



Appeal Decision

Inquiry held on 12 and 13 March 2024

Site visit made on 11 March 2024

by R Hitchcock BSc(Hons) DipCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09th May 2024

Appeal Ref: APP/V2255/C/21/3287862

Land North of Perry Leigh, Grove Road, Selling, Kent ME13 9RN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act).
 - The appeal is made by Mr Brian Macey against an enforcement notice issued by Swale Borough Council.
 - The notice was issued on 25 October 2021.
 - The breach of planning control as alleged in the notice is 'Without planning permission the material change of use of the Land from the keeping and grazing of horses to a mixed use of the Land for the keeping and grazing of horses and the stationing of storage containers'.
 - The requirements of the notice are to:
 - (i) Cease the mixed use of the Land for the keeping and grazing of horses and the stationing of storage containers on the Land.
 - (ii) Remove all storage and/or shipping containers from the Land.
 - The period for compliance with the requirements is: 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (f) 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.
-

Decision

1. The enforcement notice is quashed.

Preliminary Matters

2. Prior to the Inquiry a case management conference (CMC) took place on 6 February 2024. No evidence was heard at that time. At the meeting it was agreed, in the interests of clarity and interpretation, that a pre-Inquiry site visit should take place to view the Land and surrounds, and the content of the various storage containers and a stable building on the site. The visit subsequently took place on the afternoon of 11 March 2024 accompanied by representatives of both main parties. No evidence was heard on site.
3. The same site visit was also used to conduct an assessment of matters relevant to a second appeal, Ref. APP/V2255/X/24/3336828, made by the appellant under the written representations procedure. That appeal relates to the Council's non-determination of an application for a Lawful Development Certificate for an Existing Use or Operation or Activity (LDC). The LDC sought confirmation of the commencement of planning permission Ref. 19/500224 for the erection of a single storey storage building on the Land within the specified time limit. It is part of the appellant's ground (f) argument in this appeal that

this building can be relied upon in consideration of any alternative requirement to that specified in the Notice in remedying the breach of planning control.

4. Aside from the coincidence of the site visit, the main parties were advised at the CMC that any determination reached in either appeal would be considered on the merits of the respective evidence submitted, without prejudice to the other. I have proceeded accordingly.

The Notice

5. Section 176 of the Act requires me to consider the status of the enforcement notice and whether any defect, error or misdescription could be corrected, or its terms varied, without injustice to the appellant or the local planning authority.
6. The allegation in the Notice insofar as it relates to the 'stationing of storage containers' is imprecise. It does not provide sufficient clarity as to the exact nature of the mixed use alleged. On 14 June 2023, the Inspectorate wrote to the Council seeking clarification on this matter. On 15 June 2023, the Council clarified that the various storage containers were used 'for the storage of machinery and materials associated with the paddocks and pallet business.'
7. At the Inquiry, there was no dispute between the main parties that the Notice could be amended by adding the clarification that the Council had suggested without injustice. Subject to substituting 'the paddocks' for 'the keeping and grazing of horses', the parties were happy to proceed in the appeal. In its effect, I heard at the Inquiry that the Notice is intended to attack an alleged storage use that had expanded from an incidental scale to become a primary use in its own right; a use that is facilitated by the containers.
8. At the CMC I had requested that parties review the content of the Notice and the potential for hidden ground (b) or (c) appeals with particular regard to the uses taking place on the site owned by the appellant. This included review of their positions on the relevant planning unit/s, the nature of any uses taking place on the site at the time the Notice was served – whether they were primary or incidental/ancillary uses, and whether the mixed-use allegation in the Notice was then correct. The appellant subsequently only sought to make out a ground (c) in addition to the other submitted grounds of appeal.
9. The Land subject of the Notice forms only a part of the appellant's site. Although it serves all parts of the site, the access track and its fringes leading from Grove Road lie outside of the Land identified in the Notice. The excluded part coincides with an area that benefits from a Certificate of Lawfulness (ref. 16/502524/LDCEX) (the 2016 LDC) for use of land for storage of pallets.
10. In consideration of an alleged material change of use of land, Bridge J in *Burdle*¹ highlighted 3 broad categories of distinction in considering the relevant planning unit. These are:
 - 1) a single PU where the unit of occupation is used for one main purpose and any secondary activities are incidental or ancillary;
 - 2) a single PU that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and

