



Appeal Decision

Site visit made on 28 May 2024

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 August 2024

Appeal Ref: APP/N4205/C/23/3328666

Land to the east of 2 Westland Avenue, Farnworth, Bolton

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Zara Hussain against enforcement notices issued by Bolton Metropolitan Borough Council.
- The notices were issued on 26 June 2023.
- The breach of planning control as alleged in the notices is:
 - (A) The material change of use of the site to use for the storage of motor vehicles, motor vehicle parts and a portable building (numbered 089595/03419087 - the Material Change of Use Notice); and
 - (B) Without planning permission, the erection of metal palisade fencing along the southern and western boundaries of the site (numbered 089595/03419082) the Operational Development Notice).
- The requirements of the notices are:
 - In respect of the Material Change of Use Notice:
 - i. Cease to use the land for the storage of motor vehicles and motor vehicle part; and
 - ii. Cease to use the land for the storage of a portable building.
 - In respect of the Operational Development Notice:
 - Dismantle and permanently remove from the land the metal palisade fencing from the southern and western boundaries of the site.
- The periods for compliance with the requirements are: 90 days (in respect of both the Material Change of Use Notice and the Operational Development Notice).
- The appeal is proceeding on the grounds set out in section 174(2)(b), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 (as amended).

Decision

Material Change of Use Notice:

1. The enforcement notice is quashed.

Operational Development Notice:

2. It is directed that the enforcement notice is varied at section 5 by:
 - the deletion of '90 days' and its substitution with '6 months' as the time for compliance.
3. Subject to the variation above, the appeal is dismissed and the enforcement notice is upheld.

Procedural Matters

4. The appeal is against two enforcement notices: a notice alleging the material change of use of the site to use for the storage of motor vehicles, motor vehicle parts and a portable building (the Material Change of Use Notice) and the erection of metal palisade fencing along the southern and western boundaries of the site (the Operational Development Notice).

5. Although two enforcement notices have been issued at the site, the appeal has been registered under a single reference number by the Planning Inspectorate. Nevertheless, since it is clear from the appeal that both notices are under consideration, I shall consider both notices. I shall distinguish between the two notices by referring to them as the 'Material Change of Use Notice' and the 'Operational Development Notice'.
6. Although the appellant has written information in the appeal form against ground (a), they have not pleaded ground (a) and the fee was not received within the specified period. Planning merits do not, therefore, fall to be considered.
7. The appellant suggests the plan does not reflect the true site area, including a portion purchased from Bolton At Home, a Bolton MBC company and that the address given in the notice is wrong, does not refer to the correct postal address or carry a postcode. However, the enforcement notices do not have to include the entire area within the appellant's ownership. While the enforcement notices do not include a postcode, it is clear from the four corners of the notices which land they relate to. I see no flaw in the notices in this regard.

Matters concerning the notice: Material Change of Use Notice

8. The Material Change of Use Notice alleges 'the material change of use of the site to use for the storage of motor vehicles, motor vehicle parts and a portable building.' The placing of a portable building on land may in some cases be part and parcel of a use of land or indicative of a material change of use, for example, where it is being used for the storage of portable buildings. However, the setting up of such structures is generally regarded as a building operation.
9. 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.'
10. 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 portable building is of sufficient size to be of significance in terms of its visual impact and is likely to remain in place for sufficient time to have the quality of permanence.
11. Although the building did not appear in use at the time of my visit, items were stored within it, suggesting the building has been placed there in connection with the use of the site for the storage of motor vehicles and vehicle parts, rather than for the storage of the building itself. As a matter of fact and degree, I consider it is a building for the purposes of the Act.
12. I have considered whether it would be possible to correct the notice to refer to a building rather than a use of land. However, while an enforcement notice may require ancillary or incidental works which were carried out to facilitate a material change of use to be removed, the notice does not require removal of the building.

13. Section 176(11) of the Act provides where an enforcement notice in respect of any breach of planning control could have required any 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.
14. However, since I have found the siting of the portable building to be operational development rather than a use of land, it would be necessary to include a requirement to require its removal. Were I not to include a requirement to remove the building, given the provisions of section 176(11), it would be granted planning permission. This is clearly not the Council's intention and so correcting the notice in this way would cause the Council injustice.
15. The Council suggests communication with the appellant prior to serving the enforcement notice made it clear that planning permission was required for, amongst other things for the portable building and that the appellant applied for retention of the portable building. However, the requirements must be clear from the four corners of the notice.
16. If I were to correct the notice to include a requirement to require removal of the building, this would make the notice more onerous to comply with and would cause the appellant injustice. Thus, for the reasons given above, I find the Material Change of Use Notice is invalid beyond correction and should be quashed.
17. Since the material change of use notice is to be quashed, I shall limit my consideration of the following grounds of appeal to the Operational Development Notice.

Ground (e)

18. An appeal under ground (e) is made on the basis that copies of the enforcement notice were not served as required by section 172. Section 172(2) of the Act states that a copy of an enforcement notice shall be served (a) on the owner and on the occupier of the land to which it relates; and (b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.
19. The appellant suggests that Bolton At Home were not served, as vendors of part of the site. The Council states it carried out a Land Registry search and identified that Bolton at Home had an interest in the land prior to the service of the enforcement notices and so served it with two enforcement notices. The Council has provided a letter, dated 26 June 2023, which is addressed to Bolton at Home Limited, and which indicates it was sent by recorded delivery.
20. Section 329(3) of the Act provides that where (a) the notice or other document is required to be served on or given to all persons who have interests in or are occupiers of premises comprised in any land, and (b) it appears to the authority required or authorised to serve or give the notice or other document that any part of that land is unoccupied, the notice or document shall be taken to be duly served on all persons having interests in, and on any occupiers of, premises comprised in that part of the land (other than a person who has given to that authority an address for the service of the notice or document on him)

if it addressed to “the owners and any occupiers” of that part of the land (describing it) and is affixed conspicuously to some object on the land.

