



Appeal Decision

Site visit made on 20 June 2023

by Jessica Graham BA (Hons) PgDipL

an Inspector appointed by the Secretary of State

Decision date: 11 July 2023

Appeal Ref: APP/D0840/C/22/3294051

Land rear of Anneth Noweth, Penhallick, Carn Brea, Redruth, TR15 3YR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Tom Powell against an enforcement notice issued by Cornwall Council.
- The notice, numbered EN21/00529, was issued on 27 January 2022.
- The breach of planning control as alleged in the notice is: "Without planning permission, the material change in the use of the land from a nil use to a B8 storage use for the storage of scaffolding materials, vehicles and the siting of a shipping container, as shown outlined in red on the attached plan."
- The requirements of the notice are to:
 1. Cease the use of the land as a B8 storage including the use as a scaffolding yard as shown outlined in red on the attached plan
 2. Remove from the land all scaffolding materials and associated vehicles as shown outlined in red on the attached plan
 3. Remove from the land the shipping container as shown in the approximate position marked in green on the attached plan
 4. Remove all materials and debris resulting from compliance with the requirements of 1-3 above
- The periods for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(d), (e) and (f) of the Town and Country Planning Act 1990 as amended.

Decision

1. The appeal is dismissed and the Enforcement Notice is upheld.

Preliminary matter

2. A number of local residents have made detailed representations about the impacts of the current use. However, it is important to be clear that the grounds on which the Notice has been appealed do not, in this case, include the ground that planning permission should be granted. Had such a ground been argued, then my decision-making process would involve an assessment of the planning merits of the development (for example, its effects on the living conditions of nearby residents, and the adequacy of vehicular access); but since it has not, such matters are not before me.

The appeal on ground (e)

3. The ground of appeal is that the Enforcement Notice was not served in accordance with s.172 of the 1990 Act, which requires that a copy of the Notice be served on "the owner and on the occupier of the land to which it relates". The Appellant's case is that he is a co-owner of the Appeal Site but was not served with a copy, and was only made aware of the Notice by a third party.

4. The Council has confirmed that it issued a Planning Contravention Notice (PCN) which, among other things, requested details of the owner of the Appeal Site and the names of any other person(s) with a legal interest in it. The response from Mr Jon Powell, dated 24 July 2021, did not identify the Appellant. The Council states that it carried out a Land Registry search to ascertain the owners of the Appeal Site, the results of which did not identify the Appellant. It also attached a copy of the Notice to the entrance gates at the Appeal Site.
5. I consider the Council to have done all that could reasonably be expected of it to ensure the Notice was served on all the relevant parties. Further, and importantly, s.176(5) of the 1990 Act states: *Where it would otherwise be a ground for determining an appeal under s.174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.*
6. In this case, the Appellant was made aware of the Notice in time to lodge a valid appeal against it, and has had (and taken) the usual opportunity to submit written representations in support of that appeal. The Appellant cannot, therefore, be regarded as having been "substantially prejudiced" in this regard. It follows that the appeal on ground (e) must fail.

The appeal on ground (d)

7. The ground of appeal is that, at the date when the notice was issued, it was too late to take enforcement action against the matters stated in the notice.

The legislative framework

8. S.171B of the 1990 Act (as amended) sets out the current time limits for taking enforcement action. S.171B(3) provides that where (as here) the breach of planning control consists of a change of use other than the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of a period of ten years beginning with the date of the breach. However, s.171B (as an amendment to the 1990 Act) did not come into force until 27 July 1992, and was not retrospective in effect. Prior to this date, under the legislation then in force¹, an enforcement notice had to be served – in relation to any development – within 4 years from the carrying out of that development. After 4 years had expired, it became an "Established Use" and immune from enforcement. Immunity acquired under this legislation was preserved under subsequent changes to the legislation.
9. The relevance of this is that if a use began before the end of 1963 and gained immunity as an "Established Use", it would remain immune unless it was abandoned, superseded by a Material Change of Use, or extinguished by a requirement of a subsequent Planning Permission that had been implemented. This would be the case even if the use had become dormant by 27 July 1992, and whether or not an Established Use Certificate had been granted.²

Analysis of the evidence

10. The evidence of the Appellant is that the Appeal Site was part of a railway siding before being acquired by his family, and in the 1950s was put to use for

¹ S.45(2)(a) of the Town and Country Planning Act 1962

² *Panton & Farmer v SSETR & Vale Horse DC* [1999] JPL 461

the storage of heavy road-making equipment and steam engines by his ancestor Harry Powell, who owned a plant hire company. This accords with information provided in response to the PCN, where the previous use of the Appeal Site is listed as "1900 Road (shown on old maps); 1950-1970 Storage Yard, heavy equipment stored by family." There is no contradictory evidence, and it is a statutory offence knowingly or recklessly to give information in response to a PCN which is false or misleading in a material particular. I am therefore satisfied that the Appeal Site was, on the balance of probabilities, used to store heavy equipment from 1950 – 1970. Since this use began before 1963 and continued for a period of over 4 years thereafter, it achieved immunity from enforcement as an Established Use.

