



Appeal Decision

Inquiry opened on 6 December 2022

Site visit made on 7 December 2022

by Diane Lewis BA(Hons) MCD MA LL M MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6th April 2023

Appeal Ref: APP/N1920/C/20/3260982

Land adjacent to Romani, St Albans Road, South Mimms EN6 3PP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr John Ward against an enforcement notice issued by Hertsmere Borough Council.
 - The notice, numbered 19/0036/UCU, was issued on 10 September 2020.
 - The breach of planning control as alleged in the notice is Without planning permission, the change of use of land for commercial purposes with associated fencing, installation of hardstanding and storage of containers, plants and machinery.
 - The requirements of the notice are to:
 - Permanently cease all commercial and business operations on the land.
 - Permanently remove all the unauthorised fencing on the land from the land.
 - Permanently remove all commercial plants and machinery stored on the land from the land.
 - Permanently remove the cement silo on the land from the land.
 - Permanently remove the portable cabin and storage containers on the land from the land.
 - Permanently remove all tools and equipment stored on the land from the land.
 - Permanently remove all the hardstanding, hardcore and other similar surfacing materials on the land from the land.
 - Reinstate the topsoil and vegetative cover of the land where these have been removed.
 - Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the land.
 - The period for compliance with the requirements is six (6) months.
 - The appeal was made on the grounds set out in section 174(2)(a), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act. The appellant later introduced ground (b) and ground (g). The appeal proceeded on all these grounds.
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Decision

1. The enforcement notice is quashed.

Preliminary Matters

2. The Inquiry was held over four and half days on 6 and 7 December 2022 and on 8, 9 and 16 March 2023. The final session was conducted virtually.
3. All witnesses gave their evidence at the inquiry under a solemn affirmation.
4. An application by the Council for an award of costs against the appellant is dealt with in a separate decision.

Appeal on ground (b)

5. Under this ground of appeal the appellant did not dispute fencing was erected or that hardstanding was installed. The main issue is whether the alleged use of the land for commercial purposes with associated storage of containers, plant and machinery has occurred as a matter of fact.
6. The Town and Country Planning (Use Classes) Order 1987 was amended on 1 September 2020 by the addition of Schedule 2 Part A Class E Commercial Business and Service. Class E basically covers the retail sale of goods, the provision of services to visiting members of the public and business use.
7. The appellant maintained that the existing use of the land is not one of the uses within Class E of the amended Use Classes Order. The appellant's planning witness described the actual use as a depot for the storage of vehicles, plant and machinery and for the storage of building materials. However, when considering the planning unit the witness described the use as a composite use involving the storage of building/landscaping materials, the parking and storage of lorries, the operation of machinery to load and unload vehicles, a base for the distribution of building materials¹. During oral evidence the witness confirmed that he considered the existing use to be a composite use and not a single primary use.
8. The enforcement notice makes no mention of a Class E use. The description is not a change of use to storage. The emphasis of the allegation is on use for commercial purposes with storage being part of and supportive of that main use. Nevertheless, even before the addition to the Use Classes Order the word 'commercial' could apply to a potentially broad spectrum of business, industrial and/or storage uses. During the inquiry more was learnt about the type of use being carried on, especially through the oral evidence of the appellant and the current tenant. The interested parties in their evidence maintained that the processing of aggregates took place which led to a lot of dust and noise.
9. The appellant acquired the land in August 2018. The current tenant (VT) moved onto the site in the summer of 2019. He has operated his business, Paving Solution and Groundwork Limited, from the site since then. VT's statutory declaration stated his work typically included laying cables for BT. The yard was described as an important hub of business and essential to his company. VT stated that at first the site was covered in hard core. He decided to lay a concrete surface in order to have a surface that could be kept clean and withstand wet weather.
10. VT explained at the inquiry that he carries out work connected with paving, utilities and fibre optics and employs up to 50 or 58 people. He has a contract to carry out work for a network company, which involves making trenches, as opposed to laying cables. Sometimes he is called out to undertake emergency jobs (such as clearing blockages). The yard on site is used to store building materials, ballast and aggregates, park vehicles and keep plant and equipment. The old shed was used to store small tools. He did not accept that the processing of aggregates or the crushing of materials took place. The silo was for storing, not mixing, cement and the mobile batching plant was for use when out on sites. He also rented another yard to keep his lorries.

¹ Proof of evidence at paragraphs 4.4, 5.3 and 5.8.