21. The Council state that copies of the enforcement notices were also posted on the site on 28 June 2023. I have been provided with photographs of the notices, which show they were affixed to the palisade fencing. From the evidence before me, therefore, I consider that copies of the notice were served, as required by section 172 of the Act and so the appeal under ground (e) must fail.

Ground (b)

22. An appeal under ground (b) is made on the basis that the matters stated in the notice as constituting a breach of planning control have not occurred. The appellant states that the site was derelict and *Sui Generis* and that the use was not defined other than a small sold as residential land by Bolton At Home, a branch of Bolton MBC.
23. With respect to the palisade fencing, I saw that palisade fencing has indeed been erected along the southern and western boundaries of the site. The breach of planning control has therefore occurred as a matter of fact and the appeal under ground (b) must fail.

Ground (d)

24. An appeal under ground (d) is made on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters stated in the notice. Since the enforcement notice was issued on 26 June 2023, the appellant will need to show, on the balance of probabilities, that the fencing was substantially completed on or before 26 June 2019.
25. The appellant states that no enforcement action could be taken until the outcome of a validated planning application was decided. However, the Council is not prevented from taking enforcement action because a planning application has been submitted.
26. The Council has provided photographs which show that the fencing was not in situ in October 2014. While this is well before 26 June 2019, in an appeal under ground (d), the burden of proof is firmly on the appellant. The appellant has provided no evidence to show when the fencing was erected and so it has not been shown, on the balance of probabilities, that the fencing was substantially completed on or before 26 June 2019. The appeal under ground (d) must therefore fail.

Ground (f)

27. An appeal under ground (f) is made on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters, or as the case may be, to remedy any injury to amenity which has been caused by any such breach. Since the enforcement notice requires the fencing to be removed, I find the purpose of the notice is to remedy the breach.

28. No lesser steps have been put forward as part of this appeal. Rather the appellant's case appears to be that they would like to discuss remedial conditions to allow the use (and presumably the fencing) to remain for a temporary period, through the use of conditions. However, there is no appeal under ground (a) and I am therefore unable to consider the planning merits of such a proposal.
29. Notwithstanding the above, I have a duty to consider whether there is any obvious alternative or lesser step which would achieve the purposes of the enforcement notice with less cost and disruption. The Town and Country (General Permitted Development)(England) Order 2015 (as amended)(the GPDO), Schedule 2, Part 2, Class A, permits the erection of a fence up to 1m above ground level where it has been constructed adjacent to a highway used by vehicular traffic and 2m where it is not adjacent to a highway used by vehicular traffic.
30. While permitted development rights cannot be applied retrospectively to development already carried out, were I to uphold the notice, it would be possible for the appellant to erect another section of fence up to 1m in height above ground level where it is adjacent to the highway and up to 2m where it is not adjacent to the highway.
31. I am mindful that the enforcement regime is intended to be remedial rather than punitive. However, the appellant has given no indication that, were the enforcement notice to be upheld, they would seek to re-erect the fencing. The photographs provided by the Council show that the site was not previously bound by fencing along Westland Avenue and wooden fencing to the west of the site remains *in situ*, providing delineation between No 2 Westland Avenue and the appeal site.
32. The appellant has erected palisade fencing up to around 2.4m in height, which is generally used to secure a site. Whether or not the Council decides to re-issue the Material Change of Use Notice under section 171B(4), reducing the fence to 1m in height is unlikely to provide much security. As such, I consider it unlikely the appellant would choose to erect fencing up to 1m in height (or 2m where not adjacent to the highway) were I to uphold the notice.
33. Requiring the removal of the fencing will remedy the breach of planning control. In my view the steps do not exceed what is necessary to remedy the breach. Thus, the appeal under ground (f) fails.

Ground (g)

34. An appeal under ground (g) is made on the basis that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.
35. The appellant requests 365 days, as some vehicles are the subject of legal action, and to move them before authority from solicitors or/and insurance companies could lead to legal action in all directions. While the appellant's arguments under this ground concern the use of the land, rather than the fencing, the appellant is likely to wish to ensure that the site is secure while the vehicles are parked within the site.
36. While the Council may choose to re-issue the material change of use notice, I do not know when it is likely to be issued. As such, I consider it would be

reasonable to extend the period for compliance with the notice to 6 months to ensure vehicles within the site are secured. Thus, the appeal under ground (g) succeeds to that extent.

Conclusions

Material Change of Use Notice:

37. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control or 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.
38. In these circumstances, the appeal on the grounds set out in section 174(2)(b), (d), (e), (f) and (g) of the 1990 Act (as amended) do not fall to be considered.

Operational Development Notice:

39. For the reasons given above, I conclude that the appeal under grounds (b), (d), (e) and (f) should not succeed. With respect to the appeal under ground (g), I conclude that the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to that extent.

M Savage

INSPECTOR