11. The Council contends that this storage use has subsequently been abandoned, which is one of the means (as set out above) by which immunity from enforcement as an "Established Use" may be lost.
12. The concept of abandonment applies if a building or land "remains unused for a considerable period of time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned"³. The courts have established four criteria for abandonment: the period of non-use, the physical condition of the land or building, whether there had been any other use, and the owner's intentions as to whether to suspend the use or to cease it permanently⁴.
13. The information provided in response to the PCN states that the Appeal Site "...has been used for storage by our family in the past, 1950-1970" before going on to explain that more recently, prompted by the land having been taken over without permission, the family decided to clear the land of "rubbish dumped over the years" and put up gates for security. A family friend then got in touch and asked if he could use the yard. This suggests that the use of the Appeal Site for the storage of heavy machinery ceased in 1970 and that no further use was made of it until the storage of scaffolding materials began in 2021, some 50 years later.
14. The Appellant states that the yard has been in use, "albeit not in constant use", for as long as his family can remember. After its use for the storage of heavy road making equipment it was used by the family for the storage of aggregates and granite; in more recent times the Appellant's immediate family, who built a home in the locality, used the Appeal Site for the storage of building materials, aggregate and granite.
15. The Appellant has provided very little in the way of supporting material to substantiate his case. There are, for example, no Statutory Declarations from family members, or other persons with knowledge of the Land, speaking to the use that has been made of it; nor are there any photographs which clearly show items being stored on the Land, either historically or during the more recent construction of the family home.
16. The Appellant has provided some photographs, but these are of limited assistance. The photograph labelled "Storage yard circled in red Mid 1960s" shows the Appeal Site in the middle ground, but no apparent storage use is taking place. The photograph labelled "Our digger in storage yard" is undated,

³ *Hartley v MHLG* [1970] 1QB 413

⁴ *Trustees of Castell-y-Mynach Estate v Taff-Ely BC* [1985] JPL 40

and taken from the opposite side of the railway line with the footbridge in the foreground. I suspect the Council is right in its assertion that the digger is not on the actual Appeal Site; it looks instead to be at the far end of adjoining land in the Appellant's co-ownership. Such views of the Appeal Site as are available in the other photographs do not include any evidence of storage.

17. The Council has provided a series of images of the Appeal Site taken from "Google Earth", which range from 1988 to 2021. These do not show any apparent evidence of storage; the Appeal Site looks to be covered by vegetation until the March 2021 image, at which point the Appeal Site appears to have been cleared.
18. Drawing all of this together, while I do not doubt the Appellant's assertion that his family historically kept aggregates and granite on the land, the photographic evidence of both the Council and the Appellant indicates that the presence of any such materials must have been minimal and low-key, certainly during the years 1988 to 2021. That suggests a period of non-use of at least 33 years, during which time the Appeal Site appears to have been covered with vegetation, latterly becoming overgrown, with rubbish being dumped over the years. No intervening use of the site is evidenced.
19. As to the intentions of the owners, the test is objective rather than subjective⁵: that is, what would the reasonable person apprised of all the circumstances consider the intention of the owners to be – as opposed to what the owners themselves maintain their intentions to be. Helpful clarification of this distinction was provided by Kennedy LJ in the *Hughes* judgment, where he gave the example of a labourer's cottage which an emigrant and his family left 40 years ago and which had been in ruins for years. If the test of intention were subjective, the cottage "cannot cease to be regarded as a residence so long as its owner in America or Australia cherishes the dream that someday he will return to live there." He concluded that in such a situation there would clearly have been abandonment, so an objective assessment was important.
20. In this particular case, it may very well be that the family has always regarded – and continues to regard – the Appeal Site as a storage yard. But the evidence currently before me indicates that, on the balance of probabilities, before recent events it had not been used as one for many decades. While I appreciate there is not likely to have been any subjective intention on the part of the Appellant, or his predecessors, to abandon the storage use established between 1950-1970, I am not persuaded that there is sufficient evidence for a reasonable person to conclude, objectively, that the owners of the Appeal Site had merely suspended its use for storage, and not ceased it entirely.
21. I therefore find that the use of the Appeal Site for the storage of heavy machinery, established between 1950 and 1970, has now been abandoned. In the years since 1988 any use for the storage of granite and aggregates must have been minimal, incidental and low-key. In contrast, the undisputed evidence of neighbouring residents is that its current use for the storage of scaffolding is noisy, intrusive, and takes place at all times of the day and evening, on any day of the week. It has involved a significant increase in the number of vehicles driving to and from the site, many of them lorries. In my judgment, these changes have brought about a substantial and fundamental change in the character of the use.

⁵ *Hughes v SSETR* [2000] 80 P&CR

22. I conclude that as a matter of fact and degree, the use of the Appeal Site for the storage of scaffolding materials has resulted in a material change of use, for which planning permission was required but not obtained. The use began in 2021 and the Enforcement Notice was issued on 27 January 2022, so was within the current ten-year time limit for taking enforcement action.

Conclusions

23. In summary, for the reasons set out above I have found that between 1950-1970 the Appeal Site acquired Established Use status for the storage of heavy machinery, but that use has subsequently been abandoned, such that the land now has a nil use. The current use of the Appeal Site for the storage of scaffolding amounted to an unauthorised material change of use, and the time available to the Council for taking enforcement against this breach of planning control has not yet expired.
24. The appeal on ground (d) therefore fails.

The appeal on ground (f)

25. The Appellant has suggested that time restrictions on the use of the Appeal Site could be put in place, to address concerns about its impact on neighbouring residences. While it would be possible to impose conditions like this on a grant of planning permission, there is no application for planning permission currently before me, and without that, no mechanism for varying the Enforcement Notice to impose time restrictions. The appeal on ground (f) must therefore fail.

Conclusion

26. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the Enforcement Notice.

Jessica Graham

INSPECTOR