



Appeal Decisions

Site visit made on 20 August 2024

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 September 2024

Appeal A Ref: APP/C3105/C/23/3314954

Appeal B Ref: APP/C3105/C/23/3314955

Land at Station Yard, Station Road, Enslow, Kidlington OX5 3AX

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeals are made by Mr Chris Murphy (Appeal A) and Mrs Sharon Murphy (Appeal B) against an enforcement notice issued by Cherwell District Council.
 - The notice was issued on 15 December 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land to a concrete batching plant and the erection of associated apparatus including a conveyor, hoppers and storage tanks.
 - The requirements of the notice are: 1. Remove all concrete batching equipment from the land, including the conveyor, corrugated sheet enclosure, hoppers and tank storage shown edged in green on the plan attached to the notice. 2. Remove all heavy goods vehicles and plant associated with the unauthorised development from the land, including concrete mixers. 3. Remove all stored aggregates associated with the unauthorised development from the land, including crushed stone, gravel and sand. 4. Permanently cease the use of the land for concrete batching, processing and distribution.
 - The period for compliance with the requirements is six months.
 - The appeals are proceeding on the grounds set out in section 174(2)((b), (c), (d) and (e) of the Town and Country Planning Act 1990 (as amended).
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Decisions

1. It is directed that the enforcement notice be corrected by in paragraph 4 in the first sentence substituting '4 years' with '10 years.' Subject to this correction, the appeals are dismissed and the enforcement notice is upheld.

Preliminary Matters

2. The absence of the date of issue on the enforcement notice does not create uncertainty. The date the notice was issued can be clearly ascertained by reference to the letter that accompanied it.
3. The notice states that the alleged breach of planning control occurred within four years of the date of issue. However, the time limit for taking enforcement action where the alleged breach is the making of a material change in the use of land is ten years, having regard to s171B(3) of the Act. Operational development integral to and solely for the purpose of facilitating a material change of use is also subject to the ten-year time limit.
4. Therefore, I shall exercise the power in s176(1)(a) of the Act to correct the notice to refer to the relevant time limit. There would be no injustice, either to the appellants or the Council, in doing so. There are no implications for the ground (d) appeals. The appellants' case in relation to that ground is largely focussed on the previous, lawful use of the land. They did not seek to argue that the concrete batching plant had been operating for more than four years

before the date the notice was issued, nor is there any firm evidence in that regard.

5. An appeal against the enforcement notice was also made by a different appellant on ground (a)-that planning permission should be granted for the matters stated in the notice, along with ground (g)-that the period for compliance specified in the notice falls short of what should reasonably be allowed. That appeal is the subject of a separate decision¹.

Ground (e) appeals

6. The ground of appeal is that copies of the enforcement notice were not properly served on everyone with an interest in the land. In this and their other grounds of appeal the onus is on the appellants to show why the appeals should succeed, the relevant test of the evidence being on the balance of probability.
7. The appeal site is a substantial area of commercial land and buildings. To the north is the Oxford Canal and to the east the Cherwell valley railway line. The A4095, from which vehicular access to the site is obtained, lies to the south. The notice attacks a material change in the use of the site to a concrete batching plant ('the use').
8. The Act at s172(2) requires a copy of an enforcement notice to be served on the owner and the occupier of the land to which it relates and on any other person having an interest in the land, being an interest which, in the opinion of the Council, is materially affected by the notice. Copies of the notice were served on the appellants, who are the site owners, together with the operators of the use as occupiers.
9. During my visit, I saw that the site forms an enclosed compound in which the buildings are arranged around extensive hard surfaced areas, with a single vehicular access point. The four metal hoppers, conveyor, corrugated metal sheet structure and two cement storage tanks associated with the use are located towards the southern end of the site, along with a portable office building and substantial enclosures containing quantities of sand and aggregates. However, a central portion of the site is clearly part and parcel of the same use. Enclosures containing sand and aggregates are located in this area, along with parked cement mixer lorries, and the hard surface is used for moving materials and for vehicle circulation. Therefore, the use occupies a considerably larger part of the site than that shown on the lease plan supplied by the appellants.
10. When I visited, it was evident that at least two other businesses were operating from land and buildings on the northern part of the site. Nevertheless, few details were supplied concerning any other tenants who occupied parts of the site. Moreover, a planning application made during 2021 for the hoppers, conveyor and storage tanks², suggests that the site was not occupied by other tenants prior to the notice being issued. This is because on the accompanying plan, the extent of the application site closely corresponds to the red edged area on the notice plan. The appellants did not offer any clear and convincing explanation as to why the application plan, which was prepared when the hoppers, conveyor and storage tanks were already in situ, did not accurately reflect the extent of the land occupied in conjunction with the use before the notice was issued.

¹ Appeal Ref: APP/C3105/C/23/3314951

² Council Ref: 21/02214/F

11. Consequently, on the basis of the evidence before me and on the balance of probability, the appellants have been unable to show that there are persons who were not served with copies of the notice as required.
12. Moreover, at s176(5), the Act provides for disregarding a failure to serve copies of an enforcement notice where persons are not substantially prejudiced as a result. The appellants made full arguments during the course of these proceedings as to why their appeals should be allowed, on various grounds and, as noted above, a separate appeal was made on other grounds by a different appellant. There is no firm evidence to indicate that anyone would have made additional arguments in favour of allowing any of the appeals or would have appealed on grounds other than those advanced in any of the appeals, had they been afforded the opportunity to do so. The appellants did not seek to argue that anyone had been prejudiced by not receiving a copy of the notice. It is highly unlikely that any occupier of the site engaged in activity other than the use would be materially affected by the notice requirements.
13. Therefore, even if there had been a failure by the Council in terms of service, I would have concluded that it should be disregarded as no-one has been substantially prejudiced.
14. The ground (e) appeals fail.