11. The layout seen on the accompanied site visit in December 2022 corresponds reasonably well with the layout of the site indicated on a plan within the Council's evidence². Compounds enclosed by fencing were used for the storage of materials (blocks, bricks, pipes, aggregates and so on). Various items of plant and equipment were present on the site, including a caterpillar vehicle, a JCB machine and a grab lorry. Towards the back of the yard was a vehicle maintenance area, containers (enclosed by vehicles) were used to store tools and a portable building was in use as an office. A cement silo was sited near the old shed (also referred to as a Nissen hut) more towards the centre of the yard. Nearby was a large pile of earth and soil materials that was from paving a garden and which was to be chipped on site and given to a farmer. Much of the site was hard surfaced with concrete, although the front compound was very muddy. Parking and loading areas took up the rest of the space. When I visited St Albans Road before the inquiry large mounds of sand and gravel could be seen in the yard.
12. When the Council visited in March 2020 the officer reported that within the compounds were various containers, vehicles, machinery, tools and materials associated with construction and ground works. Compound 1 contained a cement silo and piles of sand, stones and hardcore. A metal framed structure housed machinery. Photographs from the Parish Council (undated) showed mounds of rubble near to the front boundary.
13. The Council proposed an amendment to the description of the matters constituting the alleged breach of planning control³. Additional minor alterations were agreed with the Council and the appellant at the inquiry. The agreed wording is: "Without planning permission, the material change of use of the land to use as a construction contractor's depot with associated fencing, installation of hardstanding and storage of building materials, containers, plant and machinery and use of a portable cabin for office purposes".
14. The plan attached to the enforcement notice confirms that the Land to which the notice relates is equivalent to the appellant's land ownership and which is used by VT to operate his business. The Land functions as a single unit even though there are internal compounds. The Land is the relevant planning unit because of the physical and functional separation from the adjacent property Romani and the clear demarcation from the adjoining farmland.
15. The evidence shows that the storage and other activities and uses taking place on site are in support of the firm's paving and groundwork business and operations carried out elsewhere primarily through contract work. The site is used as an operating base and is not used solely for the storage of goods to deliver or distribute to sites elsewhere. This description is reflected in the Council's use of the word commercial to encompass a range of uses and the evidence of the appellant's planning witness when confirming a composite use on the site.
16. The description of the use as a 'construction contractor's depot' distinguishes the use from 'a depot' meaning a place for the storage of quantities of equipment, food or goods or a place for where supplies and materials are stored for distribution. It is comparable to the often-used term builder's yard. In this case 'depot' suitably applies to both the use of open land and

² Appendix 2 Delegated report dated 9 September 2020

³ Inquiry Document 10 submitted on the morning of 9 March, the fourth day of the inquiry.

buildings/structures. As a matter of fact and degree the existing use of the land is a sui generis use, not a Class B8 storage and distribution use. A similar view was expressed by the Council in discussion at the inquiry.

17. On further review I consider that the detailed wording of the description would benefit from further minor changes to provide additional clarity and a better order by grouping the uses together, followed by the associated operational development. The allegation becomes: "Without planning permission, the material change of use of the land to use as a construction contractor's depot for uses including the storage of building materials, the parking and storage of plant, machinery and vehicles, the siting of containers for the storage of tools and equipment, the operation of plant and equipment to load and unload vehicles, the siting of a portable cabin in use for office purposes, the maintenance of vehicles, together with the erection of associated fencing and the laying of hardstanding."
18. In correspondence before the inquiry the Council suggested the description of the alleged breach could include reference to the former nil use in order to clarify no change of use within a particular use class occurred and that section 55(2)(f) of the 1990 Act did not apply. This possible change was not pursued when it was clear Class E was not relevant to the description of the current use. I agree no such correction is necessary given that the use of the land pre 2018 was in dispute and there is no requirement to state a previous use in the description.
19. The Council's witness confirmed that the amended description of the use as a construction contractor's depot reflects both the current activities and the activities of a former occupant CW. No reliance was placed on a material change of use through intensification. In the event I found the use was an established use the Council relied on the abandonment of the use in the period 1979 to 2018.
20. The amended description of the alleged breach of planning control was acceptable to the appellant. The appellant in closing confirmed the appeal on ground (b) 'had gone' given the proposed corrections and relying on the concessions of the Council, summarised as no change of use, no material intensification and no change in the planning unit⁴.
21. In accordance with section 176(1) of the 1990 Act I can correct any defect, error or misdescription in the notice provided that the correction will not cause injustice to either the local planning authority or the appellant. I am not able to conclude on this requirement without considering the ground (d) evidence, bearing in mind the Council's assessment of the past use and the concessions relied on by the appellant.

