



Appeal Decision

Site visit made on 23 October 2023

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 November 2023

Appeal Ref: APP/M0655/C/23/3315795

Land at Fowl Farm, Back Lane, Cuerdley, Warrington WA5 2XQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). The appeal is made by Pit Stop Cafe against an enforcement notice issued by Warrington Borough Council.
 - The notice, numbered ENF/22/09361, was issued on 16 December 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of part of an agricultural field to a café in a portable building with an associated decking platform, enclosure and tables.
 - The requirements of the notice are to:
 - a) Cease the use of the land as a cafe.
 - b) Remove from the land and not return the portable building and associated decking platform, enclosures and tables.
 - The period for compliance with the requirements is: Two calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) 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.
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Decision

1. The enforcement notice is quashed.

Matters concerning the notice

2. The enforcement notice alleges the material change of use of part of an agricultural field to a café in a portable building with an associated decking platform, enclosure and tables. The land to which the notice relates is described as 'Land at Fowl Farm...as shown edged red on the attached plan.'
3. A utilities box, hardstanding and paraphernalia, such as a water tank, signage and bin are located outside the building, decking platform and enclosure. As a consequence, the precise area used as part of the café use is likely to vary, depending where various items are placed that day.
4. While the café use is confined to a relatively small part of the land, there is no clear delineation between the area of land used in connection with the café and the remainder of the land edged in red, which appeared to be in agricultural use at the time of my site visit.
5. Although the appellant pays rent to the owner of the field to operate the café, given the lack of physical separation between the area used for the café use and the area used for agriculture, as a matter of fact and degree, I consider the appeal site comprises a single planning unit that is in mixed use because the land is put to two activities, and it is not possible to say that one is incidental to the other.

6. Where there is a mixed use, it is not open to the local planning authority to decouple elements of it; the use is a single mixed use with all its component activities. I have considered whether the notice can be corrected so that the allegation and requirements refer to all elements of the mixed use. Although this would expand the scope of the allegation, it is not disputed that much of the site is in agricultural use. Consequently, I consider the notice can be corrected without causing injustice to either party.
7. The reasons for issuing the notice explain that the breach of planning control has occurred within the last ten years. The Council suggests that it is unclear whether the development undertaken involves operational development. While I would agree it is clear that a material change of use has occurred, since the portable building, decking platform, enclosure and tables are identified in the breach, it is necessary to consider whether they comprise operational development.
8. Section 55 of the Act describes development as 'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'. Section 336 of the Act defines 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.
9. There are three primary factors in determining what is a building: size, permanence and physical attachment, none of which is necessarily decisive. The portable building is substantial in size and whilst I have no substantive details regarding its construction, it appears likely it was constructed off site. It also appears likely to rest under its own weight. The decking platform and enclosure are more likely to have been constructed on site and appear fixed into the ground.
10. A letter from the owner of the Pit Stop Café, points towards the café being set up in 2020. Although it is not clear exactly when the portable building was brought to site, it appears likely it has been located in the same position for a number of years. The portable building, decking platform and enclosure are of sufficient size to be of significance in terms of its visual impact and are likely to remain in place for sufficient time to have the quality of permanence.
11. While I consider the tables are not operational development due to their limited size, I consider that the portable building, decking platform and enclosure, given their substantial size and permanence, as a matter of fact and degree, are buildings for the purposes of the Act and should be considered under section 171B(1) of the Act, the time limit for which is four years.
12. The appellant states that there were cafes/food containers at the site over the past ten years, the last being five years prior to the appellant opening the Pitstop Café. The appellant has not appealed under ground (d) and from the evidence provided, it appears very unlikely that the appellant would be able to show the portable building, decking platform and enclosure have been substantially completed for a period of at least four years. Consequently, I consider the enforcement notice can be corrected to refer to four years in relation to the operational development, without causing injustice to either party.

13. The appellant states that they instructed Scottish Power to install electricity to the site in 2020 and United Utilities to provide a water supply. I saw that some sort of utilities box, constructed in buff brick, with a flat felt roof has been erected next to the portable building. An area of concrete also appears to have been laid. From the evidence provided and from my inspection of the site, it appears that hardcore has also been laid, upon which the portable building, decking platform and enclosure sits. From the evidence before me, it appears likely that these works have been carried out to facilitate the material change of use of the land.
14. The Council makes clear in its statement of case that the purpose of the notice is to remedy the breach by discontinuing the unauthorised use of the land as a café and by restoring the land to its condition before the breach took place. However, the notice does not require the land to be restored to its condition before the breach took place, it simply requires the cessation of the use and the removal of the portable building and associated decking platform, enclosures and tables.
15. Where an enforcement notice is issued in respect of a material change of use, and works were carried out to facilitate the material change of use, the enforcement notice may require that the ancillary works are removed in order that the site is restored to its previous condition and the breach is remedied.
16. Section 73(11) of the Act provides that where an enforcement notice in respect of any breach of planning control could have required buildings or works to be removed or any activity to cease, but does not do so, and all the requirements of the notice have been complied with then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works, or as the case may be the carrying out of the activities.
17. While it is not clear from the evidence what extent of works have been carried out to facilitate the appeal scheme, from the evidence provided it seems likely that the installation of services, including the buff brick building, were installed to facilitate the material change of use. Furthermore, I consider it highly likely the laying of concrete and hardstanding was also carried out to facilitate the material change of use. Were I to uphold the notice, planning permission would be granted for those works which the notice could have required to be removed but did not do so.
18. I have considered whether it would be possible to correct the notice to require that the land is restored to its condition prior to the breach, however, this would make complying with the requirements more onerous, which would cause injustice to the appellant. I do not consider the notice to be a nullity, since the breach and requirements are broadly stated. Nevertheless, for the reasons given above, I find the enforcement notice is invalid beyond correction.

Conclusion

19. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity 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.

20. In these circumstances, the appeal on the grounds set out in section 174(2)(a) 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.

M Savage

INSPECTOR