings to a lesser extent. Even if I am wrong, the photographic evidence merely represents a snapshot in time and does not serve to undermine the appellants version of events.
38. I accept that the historic building materials, principally associated with Mr Baron who passed away more than 10 years ago, does not amount to an active storage use. The appellant's invoices were also not particularly instructive as in themselves they do not demonstrate a storage use.
39. I also appreciate there has been fluctuating levels of building materials stored, particularly as described by Mr Warner during his oral evidence where he would purchase a large quantity of materials for delivery and then use them on jobs

over subsequent weeks. This is however not evidence of an ad-hoc or undefined use as in my view the site could still properly be described as being used in the way that condition 3 of the permission sought to prohibit. This is particularly so as the evidence is of different builders storing materials at the site throughout a relevant period, with very limited evidence that there were somehow concurrent periods when they did not store any items at the site, even if levels did vary significantly. Even though there was then limited evidence concerning some of those builders, such as Yardley and MJR, it does not cast significant doubt in my mind that leads me to conclude the appellant's version of events is less than probable.

40. Parts of the site, such as around the buildings, were understandably kept clear for parking, circulation and the unloading of materials. However, in considering the oral and written evidence in the round, this does not persuade me that there has not been the storage of materials and equipment across the planning unit as a whole in breach of condition 3 of the permission at an actionable level. The character of the primary use of the site was therefore a storage one for a relevant period.
41. This is not a case where a quantitative restriction on storage was placed. I am therefore not persuaded that the site can or should be divided into sub-areas as the position is more binary. Accordingly, the condition concerned sought a total prohibition on storage, and the evidence demonstrates on the balance of probabilities that it has been actionably breached, which defines the scope of the accrued right across the planning unit.
42. The appellant's evidence is therefore not very patchy, or the breach of the condition sporadic and variable. The evidence from those who appeared at the Inquiry was consistent and precise. Whilst there may not be documentary evidence or designated areas for each user, for example, because space for storage at the site was provided in return for reduced labour rates, this in no way undermines the appellants version of events, which has been tested through cross-examination and so should be afforded significant weight. I therefore find the appellant's evidence to be neither vague nor imprecise.
43. As a matter of fact and degree the appellant has therefore demonstrated on the balance of probabilities the asserted storage use in breach of condition 3 of the permission for a relevant period and so has discharged the necessary burden of proof. Accordingly, the breach of condition continued such that at any time during a continuous ten-year period the Council could have taken enforcement action.
44. The appellant raises that a certificate may then be granted under s177(1)(c) of the 1990 Act. That power is however discretionary and only intended to be exercised in exceptional circumstances, such as cases relating to caravan or waste sites where a licensing regime operates in parallel with planning control. Moreover, the relevant date would then be that of the appeal, not that of the notice, which was issued in November 2020, and which has not been addressed in the appellant's request. This however does not preclude the appellant from subsequently applying to the Council for a certificate.
45. The appeal on ground (d) therefore succeeds.

Conclusion

46. For the reasons given above I conclude that Appeal B should succeed, and the enforcement notice will be quashed.

Overall Conclusion

47. For the reasons given above I conclude that Appeal A should not succeed, but I shall uphold the enforcement notice with corrections. Appeal B should succeed and accordingly the enforcement notice will be quashed.

Formal Decisions

Appeal A

48. It is directed that the enforcement notice be corrected by:

- deleting the words in section 3 of the notice in their entirety and replacing them with the words '*Without planning permission, 1. the material change of use of the land hatched black on the plan attached to the notice for the mixed use comprising the external storage of motor vehicles, vehicle breaking and/or vehicle disassembly. 2. the material change of use of the remainder of the land (that not hatched black) to a mixed use including the external storage of builder's materials, plant and equipment, fencing, builder bulk bags, shipping containers, general/assorted waste products, inert waste and the like.*'
- deleting the words in section 5 of the notice in their entirety and replacing them with the words '*1) Cease using the land affected for the mixed uses described in section 3 of the notice. 2) Remove all items, equipment, plant and tools from the land affected arising from the mixed uses, including but not limited to: vehicles, vehicle parts, all builders plant, materials and waste, builder's bulk bags, fencing materials, timber pallets, structures including shipping containers and portable buildings, traffic cones, general and inert waste and green waste.*'
- substituting the plan attached to the notice for the plan attached to this decision.

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

Appeal B

50. The appeal is allowed, and the enforcement notice is quashed.

Paul T Hocking

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Harry Spurr, of Counsel, instructed by Mr Davis as Planning Consultant

He called	Mr John Warner	Owner of East Berkshire Fencing
	Mr Nick Handley	Owner of Bramley Motors
	Mr Mervyn Streich	Employee of KB & Sons
	Mr Kevin Brant	Appellant
	Mr Neil Davis	Planning Consultant

FOR THE LOCAL PLANNING AUTHORITY:

Mr Guy Williams, of Counsel, instructed by Wokingham Borough Council

He Called	Mr Simon Taylor	Planning Specialist/Team Manager
-----------	-----------------	----------------------------------

INTERESTED PERSONS:

Cllr Charles Margetts	Borough Councillor for Finchampstead North
Mr Roger Marshallsay	Finchampstead Parish Council Planning Committee
Mr Mike Allan	Neighbouring resident
Dr Mark Lee	Neighbouring resident

DOCUMENTS:

1. Opening submissions on behalf of the Appellant
2. Opening submissions on behalf of the Council
3. Copy of notes and photographs of Cllr Margetts
4. Copy of Appendix 10B notes
5. Copy of appeal decision APP/M0933/X/12/2184048
6. Extract from PPG concerning lawful development certificates
7. Copy of Mann v. SoS Environment and South Oxfordshire DC
8. Agreed Authorities bundle
9. Closing submissions on behalf of the Council
10. Closing submissions on behalf of the Appellant
11. Council's additions to closing submissions
12. Appellant's supplementary points to closing submissions



Plan

This is the plan referred to in my decision dated:

by Paul T Hocking BA MSc MRTPI

Land to the rear of 6 Johnson Drive, Finchampstead RG40 3NW

Reference: APP/X0360/C/20/3264827

Scale: DO NOT SCALE