Appeal on ground (c)

22. This ground of appeal is only in relation to the erection of the palisade fence along the site frontage. The fence is 2.0 metres (m) in height⁵ and on the site visit it was measured as being 2.89m away from the highway. In front of the palisade fence is a hedge and a low trellis-like fence below 1m in height.

⁴ Inquiry Document 13 paragraph 4.1.2

⁵ The appellant's measurement – see 5.30 of Mr Brown's proof of evidence

23. The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) grants planning permission by way of article 3 for the developments described in Schedule 2. In that Schedule, Class A of Part 2 permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.
24. Development is not permitted by Class A if the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would, after the carrying out of the development, exceed 1 metre above ground level. The GPDO does not define the meaning of "adjacent" for the purposes of Class A. However, case law has established that a fence does not have to abut or touch a highway, rather it is sufficient for a fence to adjoin a highway to trigger the lower height.
25. The palisade fence is a means of enclosing the land and it defines the boundary of the operational site, both physically and visually. The planting between the palisade fence and the lower trellis fence provides a good amount of screening but the fence is still easily visible, especially where there are gaps in the vegetation. The planting is not equivalent to nor does it function as a boundary hedgerow because of its depth, density and plant structure. The main purpose of the planting is to soften the appearance of the fence, not to enclose and secure the yard behind. The low fence is of little significance in defining the boundary to the yard because it is a low open timber structure, like a trellis. It looks to contain and protect the planting behind and does not function as a means of enclosure.
26. My conclusion is that the palisade fence, as a matter of fact and degree, is adjacent to the highway. The fence is not permitted development under Class A of Part 2 of Schedule 2 to the GPDO. Planning permission is required and none has been granted. A breach of planning control has occurred and the appeal on ground (c) fails.

Appeal on ground (d)

27. An appeal on ground (d) is that on the date the enforcement notice was issued no enforcement notice could be taken in respect of the alleged breach of planning control (as proposed to be amended). The onus is on the appellant to prove his case. The standard of proof and the relevant test of the evidence is the balance of probability. The appellant's own evidence does not have to be corroborated by independent evidence in order to be accepted but the evidence does have to be sufficiently precise and unambiguous to succeed on the balance of probability.
28. In summary, the appellant's case was that the use of the site and building was effectively for a B8 use⁶ and that by December 1963 the storage and distribution use had crystallised in legal terms. The use continued during the period 1979 to 2018 and was not abandoned. JW stated he bought the yard to store his tools, plant, machinery, lorries and building materials, believing that was the established use.
29. The Council disputed that at any point in time the land had an established use. Even if an established use could be demonstrated it was abandoned, resulting

⁶ Appellant's opening submissions

in the land having a nil use. Planning permission was required for the resumption of the former use.

Period 1963 to 1979

Evidence

30. The appellant relied primarily on the evidence of CW and DR to describe the use of the land over this period. CW produced two statutory declarations⁷. The second document⁸ additionally included reference to a theft, laying of hard standing and use of the shed for storage.
31. The statutory declaration stated CW rented the land (called the yard) during the period 1963 to 1979 and that the yard was used "for storing landscaping and building materials lorries, cars, plant and machinery". CW described the types of lorries and loading machines parked and stored in the yard. In his oral evidence the date of first occupation was corrected to late 1962. At that time there was no hardstanding. Before he took over, the land was mainly agricultural. CW stated he was a stone merchant. He bought and sold paving slabs, sand and ballast and distributed materials all over the country. Contracts were held with the NHS, Hertsmere Council and Potters Bar Council. The shed was used for the storage of spares for vehicles, red diesel, oils and tools. CW confirmed no sales took place from the land and the office was at his home.
32. In addition, CW said he sub-let the yard to Balfour Beatty over the years 1973, 1974, 1975 during the construction of the motorway. Balfour Beatty used the yard to store and operate plant and machinery and store raw materials. There were two portacabins and a concrete testing laboratory. CW referred to lots of caravans for managers/supervision and residential use. During this period CW continued to operate from the yard and carried on business as usual.
33. CW also referred to being served with an enforcement notice but it was withdrawn after the Council was shown he had established use. In cross examination CW explained his solicitor contacted the Council and the solicitor said he could carry on. CW concluded his statutory declaration by stating with "absolute certainty" the yard has authorised established use for storage.
34. DR is the nephew of CW. According to his statutory declaration DR helped in the yard doing light chores from 1969. In 1976 he took up full time employment, loading the lorries with stone and going out on deliveries with his uncle, being a driver's mate. In 1978 DR started driving a tipper lorry and delivered stone kept in the yard to various addresses. In oral evidence DR referred to work undertaken for local authorities and the deliveries made. The old shed was used for storage of spares, wheels, bags of cement and so on, while in the yard ash, ballast, sand, crazy paving, setts, kerbs and so on were stored. The paving and sand could be up to 20 feet in height. He explained a little more about Balfour Beatty's operation and that the field behind the site was used to site the living accommodation.
35. The appellant produced two aerial photographs dated 1971 and May 1972 to corroborate CW's version of events. The 1971 photo was said to show the land largely hard surfaced and containing a building and bays for the storage of

