
Appeal Decision

Inquiry Held on 28 September 2022

Site visit made on 28 September 2022

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 September 2022

Appeal Ref: APP/A0665/C/21/3283940

Land at Hales Pasture Farm, London Road, Allostock WA16 9LT

- 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 A Garnett against an enforcement notice issued by Cheshire West & Chester Council.
- The enforcement notice, numbered 20/00630/EMCOU, was issued on 2 September 2021.
- The breach of planning control as alleged in the notice is, without planning permission, the extension of a building.
- The requirements of the notice are:
 - 5a1. Demolish the extension and remove all resultant materials from the land;
 - 5a2. Close off the northern façade of the remaining building with a solid wall, constructed in brick or breeze block, and
 - 5a3. Cease the use of the land for industrial (B2) uses.

Or

- 5b1. Demolish the extension;
- 5b2. Replace the former building to its previous condition (as shown as existing building on plans titled Page 3, Page 6 and Page 9 that were submitted to accompany application re: 17/00508/FUL), this can be carried out utilising resultant materials from the building to be demolished under part 5b1 if required;
- 5b3. Close off the northern façade of the remaining building with a solid wall, constructed in brick or breeze block. Cease the use of the remaining area of land for industrial (B2) uses; and
- 5b5. Remove all resultant materials from the land.

- The period for compliance with the requirements is 12 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Procedural matters

1. I opened the Inquiry as scheduled at 10:00 on 28 September 2022. During the course of my opening remarks, it became apparent to me from the responses of the respective advocates that the situation had moved on since the notice was issued and the appeal against it was lodged. Accordingly, I paused my opening remarks to hear an update on the latest position.

2. I was advised that the appellant and the Council had reached an agreed position, as set out in a Statement of Common Ground dated 28 September 2022, the day of the Inquiry. In summary, the agreed position is that planning permission should be granted subject to a single condition requiring that a scheme of noise mitigation works are submitted to and approved by the local planning authority.
3. It was, and is, foremost in my mind that the breach of planning control alleged in the notice is the extension of a building: in other words, it is an operational development notice. There is no material change of use alleged in the notice. I was, and am, also mindful that planning permission was granted by the Council for a building of broadly similar dimensions and description in the same location in April 2017 (Council Ref: 17/00508/FUL). The principle of a building in this location was therefore established by that permission.
4. I was already cognizant of the written evidence that was before me, including the technical evidence relating to noise submitted by the appellant, the Council and the occupier of Hales Pasture House. The evidence on noise provided on behalf of the appellant is broadly in agreement with that produced on behalf the occupier of Hales Pasture House in terms of the noise levels generated and, if anything, takes a more robust stance. In view of the position agreed by the appellant and the Council that noise mitigation works were required in relation to the extension to a building subject to the notice, I saw no reason to test that evidence through cross-examination.
5. For those reasons, and for the reasons that I set out below in relation to the appeal on ground (a), it was immediately apparent to me that the agreed position set out in the Statement of Common Ground was an eminently sensible and pragmatic one in the circumstances. I therefore did not hear any evidence from the witnesses of the appellant or the Council. The occupier of Hales Pasture House, Mr Cathie, requested to read out a statement, which he did and to which I have had regard.
6. The appeal against this notice was made on grounds that included an appeal on ground (d): namely that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters. The basis of this ground of appeal was that the notice included a requirement for the B2 activities on the site to cease. However, the B2 use of the site formed no part of the breach of planning control alleged in the notice: it formed part of the requirements of the notice which, for the reasons set out below, were flawed in that respect. In any event, the appellant's request that this requirement be deleted more properly falls to be considered under ground (f), had that fallen to be considered.
7. The enforcement notice subject to this appeal (Council Ref: 20/00630/EMCOU) was the second of two notices issued by the Council in relation to the same development. This notice was to be referred to at the Inquiry as Notice 2. The first notice (Council Ref: 17/00950/EMCOU) was also subject to an appeal, under reference APP/A0665/C/21/3273557. That notice was to be referred to as Notice 1. The two appeals had been linked and both were due to be considered at this Inquiry. The Statement of Common Ground indicated that Notice 1 was to be withdrawn, and the enforcement notice was subsequently withdrawn by letter dated 28 September 2022. Accordingly, the appeal against Notice 1 has been closed and I have taken no further action on it.

