
Appeal Decisions

Inquiry Held on 11 March 2024

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 September 2024

Appeal A Ref: APP/Z3635/C/23/3331902

Land at Stanwell Farm, Bedfont Road, Stanwell TW19 7LY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by O'Connor Properties Limited against an enforcement notice issued by Spelthorne Borough Council.
 - The enforcement notice, numbered 22/00257/ENF/A, was issued on 26 September 2023.
 - The breach of planning control as alleged in the notice is the material change of use of the land from open land to use comprising the storage of builders merchants materials in connection with a builders merchants business. Including pallets and scaffolding.
 - The requirements of the notice are:
 - Permanently cease the unlawful use of the land for storage of builders merchants materials, including pallets and scaffolding and remove all such materials from the land including the racking used for this storage
 - Remove all other accumulated materials and restore the land to its previous condition as open land.
 - The period for compliance with the requirements is variously stated as two months and three months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/Z3635/C/23/3331903

Land at Stanwell Farm, Bedfont Road, Stanwell TW19 7LY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by O'Connor Properties Limited against an enforcement notice issued by Spelthorne Borough Council.
 - The enforcement notice, numbered 22/00257/ENF/B, was issued on 26 September 2023.
 - The breach of planning control as alleged in the notice is, without planning permission, the carrying out on land of building, engineering, mining or other operations in particular the erection of a warehouse building and the use of that building on Green Belt land.
 - The requirements of the notice are the demolition of the building and its base hardstanding and the removal of all resultant debris for the site.
 - The period for compliance with the requirements is variously stated as two months and three months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Summary Decisions

Appeal A: No further action is taken

Appeal B: No further action is taken

Application for costs

1. An application for costs was made by O'Connor Properties Limited against Spelthorne Borough Council. This application is the subject of a separate Decision.

Procedural matters

2. Appeal A is against an enforcement notice issued by Spelthorne Borough Council numbered 22/00257/ENF/A. I will refer to this as Notice A.
3. Appeal B is against an enforcement notice numbered 22/00257/ENF/B. I will refer to this as Notice B.

Reasons

4. The modern approach to the question of nullity is to be found in the judgment of the High Court in *Oates v SoCLG and Canterbury*¹, which drew extensively upon the preceding case law on the subject. A number of principles emerge from this judgment, including that the test in relation to nullity is best understood not as one of 'hopeless ambiguity' but rather as a failure to tell the recipient with 'reasonable certainty' what the breach of planning control is and what must be done to remedy it. The judgment in *Oates* also indicates that a degree of uncertainty does not necessarily render a notice non-compliant with statute and that the notice should be read as a whole. Overall, the judgment in *Oates* indicates that the question of nullity should not be approached in a way which is unduly technical or formalistic.
5. I have applied the judgment in *Oates*, together with the other judgments to which I have been referred, to these two enforcement notices. Although there are defects that are common to both notices, it is convenient to consider them separately in the first instance.

Notice A

6. Section 173(1) of the Town and Country Planning Act 1990 (the 1990 Act) requires that an enforcement notice shall state the matters which appear to the local planning authority to constitute the breach of planning control. In this notice, both the breach of planning control and the second of the two requirements are predicated on the term "open land". The appellant criticises the use of this term as being pivotal but not intelligible.
7. As the appellant points out, "open land" is not a use of land. It is therefore not possible for there to be a material change of use from "open land" to the use alleged in the notice or, for that matter, to any other use. Neither is "open land" a specific condition of land.
8. There is no requirement for an enforcement notice that alleges a material change of use of land, as in this case, to identify the last or lawful use². The

¹ *Oates v SoCLG and Canterbury* [2017] EWHC 2716

² *Ferris v SSE* [1989] 57 P.& C.R. 127; [1988] 1 WLUK 778 (QBD)

notice sets out the 'to' use very clearly. An enforcement notice should be read as a whole. Looked at in that way, the recipient of the notice would have been able to understand with reasonable certainty from the wording of the notice what the alleged breach of planning control is.