¹ *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

- 3) the unit of occupation comprises two or more physically separate areas that are occupied for different and unrelated purposes.
11. Bridge J went on to state that 'It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally'.
12. I heard at the Inquiry that it was the Council's position that the 2016 LDC had the effect of creating a separate planning unit for the storage of pallets. It considered that the pallet storage use was physically and functionally separate from the alleged uses taking place on the main part of the site at the time that the Notice was served.
13. However, the application for the 2016 LDC was narrowly defined. The storage element of the pallet business is only a part of that land use. It does not account for the primary function and operational element of making or recycling of pallets, nor the associated storage of tools, vehicles, trailers, machinery and materials to realise it.
14. At the appeal the Council contended that the pallet storage was largely confined to the access area at the time the Notice was served. However, their earlier clarification, that the nature of storage within the containers relates to parts of the pallet business, effectively confirms that use's operation on the wider site when the Notice was served. This is consistent with the appellant's evidence at the Inquiry which implied that the pallet business had continuously persisted on the appeal site since 1991.
15. Despite some conflict with the appellant's claims of the site's use made in an unsuccessful application for an LDC confirming lawful equestrian and storage uses in 2019, I find the Council's view that the storage of pallets defines the extent of the pallet business to be misplaced. The 2016 LDC only reflects a lawful status of the described activity at a pinpoint in time.
16. Having regard to the principles set out in *Burdle*, the evidence relevant to the date the Notice was issued, and that there is little physical separation between the pallet business and equine uses, it follows that the entirety of the site should be subject to consideration as a single mixed use planning unit. Furthermore, it is established in caselaw that in those circumstances it is not open to the Council to decouple the uses taking place within it². Accordingly, regardless of its lawfulness or otherwise, I find that the absence of reference to the primary use of a pallet business as an element of the alleged mixed use is a flaw in the Notice, as is the exclusion of the access land.
17. At the Inquiry the main parties approached the correction of the Notice in a very constructive way. Notwithstanding, I am required to consider whether any necessary correction or variation would cause injustice to the main parties in the appeal.
18. The inclusion of an additional use in the allegation could lead to either a degree of under-enforcement or an effective confirmation of lawfulness without the main parties (or others) having fully made their cases in the light of all relevant facts and considerations. Although I heard widened arguments about uses taking place on the site at the Inquiry, this did not necessarily extend to

² *R (oao East Sussex CC) v SSCLG & Robins & Robins* [2009] EWHC 3841 (Admin)

consideration of such matters as breaks in use (or mixed use/s) or other uses that might cause a change to the mixed use on an extended site, for example.

19. In order to assess whether the character of the use of land has occurred, it is necessary to know what the former use/s is/are, and the extent to which any operations or uses are incidental. Where an enforcement notice omits part of a mixed use, it will inevitably affect both the fact and degree assessment as to the extent to which any storage might be deemed to be incidental (or a primary use) and the detail of the cases made out by the parties in the appeal as to whether a material change of use has actually occurred, or not. As such, it could affect the cases made in relation to claimed fallback position/s. Moreover, a change to the allegation would inevitably impose limits on the ground (a) appeal and the deemed application for planning permission.
20. An extension of the site could lead to the alternative use of the access land with its own planning implications. This would be without opportunity to make representation on effects arising from the combined mixed use or to consider if any means of mitigation in that location are appropriate or effective and could be legitimately secured by planning condition, for instance.
21. A correction of the allegation would require a corresponding correction to the requirements in the Notice. It could make the requirements more onerous to comply with. In the case circumstances, rather than requiring a blanket removal of 'all storage and/or shipping containers' (itself imprecise), as set out above, it would require clear distinction between any incidental elements and those forming an alleged distinct primary use. As those arguments would be affected by reference to the wider pallet business, including the storage on the access, the change in the allegation would potentially cause significant prejudice to the parties' cases.
22. Taking all of the above together, I find that the required corrections to the Notice would be too numerous and wide-ranging. My duty to have regard to potential injustice leads me to the conclusion that the Notice should be quashed.

Conclusion

23. For the reasons given above, I conclude that the enforcement notice does not address the correct planning unit, nor specify with sufficient clarity the alleged breach of planning control. Furthermore, I am unable to make the numerous necessary corrections to the Notice without them resulting in injustice to any party. The enforcement notice is invalid and will be quashed.
24. It is open to the Council to serve a further notice which clearly sets out the nature of the breach and the requirements, should it consider it expedient to do so, subject to the provisions of s171B(4) of the Act.
25. In the circumstances, the appeals on the grounds (a), (c), (d), (f) and (g) set out in s174(2) of the Act and the application for planning permission deemed to have been made under s177(5) of the Act do not fall to be considered.

R Hitchcock INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Robin Green	Counsel
Brian Macey	Appellant
Victor Hester	Planning Consultant, VLH Associates

FOR THE LOCAL PLANNING AUTHORITY:

Giles Atkinson	Counsel
Paul Gregory	Area Planning Officer, Swale Borough Council

INTERESTED PARTIES:

Robin Gardiner	Resident
Andrew Rodgers	Resident
James Gavin	Resident