⁷ The spelling of the surname is slightly different in the two documents but this probably is a typographical error

⁸ Inquiry Document 4

construction materials. The witnesses in their oral evidence described the 1971 photo as a bit washed out (DR) but identified the shed in the middle, stacks of paving, sand, ballast and bricks, and a lorry (J-type Beford). The stored materials at the back and along the sides were typical of the layout of the site. CW picked out the old A1 highway on the 1972 photo but otherwise the appellant (JW) agreed that there was no real difference between the 1971 and 1972 photos.

36. The additional evidence relevant to this period consists of two documents. The appellant provided a copy of a record of an application to Potters Bar UDC by CW for development described as storage of horticultural stone⁹. The workforce was stated to be 2 employees. The document records the application was refused on 10 February 1966.
37. The Council submitted a letter dated 18 June 1980 from Bairstow Eves to the Council¹⁰, which was an enquiry as to whether the land could be developed as residential or otherwise. The text stated the land used to be occupied by CW as a haulage contractor's yard.

Assessment

38. The period in question is a long time ago – 1963 is now 60 years ago and 1979 is over 40 years ago. It is not surprising that contemporary documents relating to the business are no longer available to CW as he probably would have little reason to have kept details of the lease arrangements, business records and so on. The Council said extensive searches were carried out of its records but nothing was found other than the few documents produced for the appeal. The likelihood is that documents were not retained or were destroyed as a result of the change in local authority boundaries in 1974. Therefore the main source of evidence on the use of land in this period is the personal evidence of CW and DR. These witnesses each made a statutory declaration. They gave their oral evidence under affirmation and were made aware of the serious consequences of not telling the truth. I consider the witnesses did their best to help the inquiry.
39. An established use certificate secures immunity from enforcement action for the use to which it relates. As a matter of fact no established use certificate has been produced. Hence there is no formal document on which the appellant can rely to describe the use or to show immunity from enforcement action. On the basis of CW's account of contact with the Council, the probability is that no application was made during the period 1963 to 1979. The only application made was for planning permission but the application was refused. There is no record of any subsequent enforcement action.
40. The probability is that CW rented the land in association with his business. The business operation described by CW and DR was essentially the storage of materials for delivery to customers' sites. In other words, CW supplied paving and landscaping materials and the site was used to store the materials. The vehicles and equipment on site were for loading and unloading and to facilitate the storage and distribution use. There was no reference to any other activities or uses being carried out. The two contemporary documents produced are

⁹ Document ref PBA1

¹⁰ Inquiry Document 8

consistent with this description – the application was for a storage use and ‘haulage’ indicated a use involved with the transport of materials.

41. The 1971 photo submitted at the inquiry¹¹ is of better quality than the photo submitted electronically. The appeal site is identifiable adjacent to the Romani property. The boundary between the two is not as strong as the boundary to the open farmland to the west and north. Much of the site appears to be devoid of vegetation apart from in the south west corner. The old shed is clearly visible towards the centre with possibly a vehicle or a small quantity of storage close by. Part way along the rear and side boundaries there looks to be some form of storage or structures. A slightly different shape could possibly be a vehicle. Without previous knowledge of the site I am unable to identify the details described by the witnesses. However, the photo shows the land was in a different use to the residential use and agricultural use on adjacent lands. The photo is generally consistent with the use described by the witnesses and provides support for their account of a storage use.
42. The appellant’s case for an established use has two weaknesses, the date of the commencement of the use and the use of the land by Balfour Beatty. The use must have begun before the beginning of 1964 and continued since the end of 1963¹². CW dated the beginning of the tenancy to 1963 in the statutory declarations. In his oral evidence he gave a date of late 1962, which introduces a degree of uncertainty. No explanation was given for the change in date or how he was able to be sure of the 1962/1963 date after such a long period of time. Commencement of a tenancy may not necessarily equate to the beginning of the use. A date of 1965 was given for the laying of hardstanding in the yard. The application for and the refusal of planning permission in 1966 were not consistent with the claim of an established use.
43. On this matter the appeal decision¹³ submitted by the appellant is helpful. The Inspector concluded that the established use provisions did not come into play because there was no specific evidence to show when the storage use actually started after the purchase of the appeal site. The position is very similar in this case.
44. The appellant considered the period of use by Balfour Beatty was not an intervening unlawful use because it was permitted by Part 9, Class B of the GPDO¹⁴. This GPDO reference is to the Town and Country Planning (General Permitted Development) (England) Order 2015, which post-dates the development and was not the relevant statutory instrument at the time. Even if the Balfour Beatty use was permitted development, the information about the use indicates that primary activities were not confined to storage but also included a concrete testing laboratory and office use in portacabins. There is insufficient information to conclude whether the land became two planning units in separate and functionally distinct uses or the land remained a single planning unit in a composite use, or if the site remained in a storage use.