9. The enforcement notice does include the words "Including pallets and scaffolding" directly after the main description of the breach of planning control that is alleged, but separated from it by a full stop. Although the inclusion of these words was no doubt intended to clarify the breach of planning control, in practice the inclusion of those words as a separate sentence does introduce a degree of uncertainty.
10. The judgment in *Oates* indicates that a degree of uncertainty does not necessarily render a notice non-compliant with statute. In my view, that is the case here. I am satisfied that the notice tells the recipient with reasonable certainty what the alleged breach of planning control is, and therefore complies with Section 173(1) of the 1990 Act.
11. Had the notice not been a nullity for other reasons (see below), I would have corrected the allegation in the notice to omit the words "open land" and "Including pallets and scaffolding" as being superfluous. I would have been satisfied that I could have done so without causing injustice.
12. Section 173(3) of the 1990 Act states that an enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the purposes set out in Section 173(4) of the 1990 Act. The latter include remedying the breach of planning control.
13. The enforcement notice says in terms that the purpose of the notice is to remedy the breach of planning control. The requirements of the notice must therefore be read in the context of that clear purpose. That would have been clear to the recipient on 'opening the envelope', so to speak.
14. The requirement set out under the second bullet point in Schedule 4 of the notice includes to restore the land to its previous condition *as open land* (emphasis added). This reflects, but does not follow exactly, the wording in Section 173(4)(a) of the 1990 Act. The Courts have held that the oft-used standard wording 'to restore the land to its condition before the development took place' is sufficient for validity purposes. In that respect, it is axiomatic that in many cases the landowner will be the person with the best knowledge as to what that previous condition was.
15. Where the term "open land" appears in the breach of planning control alleged in the notice, it clearly refers (erroneously) to a use of the land. However, the use of the term "open land" in the requirement at Schedule 4 does not bear the same interpretation. The term "open land" in Schedule 4 must be read in the context of the requirements as a whole. These include, under the first bullet point, to permanently cease the unlawful use of the land for storage of builders merchants materials and remove all such materials from the land³. The cessation of use alleged in the notice is therefore already addressed in the notice before the term "open land" is encountered.

³ Having regard to the provisions of Section 181(1) of the 1990 Act, which states that compliance with an enforcement notice shall not discharge that notice, the word 'permanently' is unnecessary in this context.

16. Furthermore, the words “open land” in the requirement immediately follows the words “restore the land to its previous condition”, and must be read in conjunction with those words. The construction of Section 173(4)(a) of the 1990 Act is again relevant here: by discontinuing any use of the land or by restoring the land to its condition before the breach took place (emphasis added). Consequently, Section 173(4)(a) of the 1990 Act itself identifies a distinction between the cessation of a use of land and the restoration of the condition of that land. The association of the term “open land” in the notice with restoring the land to its previous condition suggests that the Council intended the term to mean something other than the use of that land.
17. There is also a more straightforward, and in some respects more obvious, interpretation of the term “open land”. The Oxford English Dictionary defines ‘open’ as meaning exposed to view and, in connection to land, as not covered with buildings or trees. On that interpretation, the term “open land” becomes merely a description of that land: in other words, whether or not there are unobstructed views across the site. It is perfectly possible for a reasonable person to interpret the term “open land” in that way. In fact, I interpreted it that way on first reading the notice.
18. Indeed, the Council has confirmed that the reference to open land in the notice is simply to the empty site that (in the Council’s view) existed prior to the use alleged in the notice and to which the Council required the condition of the site to return. Nothing more and nothing less. That was intention in drafting the notice, both in terms of the alleged breach of planning control and the requirements to comply with it.
19. The appellant appears to interpret the term “open land” as connoting openness in the meaning of Green Belt policy: in other words, undeveloped. By linking the term “open land” with the concept of openness for the purposes of Green Belt policy, the appellant’s interpretation is somewhat technical and formalistic. I recognise that the potential to interpret the term “open land” in more than one way introduces a degree of uncertainty to the notice. In that respect, the notice is less than clear. However, I consider that this degree of uncertainty falls within the range contemplated in *Oates* and does not render the notice non-compliant with Section 173(3) of the 1990 Act. I am satisfied that, when read as a whole, the notice tells the recipient with reasonable certainty what must be done to remedy the breach of planning control that is alleged.
20. Again, had the notice not been a nullity for other reasons, I would have varied the requirement in the second bullet point of Schedule 4 of the notice to omit the term “as open land”. I would have been satisfied that I could have done so without causing injustice.
21. Section 173(9) of the 1990 Act states that an enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased. Uniquely, in my experience, the period for compliance appears in two different places in the notice: firstly in the covering letter, and again in Schedule 4 of the notice. The difficulty is that the period for compliance stated in the covering letter is two months, whereas the compliance period stated in Schedule 4 of the notice is stated as three months.
22. There is no doubt that having two different compliance dates in the notice would have led to confusion for the recipients. The question of nullity applies upon first receipt of the notice; on ‘opening the envelope’. At that point, the

recipients could not have known with reasonable certainty with which of the two different periods of compliance they would need to comply. In that sense, the notice would not tell the recipients from within the four corners of the document both what the breach of planning control is, what must be done to remedy it and crucially by when. Given that the recipients could be liable for prosecution if the notice was not complied with within the stated period(s) for compliance, that degree of uncertainty could have had serious consequences. It therefore goes well beyond the degree of uncertainty contemplated in *Oates*.

23. I have considered whether a pragmatic approach could be adopted whereby the shorter of the periods of compliance could be struck out, and thereby giving the appellant the benefit of the doubt by leaving the longer period for compliance as the sole period with which they must comply. However, because the degree of uncertainty caused by two different dates renders the notice a nullity, that is not an option open to me. Accordingly, the notice cannot stand.