The enforcement notice

8. Prior to the Inquiry, I had indicated in a Pre-Inquiry Note that I considered the notice to be invalid but capable of correction. Given that the notice is to be quashed, there is now no merit in correcting and/or varying the notice.
9. It is, however, important to set out my reasoning on one of the errors in the notice, because that has a significant bearing on my approach to the appeal on ground (a) below. This relates to the use of the land on which the extension alleged in the notice is sited.
10. The meaning of development for the purposes of the 1990 Act is defined at Section 55(1) of that Act and makes it clear that there are two limbs to the meaning of development: the carrying out of building, engineering, mining or other operations in, on, over or under land (i.e. operational development), or the making of any material change in the use of any building or other land (emphasis added). The distinction between the two limbs runs right through the 1990 Act.
11. Section 173(3) of the 1990 Act states that a notice shall specify the steps required to be taken to remedy the breach of planning control that has occurred or to remedy any injury to amenity, as the case may be. In this case, the requirements of the notice include at paragraph 5a3 and paragraph 5b4 to cease the use of the land for industrial (B2) uses. The notice is in only relation to operational development: a material change of use of the land forms no part of the matters stated in the notice.
12. Section 173(3) of the 1990 Act also makes it clear that the requirements of a notice must closely follow the breach of planning control that is alleged. Consequently, a notice directed solely at operational development cannot require the use of the land to cease. If the Council had intended to attack the use of the land, then a material change in the use of the land should have formed part of the breach of planning control alleged in paragraph 3 of the notice, or alleged in a separate notice.
13. For those reasons, had I been minded to uphold the notice, I would have deleted the requirements at paragraphs 5a3 and 5b4 in any event. It follows that Mr Cathie would have been in exactly the same situation then as he is now, insofar as the question regarding the lawful planning use of the land would not have been resolved even had the notice been upheld.
14. I now understand from the statement read out by Mr Cathie that the rationale behind Notice 2 was an attempt to rectify the omission of any reference to the use of the land in Notice 1. The determination of the lawful use of the land is a matter for the Council in the first instance. I express no opinion on that. Should the Council take the view that a material change of use of any part of the land has taken place, it is then for the Council to decide whether it is expedient to issue a further enforcement notice requiring that use to cease.
15. As indicated above, Section 55 (1) of 1990 Act indicates that the two limbs of development are separate. Consequently, because the current enforcement notice only alleges operational development, my decision in relation to this current appeal can have no bearing on the Council's decision in respect of the lawful planning use of the land on which the extension is sited.

The appeal on ground (a) and the deemed planning application

16. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The Council has stated one substantive reason for issuing the enforcement notice, from which the main issue raised is the effect on the living conditions of the occupiers of Hales Pasture House, specifically in relation to noise disturbance.
17. In considering this main issue, my approach has been dictated by the distinction between the two limbs of development that runs through the 1990 Act. There is, however, an important distinction to be made arising out of the specific breach of planning control that is alleged in the notice: specifically, an *extension* of a building (emphasis added). The breach of planning control does not specify to which host building the extension relates, but it can only be the building certified in a Lawful Development Certificate (LDC) dated 3 September 2018 (Council Ref 18/01758/LDC) as having a lawful use for industrial B2 use.
18. To construct the extension first required the partial demolition of that building, such that the extension covers, in part, land that is subject to that LDC. Consequently, and notwithstanding that the notice is an operational development notice only, in considering whether or not to grant planning permission for the extension under this ground of appeal it is permissible (indeed, necessary) to consider whether any conditions should be imposed in order to mitigate the effects of the *existing* lawful use of the land covered by the extension. To do so does not, of course, in any way prejudice any decision that the Council may ultimately make in relation to the lawful use of the land covered by the extension that falls outside of the land subject to the LDC.
19. The general consensus of the written evidence provided by the appellant and on behalf of Mr Cathie is that the noise emanating from the extension has a significant adverse impact on the living conditions enjoyed by the occupiers of Hales Pasture House. The scale of that impact is very eloquently described in the written evidence of Mr Cathie, and is evidenced in the Nuisance Record Sheets that he has provided. The evidence of the Council's Environmental Protection team is more circumspect, indicating that a noise impact assessment demonstrating the acceptability of noise levels is required before it could support the use in this location.
20. Nevertheless, it is common ground that existing openings in the extension would need to be closed-up in order to adequately reduce the break-out of internal noise to Hales Pasture House. I am therefore satisfied that a condition to that effect is necessary in order to make the development acceptable in planning terms.
21. The noise consultants acting for the occupiers of Hales Pasture House suggest that a condition restricting the hours of use is also necessary. However, such a condition would relate to the use of the land and not to the matter alleged in the notice (i.e. the extension itself). Moreover, in relation to that part of the land subject to the LDC, the lawful use of industrial B2 use is not fettered by any restriction on hours of operation. For that reason, and in the particular circumstances of the breach of planning control that is alleged, it is not open to me to impose a condition restricting the hours of operation within the extension.

