



Appeal Decision

Site visit made on 13 June 2023

by Alexander Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5 July 2023

Appeal Ref: APP/W2465/C/23/3314787

43 Overton Road, Leicester LE5 0JB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr M Wariach against an enforcement notice issued by Leicester City Council.
- The notice was issued on 13 December 2022.
- The breach of planning control as alleged in the notice is without planning permission, the construction of a two storey detached building at the rear of the property and use of the property for vehicle sales.
- The requirements of the notice are to:
 1. Demolish the two-storey building located to the rear of the site outlined on the attached plan in blue.
 2. Remove all materials resulting from compliance with step 1 from the site.
 3. Cease the use of the site for vehicle sales.
- The period for compliance with the requirements is: 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b) and (d) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections in the terms set out below in the Formal Decision.

The Notice

1. On an appeal, any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority.
2. The breach of planning control alleged in the enforcement notice (the Notice) is 'Without planning permission, the construction of a two storey detached building at rear of property and use of property for vehicle sales.'
3. Whilst the notice refers to the 'use of property' it does not allege that a material change in the use of the property has occurred. It therefore follows that the allegation in the notice would not constitute development for the purposes of section 55(1) of the 1990 Act.
4. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of any development of land. Because the breach of planning control as alleged in the notice does not constitute the development of land, it follows that planning permission would not be required for it. The notice is defective in that respect.
5. However, having regard to the appellant's case and their appeal under grounds (b) and (d), they have clearly understood that the allegation was intended to refer to a material change of use. As such, I am satisfied that a correction of

the notice to include reference to a material change of use would not cause injustice in this case.

6. In addition, the red edged area on the plan attached to the notice encompasses the dwellinghouse of 43 Overton Road as well as the two-storey detached building and the area allegedly used for vehicle sales. Therefore, without prejudice to the appellant's argument that there is no vehicle sales business operating from the site, during my site visit it was apparent that the allegation in the notice is incorrect. There is clearly a residential use taking place on the site in addition to any alleged vehicle sales.
7. Accordingly, I intend to correct the Notice to delete the breach of planning control alleged in paragraph 3 of the Notice and replace it with 'Without planning permission, the construction of a two-storey detached building at the rear of the property and the material change of use of the property to a mixed use comprising vehicle sales and residential'.
8. As a consequence of the above correction, I shall also correct requirement 3 under paragraph 5 of the Notice to reflect the mixed use.
9. Furthermore, the reasons for issuing the Notice refer to the breach of planning control having taken place within the last 4 years. Whilst the 4 year period of immunity relates to the operational development component of the alleged breach, ie the construction of the two-storey detached building, it is not applicable to the material change of use component, ie the mixed use of vehicle sales and residential. Therefore, I shall correct the Notice to reflect this by including the 10 year period of immunity for the material change of use, in addition to the 4 year period for the operational development.
10. I consider that I can carry out these corrections without causing injustice to any parties.
11. In addition to the above, the red edged area on the plan attached to the notice does not cover the full planning unit of the alleged material change of use. During my site visit, the land to the rear of 39 Overton Road also had vehicles on it and appeared to be contiguous with the appeal site. The parties have had the opportunity to comment on this matter. The red edged area cannot be corrected to include this land because to do so would cause injustice to the appellant as the Notice would become more onerous. However, the Notice is not invalid because of this, it simply means that this area of land is not covered by the Notice.

Preliminary Matter

12. The appellant argues the planning merits of the development. However, such matters cannot be taken into consideration under a ground (b) or (d) appeal.

The ground (b) appeal

13. In appealing on ground (b) the burden of proof is firmly on the appellant to demonstrate that the alleged breach of planning control has not occurred as a matter of fact.
14. The appellant argues there has not been a material change of use of the two-storey building to the rear of the property and it has always been ancillary to the dwelling, 43 Overton Road. However, the Notice does not allege that the

use of the building has changed. What the Notice alleges is that the building has been erected within the last four years, without planning permission, and therefore is a breach of planning control. Following my intended corrections to the Notice, the second component of the allegation is that there is a material change of use of the property to a mixed use comprising vehicle sales and residential.

