Appeal Decision

Site visit made on 13 June 2022

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 10 August 2022

Appeal Ref: APP/A0665/C/22/3292334
The property and associated land at Dairy House Farm, Holmes Chapel Road, Sproston CW4 7LP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Charles Sherwin against an enforcement notice issued by Cheshire West & Chester Council.
- The enforcement notice was issued on 26 January 2022.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the Land from agriculture to a mixed use of agriculture and the deposit, storage and processing of waste material.
- The requirements of the notice are:
    1) Cease the use of the Land for the deposit, storage and processing of waste material.
    2) Remove all imported waste material from the Land to a permitted or exempted site by using an accredited licensed waste carrier.
    3) Restore the land to its condition before the breach of planning control, that is, surfaced with grass.
- The period for compliance with the requirements is:
    1) On the date this notice take effect.
    2) Within 6 calendar months.
    3) Within 12 calendar months.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (f) and (g) of the 1990 Act as amended.

Summary of Decision: The enforcement notice is quashed.

The Enforcement Notice

1. The appellant has suggested holding the appeal is abeyance until a planning application has been determined. There is no evidence that a planning application has been submitted or that it would resolve matters to the agreement of the main parties. I have, therefore, proceeded to determine the appeal.

2. The appellant argues the enforcement notice is a nullity because it fails to specify the compliance period to cease the unauthorised use. Paragraph 6(1) of the notice, which relates to the first requirement only, is "on the date the notice takes effect". Section 173(9) of the 1990 Act makes it mandatory for the notice to specify "the period" at the end of which there has to be compliance with its requirements.

3. The appellant refers to *Lynes*[1]*,* in support of their argument. In that case, two enforcement notices were issued, both specifying the time for compliance as

[1] *R (oao) Lynes & Lynes v West Berkshire DC* [2002] EWHC 1828 Admin; [2003] JPL 1137.

"immediately this notice takes effect". The Court held that Section 173(9) required the notice to specify "the period" at the end of which there had to be compliance. The notices did not specify a period at all. The word "period" implied a starting point and an end point with a period of time in between. The notices did not purport to specify a period for compliance, they simply required compliance immediately the notice took effect.

4. The submission that the compliance period ran from receipt or service of the notice was not accepted because that would mean a period for compliance starting before the notice takes effect. A notice had to specify a compliance period, starting from the date the notice took effect, for the carrying out of required steps or the cessation of specified activities. A notice which, on its face and without having to refer to evidence elsewhere, failed to specify a compliance period as required by Section 173(9) was a nullity and was therefore of no legal effect. It could not be amended under Section 176, since that power could only apply to a notice which was not a nullity. The failure to comply with a basic statutory provision for a valid notice, such as specification of a compliance period, was not a mere technicality; a notice which, on its face, did not comply with such a requirement was a nullity and incapable of correction.

5. I have also had regard to *Payne*[2], in which the subject enforcement notice required the submission of a scheme for levelling and planting to be submitted to the local planning authority for approval. The Inspector found the requirement insufficiently specific to comply with s173(3) and described the notice as 'unacceptable because of the uncertainty it introduces.' Even so, they substituted precise requirements. It was held that the Inspector erred because, since they had made an express finding that the notice did not comply with s173(3), they ought to have found it null and incapable of variation.

6. The Council seeks support from *King*[3]. In that case, an enforcement notice stated that it was to take effect on the 11th day of April 1977. It set out that "on or before the 20th day of June 1977 you are hereby required to take the steps specified in the third schedule hereto", which were to discontinue the use of the land. Among other points, it was argued that the notice did not specify a period within which the steps had to be taken. However, it was found that, because there were two dates in the enforcement notice, it was possible to decide the time within which one is required to take the necessary steps.

7. Thus, if it is possible to deduce the period within the four corners of the enforcement notice, perhaps because it sets out two dates, or phased compliance with some dates inadvertently missed out, it may be possible to correct the enforcement notice and provide for a revised timetable subject to there being no injustice. The same may be true if the notice provides for phased compliance and specifies a period for some steps but not others, as in this appeal.

8. I have also had regard to *Oates*[4], when considering the Council's suggestion that the notice may be correctable. In that case, the third requirement of the enforcement notice was to 'make good the land…' The Inspector found the step 'vague and subjective' but that it could be deleted without causing injustice.

[2] *Payne v NAW and Caerphilly CBC* [2007] JPL 117.
[3] *King & King v SSE* [1981] JPL 813.
[4] *Oates v SSGLG v Canterbury* [2018] EWCA Civ 2229.

The grounds of challenge included that the notice ought to have been found null, but the High Court endorsed the Inspector's approach, and the ground was not pursued in the Court of Appeal. Compliance with steps (1) and (2) would suffice to remedy the breach; the Inspector was entitled to use their powers to remove what they found unnecessary.

9. The applicable principles of the case were - (1) if an enforcement notice does not comply with Sections 173(1), (3) or (4), it is null and cannot be saved by the curative powers of correction; (2) the notice must inform the recipient with reasonable certainty what the breach of planning control is and what is needed to remedy it (following *Miller-Mead*[5]); (3) some degree of uncertainty or other defect in the relevant section of the notice does not mean that there has been non-compliance with the statutory requirements; (4) a decision by the Inspector as to whether a defect in the notice renders it null is a matter of judgement and should be accorded very considerable weight; (5) the defect must be considered in context and with regard to the importance or otherwise of that part of the notice. It is open to an Inspector to conclude that, while part of the relevant section of the notice was uncertain and could not stand, the notice as a whole complied with the statutory requirements. The Inspector could delete the offending part and (6) the Inspector and the Courts should approach the exercise in a way that was not unduly technical or formalistic.