22. The noise consultant acting for the appellant suggests that measures to close up the existing openings in the building could include the construction of a proposed single-storey lean-to extension for which, I understand, a planning application is currently being considered by the Council. However, the proposed lean-to forms no part of the breach of planning control alleged in the notice and therefore is not before me. Consequently, it is not open to me to impose any conditions that relate to the proposed lean-to.
23. The extension subject to the notice is of a scale and design that is appropriate for its rural setting. The bulk of the building is no greater than that of the building in the same location granted planning permission by the Council in April 2017, and therefore has no greater impact on the outlook of the occupiers of Hales Pasture House than that building would have done if that permission had been implemented.
24. In the light of the agreement set out in the Statement of Common Ground, the appellant and the Council have suggested only one condition should I be minded to allow the appeal. In addition to requiring a scheme of noise mitigation works to be submitted to and approved by the Council, that condition sets out the implications should the condition not be complied with. I consider that this condition is necessary in order to safeguard the living conditions of the occupiers of Hales Pasture House. I have carefully considered whether any other conditions are necessary beyond that suggested, but none occur to me.
25. I conclude that, subject to that one condition, the breach of planning control alleged in the notice (the extension) accords with Policies STRAT9 and SOC5 of the Cheshire West and Chester Local Plan (Part One), as well as Policy DM2 of the Cheshire West and Chester Local Plan (Part Two). These policies require, amongst other things, that development must be of an appropriate scale and design to not harm the character of the countryside, and that development will only be supported where it does not result in a significant adverse impact upon the residential amenity of the occupiers of existing properties, including in relation to noise.
26. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that the extension subject to the notice accords with the development plan. I have not been advised of any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.
27. I conclude that planning permission ought to be granted for the breach of planning control constituted by the matters stated in the notice, subject to a condition.

Conclusion

28. For the reasons given above, the appeal succeeds on ground (a). I shall grant planning permission for the development as described in the notice. As a consequence, the appeal on ground (f) does not fall to be considered.

Formal Decision

29. The enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the extension of a building as shown on the plan attached to the notice and subject to the following condition:

The extension to the building hereby permitted shall be demolished within 6 months of the date of failure to meet any one of the requirements set out in i) to iv) below:

- i) Within three months of the date of this decision a scheme of noise mitigation works shall have been submitted for the written approval of the local planning authority. The scheme shall include a vertical extension of an existing internal wall, additional doors to the openings within the building, blocking up the opening in the northern façade and include a timetable for its implementation;
- ii) If within 11 months of the date of this decision the local planning authority refuses to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;
- iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State;
- iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable. Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be retained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

Paul Freer
INSPECTOR

APPEARANCES

For the appellant:

Mr Jonathan Easton

Of Counsel

For the Local Planning Authority:

Mr Killian Garvey

Of Counsel

Interested Persons

Mr Steve Cathie

Occupier, Hales Pasture
House

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1/ Statement of Common Ground, dated 28 September 2022
- 2/ Copy of letter dated 14 September 2022, notifying of the date of the Inquiry
- 3/ Speaking Note for Public Inquiry, submitted by Mr Cathie
- 4/ Letter dated 28 September 2022 withdrawing the enforcement notice ref:
17/00950/EMCOU