



Appeal Decision

Hearing held on 7-8 August 2024

Site visit made on 7 August 2024

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 September 2024

Appeal Ref: APP/J1535/C/22/3297662

Land and Buildings at Blunts Farm, Coopersale Lane, Theydon Bois, Epping CM16 7NT, shown edged black on the attached plan

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
 - The appeal is made by Theydon Farm Units Ltd against an enforcement notice issued by Epping Forest District Council.
 - The notice was issued on 24 March 2022.
 - The breach of planning control as alleged in the notice is:
 - (a) Without planning permission the material change of use of the site and buildings to commercial and business uses.
 - (b) Without planning permission the laying of road planings to create an accessway, the laying of hard surfacing on the site and construction of a breeze wall over 2 metres in height.
 - The requirements of the notice are:
 1. Cease the commercial use of the site and the buildings numbered 3, 4, 5, and
 2. 6 as shown on the attached plan outlined in black.
 3. Remove all the road planings that create a roadway and hardstanding as indicated by the hatched area on the attached plan outlined in black.
 4. Remove the breeze block wall as indicated at 8 on the attached plan outlined in black.
 5. Remove all the resultant debris from the land arising out of 2 & 3 as above.
 6. N.B. The buildings marked at 1 and 2 are subject to an extant planning enforcement notice. There is currently no planning breach within these units. The building at 7 on the plan has been demolished.
 - The period for compliance with the requirements is: 3 months
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (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.
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Decision

1. The enforcement notice is quashed.

Application for Costs

2. Before the Hearing was closed in writing, an application for costs was made by Theydon Farm Units Ltd against Epping Forest District Council. This application is the subject of a separate Decision.

Preliminary Matter

3. The Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002 make no provision for a Statement of Common Ground (SoCG).

Nevertheless, I was made aware in June 2024 that the main parties intended to provide one. I received a signed copy of the SoCG on 1 August 2024 and on the same day I issued a Pre-Hearing Note and Agenda for the Hearing, taking into account what had been agreed in the SoCG.

Reasons

The Notice

4. Subsection 173(1)(a) of the Town and Country Planning Act states that an enforcement notice shall state the matters which appear to the local planning authority to constitute the breach of planning control. Section 173(2) states that a notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.
5. In respect of the material change in the use of the land and buildings in this case, this is stated in paragraph 3(a) of the enforcement notice. However, the phrase used, "commercial and business uses", is broad and vague. Crucially, I note that it was not informed by any response to a Planning Contravention Notice (PCN) having been issued.
6. A PCN is the statutory tool which allows a local planning authority to require any information they want for enforcement purposes about any operations being carried out; any use of; or any activities being carried out on the land. The absence of a PCN is indicated by the Council's answer to question 13 of the Questionnaire and I checked at the Hearing that this had been answered as intended.
7. The local planning authority need not serve a PCN before considering whether it is expedient to issue an enforcement notice or to take any other appropriate enforcement action. However, I have not been provided with any information which assists me in understanding how the Council arrived at what is stated in paragraph 3(a) of the enforcement notice, such as site visit notes or a report authorising the issue of an enforcement notice, describing what had occurred.
8. Irrespective of any grounds of appeal pleaded by the appellant, I have a duty to get the enforcement notice in order, if I can, drawing on my powers under section 176(1)(a) of the Act. This allows me to correct any defect, error or misdescription in the enforcement notice, if I am satisfied that the correction will not cause injustice to the appellant or the local planning authority. The wording of the allegation is important because the grounds of appeal are assessed against it and the terms of the deemed planning application are derived from it.
9. When the appeal was lodged on 26 April 2022, the appellant provided a document which is referred to as 'Notice of Appeal' (NoA). Paragraph 5 of that document states:

"The buildings on the site which are the subject of the EN are currently used for commercial and business uses. Three buildings are used for car repairs and car wrapping (a business use). The remainder of the buildings on site which are the subject of the EN are used for storage or distribution. As part of the ground (a) appeal (set out below), it is proposed that all of these buildings will be restricted by planning condition (within the broad class of commercial and business uses specified in the EN) to storage and distribution uses."