10. However, *Oates* cannot be read as authority for the proposition that an Inspector could delete a 'scheme' requirement so long as other steps are not vague and compliance with them would suffice to remedy the breach. *Payne* still applies insofar as, if an Inspector finds that an enforcement notice does not comply with s173, they must conclude that it is null.

11. Having regard to the above, *Oates* sanctions the correction of a notice to eliminate an element of vagueness or uncertainty, as long as the notice as a whole enables the recipient to know with "reasonable certainty" what they have done wrong and what they need to do to put it right. I reject the Council's argument that the appellant has 24 hours on the day the notice takes effect to carry out the required actions and that this corresponds to a period. However, the appeal before me differs from *Lynes* in that the time for compliance "on the date this notice takes effect" is the first of a series of steps to be taken progressively to achieve the remedy. It is not hopelessly uncertain and I am satisfied that it is not a nullity. I consider it matter of judgement whether it would be appropriate to extend the compliance period in 6(1) provided the overall result is coherent and causes no injustice.

12. In *Oates*, the offending requirement could simply be deleted and the enforcement notice would still ensure the breach was remedied. In this appeal, I cannot delete step 5(1). This is crucial as it requires the unauthorised use to cease. The Council suggests that the part of the requirement, which concerns the storage of waste material, could be deleted. It is indicated that this is unnecessary, since it is covered by the second step which requires the removal of the stored material. On this basis, I am invited to correct 6(1) to replace "on the date this notice takes effect" to 28 days. Thus, the appellant would have 28 days to cease the use of the Land for the deposit and processing of waste material, and six months to remove the material from the land.

[5] *Miller-Mead v MHLG* [1963] 2 Q.B. 196.

13. However, if I were to delete that part of 5(1), which requires the use of the site for the storage of waste to cease, there is a risk of planning permission being granted for the storage of waste by virtue of Section 173(11). The notice must require the unauthorised use, as alleged, to cease. If I were to correct 5(1) so that it concerns the deposit and processing of waste only, there would be a consequential correction to 5(2), to cease the use of the land for the storage of waste and remove all the imported material.

14. I am very conscious of the need to avoid technicalities when dealing with enforcement notices, but the required corrections in this appeal go to heart of the notice. The corrections would, in my opinion, cause injustice as they would affect two of three requirements and the associated timescales. I find, therefore, that the notice is invalid and incapable of correction.

15. For completeness, I have considered the other invalidity arguments made by the appellant. It is claimed that the reference to waste in the allegation is not sufficiently specific. The definition of waste for planning purposes includes any material that is discarded by the producer or the person in possession. If the intention is to discard and later reuse the material, it would still be waste in the interim. As such, I am satisfied that the use of the term waste in the allegation is clear and specific.

16. It is also argued that the enforcement notice plan erroneously includes agricultural land and associated buildings. In cases where there is a dispute concerning a material change of use, it is first necessary to ascertain the correct planning unit, and the present and previous primary uses of that unit. The planning unit is a concept which has evolved as a means of determining the most appropriate physical area against which to assess the materiality of change. The general rule has always been that this should be assessed in terms of the whole site concerned. In addition, the planning unit is usually the unit of occupation and it is not open to a local planning authority to divide up a planning unit artificially so as to achieve a more restrictive effect than would result from an enforcement notice directed at the unit as a whole. In many cases the activity complained of only takes place on a small area, but the local planning authority is entitled to anticipate changes to defeat the operation of the notice by enforcing against the planning unit as a whole.

17. The Council considers the planning unit to be that shown in the plan. It has identified the unit of occupation being the land and buildings at Dairy House Farm, which it has defined on the basis of established site boundaries. It follows that the allegation should be framed as a mixed use because the Council considers the land is put to two activities and it is not possible to say that one is incidental to the other. In such circumstances, it is not open to the local planning authority to decouple elements of a mixed use because the use is a single mixed use with all its component activities. Further, the allegation should refer to all the components of the mixed use, even if only one is required to cease.

18. I appreciate that the appellant is concerned that they would not be able to operate the agricultural activities on the land because the farm produces and processes waste arising from those activities. It is correct that where a lawful activity is referred to in the allegation as part of a mixed use the enforcement notice cannot require it to cease. However, the notice does not seek to restrict the agricultural activities or any incidental activity that is genuinely required in

connection with the lawful use. The requirements are directed at the waste uses only. There is no conflict with the judicial authorities quoted by the appellant insofar as they are relevant[6]. Overall, I consider the Council's approach to be logical and in line with established principles.

19. Finally, the land identified in the enforcement notice plan includes a number of agricultural buildings, and two static caravans which appear to provide staff facilities for incidental use in connection with the dairy farm. There is no suggestion that the caravans are being used for residential purposes and, hence, it would not be necessary to specify residential as a separate primary use forming part of the mixed use.

Conclusion

20. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the period for compliance. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the 1990 Act as amended, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed.

21. In these circumstances, the appeals on the grounds (c), (f) and (g) set out in section 174(2) of the 1990 Act as amended do not fall to be considered.

Formal Decision

22. The enforcement notice is quashed.

Debbie Moore

Inspector

[6] *Mansi v Elstree Rural DC* (1965) 16 P. & C.R. 153 and *Kinnersley Engineering Ltd v SSETR* [2001] J.P.L. 1082.