



Appeal Decision

Site visit made on 26 June 2023

by H A Orr MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4th July 2023

Appeal Ref: APP/G2245/C/22/3311457

Land north of Grove Road Fordcombe Road, Penshurst, Kent

- 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 William Michael Westphal against an enforcement notice issued by Sevenoaks District Council.
 - The enforcement notice, numbered 22/00376/OPDEV, was issued on 19 October 2022.
 - The breach of planning control as alleged in the notice is without planning permission the siting of a steel constructed building (in the approximate area marked with X on the attached plan).
 - The requirements of the notice are:
 - 1) Remove the steel constructed building from the land
 - 2) Remove any resultant waste or material from the land.
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (f) and (g) 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.
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Decision

1. The enforcement notice is quashed.

Background and matters concerning the notice

2. The subject development is sited close to the well-established boundary hedge adjacent to Fordcombe Road. From the site visit the steel constructed building (the SCB) has the external appearance of a modest sized shipping container, although it was not possible to establish from the site visit what it was being used for. From the evidence and my observations, the remainder of the field was in use for the grazing of a flock of sheep, although I acknowledge that this may have changed since the notice was issued.
3. Development, as set out in section 55 of the ACT, comprises two limbs; the carrying out of building, engineering, mining or other operations in, on, over or under land and the making of any material change of use in the use of any buildings or other land. The construction of a building is generally held to constitute operational development rather than a use of land. Section 336 of the Act defines a building as 'any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building'. There are three primary factors in determining what is a building: size, permanence and physical attachment, none of which is necessarily decisive.

4. Where the allegation is of unauthorised development, the notice should distinguish between operations and a material change of use with the allegation and requirements, clearly structured to reflect the nature of the development being alleged. The notice should be drafted in such a way as to tell the recipient fairly what they have done and what they need to do to remedy it.
5. In this case the enforcement notice alleges the siting of a the SCB and goes on to confirm that the structure has been in situ for less than 4 years. This is indicative of an operational development notice, which seems to be supported by the related Enforcement Report. Furthermore, the requirements of the notice do not require any unauthorised use to cease. However, in the Council's appeal statement they make it clear that, the enforcement notice was intended to target an unauthorised change of use of the Land. They go on to substantiate this by suggesting that the reference to four years, rather than 10 years, at paragraph 4, is a typographical error that could be corrected without injustice.
6. The enforcement notice allegation gives no indication of the lawful use of the land, the exact nature of the unauthorised use it seeks to target, or the extent of that unauthorised use within this substantial site. It is unclear from the evidence I have, how the Council determined firstly that the siting of the SCB, amounted to development, and if it did, whether it constituted operational development, or a material change of use of the land. This is pertinent because part of the appellant's case is that the SCB does not constitute development at all, being a portable metal structure, used to store essential tools, materials and animal feed for use on land in agricultural use.
7. I acknowledge that my concerns about the notice are compounded by what I saw on site. An enforcement notice is invalid if it is flawed in some way, but not so defective as to be a nullity. The powers transferred to Inspectors in Enforcement appeals include the power to correct any defect, error or misdescription in the notice under s176(1)(a), or vary the terms of the notice, where the Inspector is satisfied that doing so will cause no injustice to the appellant or the Council. Alternatively, there is the power to quash the notice.
8. The Council have provided no evidence to explain clearly what the alleged change of use is to, or how the notice could now be corrected. The siting of the SCB is not in itself, a use of the land and it is essential, where a material change of use is alleged, that the notice specifies what that material change is to.
9. Drawing the above points together, the notice issued by the Council appears to have been issued on the basis that operational development had occurred. Conversely, they have advanced their case on the basis that a material change of use has occurred. The appellant seems to have approached his case based on an allegation of operational development.
10. If I was to correct the notice to refer to a material change of use as suggested by the Council, then this would cause injustice to the appellant by affecting the way he could have constructed his case. Moreover, as there is no certainty what the nature of any uses taking place, or whether it forms part of a wider mixed use, correcting the notice to reflect an allegation of a material change of use, has the potential to cause injustice to the Council.

11. Consequently, I find that I cannot correct the notice without the risk of injustice, or with the necessary degree of certainty. Whilst I acknowledge that the Council may be able to issue another notice, I shall quash the enforcement notice as inaccurate and incapable of correction without injustice to either the appellant or the Council.

Conclusion

12. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control, or the steps required 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.
13. I would draw the appellant's attention to the provisions under s171B(4) which allows the Council to issue another notice. In these circumstances, the appeals on the grounds set out in section 174(2) (b), (c), (f) and (g) of the 1990 Act as amended do not fall to be considered.

Hilary Orr

INSPECTOR