10. The appeal site is a complex of several former agricultural buildings subdivided into different units, with a shared access and parking arrangements. The main parties agreed at the Hearing that the appeal site constitutes a single planning unit and having inspected the site I have no reason to disagree.
11. At the Hearing I sought clarity from the main parties on whether I should correct the allegation in paragraph 3(a) of the enforcement notice to reflect what is stated by the appellant in paragraph 5 of the NoA. At this point, the Council adopted the position that the unauthorised use targeted by the notice is a mixed use of car repairs, car wrapping and storage and distribution. In other words, there are two or more primary (or main) uses existing within the same planning unit and one is not incidental to the other. This is consistent with my observations at my site visit and I am satisfied that paragraph 3(a) of the notice infers that the breach includes a mixed use.
12. However, the appellant's position is that storage and distribution is the 'predominant' use (although this is not what is suggested by the wording of paragraph 5 of NoA). Moreover, the only way the breach could be a storage and distribution use is if the car repairs and car wrapping were incidental components of the primary use, that primary use being storage and distribution. But nothing has been provided which satisfies me this is the case, bearing in mind that in an enforcement appeal the burden of proof is on the appellant and bearing in mind that activities should not be regarded as incidental simply because they are small in relation to others, the appellant having indicated that the car repairs and car wrapping are very much a 'minority' of the primary use for storage.
13. So on the balance of probability, based on all the evidence before me, the material change of use which has occurred in this case is a mixed use, comprising the components that the appellant set out in paragraph 5 of the NoA. Mindful of the test of injustice set out in section 176(1) of the Act, at the Hearing I canvassed the views of the parties on whether correcting the alleged material change of use to a mixed use comprising car repairs, car wrapping and storage and distribution would cause injustice.
14. The Council's response was that the policy considerations remain consistent, such that injustice would not be caused. However, from all the discussion at the Hearing, as a matter of my planning judgement, it seems that the position adopted by the Council at the Hearing (that what is before me is a mixed use of car repairs, car wrapping and storage and distribution) affects how the appellant would argue their case, for two principal reasons.
15. First, it means that the appellant's ground (b) appeal, which relates only to the plan attached to the notice and how the land affected by the notice is defined, would also include the claim that the allegation is wrong because (in their view) the breach is a storage and distribution use and the other components are only incidental. Had the appellant known the Council would reach the view that it has, the appellant could have sought to supply relevant evidence of the use, in respect of, when the notice was issued, what activities were primary and what activities were incidental.
16. Second, the appellant's entire ground (a) appeal is predicated on the use being a storage and distribution use. This is a use for which there is said to be a significant need for and planning policy support. These factors are not the same if the use is something materially different.

17. In other words, the appellant's planning merits argument would fundamentally change if I were to correct the notice in the manner now sought by the Council. As the appellant said, their ground (a) appeal could not proceed. As such, the appellant would be at a fundamental disadvantage.
18. The above problems are a direct result of paragraph 3(a) of the enforcement notice being broad and vague, to such an extent that the main parties have interpreted what it means in different ways at different times. A more diligent investigation of the unauthorised use may have ensured that the notice was accurate in this regard and avoided these difficulties.

Other Matters

19. The pursuit of a storage and distribution use for the planning unit would need to be via an application for planning permission to the Council and at the Hearing I heard that there is an application for planning permission for such a use with the Council which is awaiting determination, Ref EPF/1406/22.
20. I appreciate that the appeal parties have waited since April 2022 for the Hearing to take place. But this makes no difference to my conclusion in this case. Moreover, the problem with the notice, explained above, became clear only following discussion at the Hearing and the time taken for the appeal to be decided is not a matter for me to consider in an appeal under section 174.
21. I realise that my conclusion on this appeal means that the breach is not resolved, some considerable amount of time after the notice was issued. But this does not mean that, following diligent investigation, the Council cannot issue a further notice which correctly recites the breach, whether or not planning permission is granted for a storage and distribution use in the meantime.

Conclusion

22. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control.
23. 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.
24. In these circumstances, the appeals on the grounds set out in section 174(2)(a), (b), (d), (f) 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.

L Perkins

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Trevor Dodkins	Phase 2 Planning & Development Ltd
Steve Field	Arden Consulting Engineers
Thomas Hill KC, of counsel	
Phoebe Juggins	Appellant
Daniel Kozelko, of counsel	
Kevin Markey	Arden Consulting Engineers
Samantha Stephenson	Phase 2 Planning & Development Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Ben Atkinson	Epping Forest District Council
Yee Cheung	Epping Forest District Council

INTERESTED PARTIES:

Nigel Abbott	DMH Stallard, on behalf of Olivia Brockway
Olivia Brockway	Local resident
John Warren	Theydon Bois Action Group

DOCUMENTS

1. Appeal Decision Ref APP/J1535/A/13/2201035 dated 14 November 2013
2. Plan for Appeal Decision Ref APP/J1535/A/13/2201035
3. Enforcement Notice Plan overlaid with Land Registry Plan
4. Email from Matthew Lane of Essex Highways dated 3 July 2024
5. Revised Enforcement Notice Plan dated 7 August 2024
6. Edited Statement of Olivia Brockway
7. Aerial Photograph dated 2006
8. Aerial Photograph dated 9 October 2006
9. Aerial Photograph dated 2013
10. Aerial Photograph dated 2018
11. Aerial Photograph dated 2021
12. Appellant's Position in respect of Inspector's Jurisdiction to Allow the Ground (a) Appeal
13. *Ikram v Secretary of State for CLG* [2021] EWCA Civ 2
14. Epping Forest Interim Air Pollution Mitigation Strategy: Managing the Effects of Air Pollution on the Epping Forest Special Area of Conservation dated December 2020