



Appeal Decisions

Site visit made on 30 April 2024

by Felicity Thompson BA(Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 July 2024

Appeal A Ref: APP/T5720/C/23/3316094

Appeal B Ref: APP/T5720/C/23/3316161

Land at 129 Pelham Road, Wimbledon, London SW19 1NZ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended).
 - Appeal A is made by Mr Michael Healey of Normic Development Co. Ltd against an enforcement notice issued by the Council of the London Borough of Merton.
 - Appeal B is made by Mr Xhevat Bafcari against an enforcement notice issued by the Council of the London Borough of Merton.
 - The notice was issued on 6 January 2023.
 - The breach of planning control as alleged in the notice is without planning permission, the unauthorised material change of use of the Land from ancillary car parking for use class E to commercial car park (sui generis).
 - The requirements of the notice are:
 - (a) To permanently cease the use of the land as a commercial car park (sui generis).
 - (b) Permanently remove all paraphernalia relating to the new car park such as (but not limited to) advertising boards and directional signs.
 - (c) Permanently remove from the Land all materials, fixtures, fittings and debris associated in compliance with the works listed in (a) and (b) above.
 - The period for compliance with the requirements is one month.
 - The appeals are proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 (as amended).
-

Decision

1. The enforcement notice is quashed.

Reasons

The planning unit

2. Whilst it is not essential for an enforcement notice to clearly set out what the planning unit is, where there is a dispute as to whether a material change of use has occurred, it is first necessary to ascertain the correct planning unit, and the present and previous primary (as opposed to incidental) uses of that unit.
3. It is an established principle that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes; the concept of physical and functional separation is key.
4. The land outlined in red on the plan attached to the enforcement notice, includes an office at 129 Pelham Road and several lock up garages. At my visit I also observed what appeared to be tradespersons loading/unloading materials into a garage on the land. These uses use the same access as the car park and

are therefore physically connected with the car park use. Consequently, as a matter of fact and degree, it appears the land identified in the notice is in a mixed use, and the notice does not describe all the components of the mixed-use taking place on the land.

The allegation

5. The allegation should refer to all the components of the mixed use even if only one is required to cease. This is because, where there is a mixed use, it is not open to the Council to decouple elements of it; the use is a single mixed use with all its component activities. Even if the additional components are lawful, the enforcement notice should be corrected, if possible, to describe the mixed use properly.
6. Moreover, whilst not necessary, it is better for an enforcement notice alleging a material change of use to recite the previous use, to make it clearer why the Council considers there has been a material change of use.
7. The allegation refers to a material change of use from ancillary car parking for Use Class E¹. The allegation should specify the previous primary use(s) of the land, not reference a use class or ancillary uses, since an ancillary use is usually part of the main use. Moreover, class E includes various uses which it appears, based on the evidence, the Council do not consider the car parking has been ancillary to.
8. In submissions the Council referred to the land having been used as ancillary staff car parking for surrounding office(s) and for the parking of cars relating to a workshop/garage car repair use however, it is not clear what the Council consider the primary and lawful use(s) of the land to be.
9. I sought the Council's views about this and what other uses are taking place on the land, whether they are primary or incidental uses, how the notice should be corrected, and if this could be done without injustice to either the appellant or Council. No response was received.
10. I have a duty to get a notice in order if I can. Pursuant to section 176 of the Act I have power to correct any defect, error or mis-description provided I am satisfied there will be no injustice to either party.
11. It may have been possible to correct the allegation to delete what the material change of use is alleged to be from. However, an enforcement notice cannot require a lawful activity to cease. Since it is not clear what other uses are taking place and whether they are lawful, were I to correct the allegation to include the uses identified above, but not the requirements, it would result in deemed planning permission being granted by virtue of section 173(11) for those additional uses if the requirements are complied with. This would cause the Council injustice.
12. If I were to correct the allegation and requirements, this would expand the allegation and requirements and therefore the scope of the enforcement notice, making it more onerous to comply with, thereby causing injustice to the appellant. Moreover, a full description of the alleged mixed use may have changed the appellants case on grounds (b) and (c) and could have given rise to an appeal on other grounds.

¹ The Town and Country Planning Use Classes Order 1987 as amended (UCO)

13. Accordingly, I do not consider that correcting or varying the enforcement notice is possible without causing injustice. Therefore, it should be quashed as inaccurate and incapable of correction without injustice to the Council or the appellants. Since this is a case where the Council have misdescribed the alleged breach, they may be able to issue another enforcement notice in exercise of their 'second bite' powers under section 171B(4).

Conclusion

14. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control. 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.
15. In these circumstances, the appeals on the grounds set out in section 174(2) (b) and (c) of the 1990 Act (as amended) do not fall to be considered.

Felicity Thompson

INSPECTOR