Notice B

24. I find nothing in the appellant's complaint that the notice refers to "the carrying out on land of building, engineering, mining or other operations". That is simply a reference to the meaning of development as set out in Section 55(1) of the 1990 Act. The salient point is that the notice then goes on to allege "in particular the erection of a warehouse building". I do not read that as being an example: I read it as specifying the breach of planning control from within the range of the types of development set out in Section 55(1) of the 1990 Act, as referenced in that same sentence. To that extent, it is a helpful clarification. The appellant would have been able to understand with reasonable certainty that element of the allegation.
25. The reference in the notice to the use of that building on Green Belt land does introduce an element of uncertainty. Even so, as a matter of ordinary language, the meaning of those words is clear and intelligible.
26. It is also relevant that Section 75(3) of the 1990 Act states that, if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed⁴. It is settled case law that a use cannot survive the destruction of buildings and installations necessary for it to be carried on. The demolition of the building in compliance with the notice would therefore have brought about the end of the use of that building in any event. In that sense, it matters not that the use of the building is referred to in the allegation albeit, had the notice not been a nullity for other reasons, I would have corrected the notice by omitting the reference to the use of that building on Green Belt land as being superfluous.
27. Consequently, to the extent that there is some uncertainty, the degree of that uncertainty is well within the range contemplated in *Oates*.
28. Similarly, I find nothing in the appellant's complaint about the plan attached to the notice. The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 state at Part 2, Regulation 4 that an enforcement notice issued under section 172 of the 1990 Act shall specify the precise boundaries of the land to which the EN relates, whether by reference to a plan or otherwise. The notice complies with Regulation 4.

⁴ Where there is no planning permission in place, as in this case, I take 'permission' to mean 'use'.

29. The text of the enforcement notice indicates that the building in question is *marked* in blue on the plan attached to the notice (emphasis added). In practice, the building is hatched with diagonal blue lines. Nonetheless, the building marked in blue is the only building shown on the plan that is marked or hatched in blue. Consequently, there can be absolutely no confusion as to which building the notice is attacking or what building needs to be demolished in order to comply with the notice.
30. The appellant considers that the plan is inaccurate and spans two buildings. I am not convinced that is correct. The blue hatching does not fill the entire outline of the building shown on the plan attached to the notice: it stops short of that, approximating to the actual position of the building. But the wider point is that the appellant, being one of the recipients of the notice, is the owner of the land to which the notice relates. It is reasonable to expect the landowner to be familiar with the site, and this building. The notice must be read as a whole, including the written description of the building ("warehouse building") and the plan attached to the notice. Read together, it should have been apparent to any recipient of the notice, and in particular the landowner, which building on the site the notice was attacking.
31. The other points raised by the appellant (the lawful hardstanding and the *Mansi* doctrine) are points that would form grounds of appeal had the notice not been a nullity. In particular, those are matters that would form an appeal on ground (f) as set out in Section 174(2) of the 1990 Act: namely, that the requirements of the notice exceed what is necessary. They do not go directly to the question of nullity.
32. Although I have concluded that the notice is not defective in these respects, or at least could be corrected and/or varied without causing injustice, the notice suffers from exactly the same defects as Notice A in relation to the period(s) of compliance. For the same reasons as in relation to Notice A, the discrepancy between period for compliance of two months stated in the covering letter and the compliance period of three months stated in Schedule 4 of the notice does not comply with Section 173(9) of the 1990 Act. The notice must therefore be considered to be a nullity.

Conclusion

33. I conclude that the Notice A is a nullity and that Notice B is also a nullity. In these circumstances, the appeals on the grounds set out in section 174(2) (a), (c), (d), (e), (f) and (g) of the 1990 Act, and the applications for planning permission deemed to have been made under section 177(5) of the 1990 Act, do not fall to be considered.

Formal Decisions

Appeal A (APP/Z3635/C/23/3331902)

34. Since Notice A is found to be a nullity, no further action will be taken in connection with the appeal. In the light of this finding the Local Planning Authority should consider reviewing the register kept under section 188 of the 1990 Act as amended.

Appeal B (APP/Z3635/C/23/3331903)

35. Since Notice B is found to be a nullity, no further action will be taken in connection with the appeal. In the light of this finding the Local Planning Authority should consider reviewing the register kept under section 188 of the 1990 Act as amended.

Paul Freer
INSPECTOR

APPEARANCES

For the appellant:

Miss Melissa Murphy

Of King's Counsel

For the Local Planning Authority:

Mr Roderick Morton

Solicitor, Ivy Legal

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1/ Signed and dated Statement of Common Ground
- 2/ Legal submissions re: Nullity on behalf of the appellant.
- 3/ Council's submissions on Nullity, with copies of legal authorities