15. The facts of the case are that a two-storey detached building has been constructed. The question of whether the building is immune from enforcement action is not a matter for consideration under a ground (b) appeal. I will consider this under the ground (d) appeal.
16. With regards to the vehicle sales component of the alleged mixed use, the appellant contends that no vehicle sales business operates from the property. At the time of my site visit there were approximately 20 vehicles parked on the site, including 2 vans and a minibus. The appellant argues these are for private use.
17. A photograph¹, dated 24 February 2021 submitted by the Council shows a number of vehicles on the site with what appears to be pricing signs displayed in their windscreens. Another photograph², dated 6 April 2018, shows a sign for 'ASW Cars'. Whilst it is not clear from this photograph where the advertisement is displayed, it is of a similar size and has the same logo as a sign I saw on site displayed above the front boundary wall of the site. Furthermore, I noted during my site visit a note attached to the front vehicular gates which stated 'Notice to All Customers: We have moved site to....Please call...to arrange an appointment. ASW'.
18. Whilst no vehicles were advertised for sale at the time of my visit, the sheer number of them suggest they could have been more than simply for personal use. In culmination with the photographic evidence and my own observations, it is reasonable to conclude that a vehicle sales business trading under the name of ASW Cars operates from the site or at the very least has done so.
19. I find therefore that the appellant has not demonstrated that, on the balance of probabilities, the matters alleged in the Notice have not occurred.
20. The ground (b) appeal fails.

The ground (d) appeal

21. In pursuing this appeal on ground (d), the onus is on the appellant to demonstrate on the balance of probabilities that at the time the Notice was served on 13 December 2022, it was too late to take enforcement action against the alleged breach of planning control. The relevant test of the evidence is 'on the balance of probability' (i.e. that it is more probable than not). If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.
22. The appellant's ground (d) appeal focuses on the detached building, stating that it has been in situ for more than 10 years and had a first-floor extension

¹ Appendix 5 to the Council's Statement of Case

² Appendix 4 to the Council's Statement of Case

more than 4 years ago. A photograph³, dated 18 January 2016, clearly shows a single-storey detached outbuilding in a similar position as the existing outbuilding. The same outbuilding appears to be in the photograph dated 12 October 2016. The building in the photograph dated 24 February 2021 is two-storey in height and appears to be in a similar position to the previous single-storey building depicted in the earlier photographs. However, it looks markedly different in that the openings to the front elevation are different and obviously there is the second storey. Whilst the appellant states the first-floor was an extension, there is no evidence to substantiate this. Given the differences between the single-storey building and the two-storey building it is entirely plausible that the single-storey building was demolished before the two-storey building was erected.

23. The appellant states they have photographs, contractor receipts and legal statements to support their argument that the detached two-storey building was erected more than four years prior to the Notice being served. However, no such evidence is before me. It is for the appellant to make their own case and submit evidence to support it.
24. Given the ambiguity and impreciseness of the appellant's evidence, I am not persuaded that, on the balance of probabilities the detached two-storey building was erected more than four years prior to the Notice being served.
25. The ground (d) appeal therefore fails.

Formal Decision

26. It is directed that the enforcement notice is corrected by:
- a. The deletion of the alleged breach of planning control under paragraph 3 and substituting "Without planning permission, the construction of a two-storey detached building at the rear of the property and the material change of use of the property to a mixed use comprising vehicle sales and residential."
 - b. The insertion of "for the operational development and 10 years for the material change of use" immediately after "...the last 4 years" under paragraph 4.
 - c. The deletion of requirement 3 under paragraph 5 and substituting "Cease the mixed use of the site for vehicle sales and residential by ceasing the vehicle sales component."
27. Subject to the corrections, the appeal is dismissed and the enforcement notice is upheld.

Alexander Walker

INSPECTOR

³ Appendix 2 to the Council's Statement of Case