¹¹ Inquiry Document 2

¹² The Town and Country Planning Act 1968 section 17(1)(a) stated that a use is established if it was begun before the beginning of 1964 without planning permission and has continued since the end of 1963. The Town and Country Planning Act 1990 at section 191(a) made the same provision until the amendment by the Planning and Compensation Act 1991 which provides for certificates of lawfulness of existing use or development.

¹³ Document PBA9 paragraphs 25 to 27

¹⁴ Part 9 = development by highways authorities, Class B Permitted development: The carrying out by the Secretary of State or a strategic highways company of works in exercise of the functions of the Secretary of State or the company under the Highways Act 1980 or works in connection with, or incidental to, the exercise of those functions.

45. The Council's case is based on a lack of objective evidence to support the appellant's case. The Council did not directly attack the credibility of the evidence of CW and DR or claim they were not telling the truth. The Council accepted that the use carried on during this early period was the same as the use being carried on by the current tenant.

Conclusions on past use and the enforcement notice

46. On the balance of probability, the use carried out by CW was a single primary use for storage purposes and has not been shown to have started before 1 January 1964.
47. The former use of the planning unit was for storage purposes (Class B8). The existing use is a contractor's construction depot (*sui generis*), as described in the proposed wording for the alleged breach of planning control.
48. The appellant and the Council presented a case based on the existing use being the same use as that undertaken by CW during the period 1963 to 1979.
49. The appellant was clear that reliance was placed on the concessions made by the Council and the ground (b) case remained if I did not accept the concessions. To correct the notice as proposed potentially could cause injustice to the appellant because the appellant has not had the opportunity to present a case on the potential new issues raised. The appellant may have wished to pursue a case of invalidity or to argue the change of use is not material through the ground (c) appeal. There could potentially be injustice to the Council having regard to the evidence that emerged during the inquiry and the differing observations expressed on the current use.
50. In view of these concerns, I am not satisfied that the statutory requirement in section 176(1) of the 1990 Act is met.

Conclusion

51. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control. 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.
52. In these circumstances, the appeals on the grounds set out in section 174(2)(a), (f) and (g) of 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 fall to be considered.

Diane Lewis

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Alan Masters	Barrister, instructed by Phillip Brown
He called	
John Ward	Appellant
Colin Welsh	Witness of fact
Danny Rudman	Witness of fact
Vasile Teace	Tenant
Philip Brown BA (Hons) MRTPI	Managing Director, Philip Brown Associates

FOR THE LOCAL PLANNING AUTHORITY:

Shemuel Sheikh	Barrister, instructed by Hertsmere Borough Council
He called	
Matthew Dennis	Planning Enforcement Officer

INTERESTED PARTIES:

Catherine McCaffrey	South Mimms Parish Council
Margaret Harrison	Resident
Stella Papaphilippou	Resident
Daniel Becker	Resident

DOCUMENTS submitted at the inquiry

- 1 Opening submissions of behalf of the Council
- 2 Bundle of photographs submitted by the appellant
- 3 Photograph of yard 2018 submitted by the appellant
- 4 Statutory declaration by Mr Welsh dated 4 June 2019
- 5 List of draft conditions
- 6 Statement of common ground dated 8 March 2023
- 7 South Mimms Conservation Area Character Appraisal and Management Plan April 2020
- 8 Letter from Bairstow Eves dated 18 June 1980
- 9 Hertsmere Local Plan 2012-2027 Policies Map
- 10 Draft amendments to enforcement notice
- 11 Revised list of draft conditions
- 12 Closing submissions of behalf of the local planning authority
- 13 Notes on closing submissions on behalf of the appellant