Ground (b) appeals

15. The ground of appeal is that the matters alleged in the notice have not occurred as a matter of fact.
16. The appellants did not seek to argue that the use has not occurred, or that the hoppers, conveyor, corrugated metal sheet structure and storage tanks were not in situ, prior to the issuing of the notice. Whether those matters have involved development and if so, whether planning permission is required, falls to be considered in the ground (c) appeals. There is no firm evidence of the site being in a mixed or composite use prior to the notice being issued.
17. The ground (b) appeals fail.

Ground (c) appeals

18. The ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control.
19. The Act at s55(1) defines 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 of use of any buildings or other land. Planning permission is required for the carrying out of any development of land, having regard to s57(1) of the Act.
20. From the details supplied, the planning history of the site can be summarised as follows. Permission was given in February 1983 for change of use of most of the site to a coal and wood yard³. In August 1995, permission was given, partly retrospectively, for change of use of a small part of the site for the storage of fuel, along with erecting an office unit, new warehouse and an extension to an existing warehouse. Conditions attached to the 1995 permission prevent this part of the site from being used for purposes other than that applied for. The main parties agreed that the lawful use of the site is for storage and distribution purposes, falling within Class B8 in Schedule 1 of the Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO). Apart from where the conditions on the 1995 permission apply, there is no sound reason why I should find otherwise.

³ Council Ref: CHS.473/82

21. The use involves more than simply the storage and distribution of a finished product, such as might fall within Class B8. A manufacturing process is undertaken at the site, utilising mechanical equipment including the hoppers, conveyor and storage tanks, in which quantities of raw materials, i.e., powdered cement, sand and aggregates are assembled. These materials along with water and other additives are loaded in the required proportions into concrete mixing lorries, then combined together to create a partly finished product prior to being transported off-site.
22. The foregoing activity falls within the definition of an industrial process set out in Article 2 of the UCO, being '*a process for or incidental to purposes including the making of any article or part of any article and the getting, dressing or treatment of minerals.*' Deliveries to the site of the powdered cement, sand and aggregates, the storage of those materials and the transportation off-site of the part-finished product are all incidental to that process. Use for the carrying on of an industrial process (other than where it can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit) is a general industrial use falling within Class B2.
23. Additionally, the use is not insignificant in scale. On weekdays and on Saturday mornings, lorry loads of concrete are batched at intervals and transported off-site by cement mixer lorries. When deliveries of powdered cement, sand and aggregates are also taken into account, there are likely to be a substantial number of HGV movements to and from the site. There are impacts on residential amenity arising from the use, having regard to noise and disturbance as well as dust emissions. There are also impacts on highway safety arising from the HGV movements, along with visual impacts from the hoppers, conveyor, corrugated metal sheet structure and storage tanks. Therefore, as a matter of fact and degree, the use is materially different in character to a storage and distribution use and more akin to a use falling within Class B2.
24. Changing between different UCO Classes involves a material change of use, falling within the definition of development. No planning permission is granted by any Class in any Part of Article 3, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) for a change of use from Class B8 to Class B2. Furthermore, there is a failure to comply with conditions attached to the 1995 permission. No express permission has been granted for the use.
25. Given the Council's measurements, which were not in dispute, along with my own observations, the hoppers, conveyor, corrugated metal structure and storage tanks are of considerable size. The substantial metal supporting frames are part and parcel of and integral to the hopper, conveyor and storage tank structures. The corrugated metal structure has a metal frame onto which the corrugated cladding has been attached. It is highly likely that all of these structures underwent some form of assembly after being brought to the site. Whilst prefabricated components have clearly been used, it is highly probable that assembling the structures would have involved a significant element of technical expertise. There is little firm evidence of any of the structures being brought to the site in a largely pre-assembled state. The structures have been in the same position for in excess of three years. They are unlikely to be readily capable of being moved without being partially or wholly dismantled, unless perhaps by using specialist equipment, and doing so is likely to be a significant undertaking involving technical input.
26. In addition, the hoppers, conveyor and storage tanks are firmly fixed to the hard surface covering the external parts of the site, by metal bolts in the bases of the supporting frames. The structures are also likely to weigh a considerable

amount, they are connected to services including electricity and water and their physical presence has significantly changed the formerly open appearance of part of the site.

27. Consequently, when applying the three primary tests identified by the Courts⁴ as being decisive of a building-namely size, permanence and physical attachment to the land, as a matter of fact and degree, setting up the structures at the site has involved building operations falling within the definition of development. Article 3(5) of the GPDO disappplies any permission granted by the Order for operational development where, as in this case, it is in connection with an unlawful use. There is no express grant of permission for the structures.
28. A breach of planning control is defined in s171A(1) of the Act as carrying out development without the required planning permission or failing to comply with any condition or limitation to which planning permission has been granted. Therefore, on the balance of probability the appellants have been unable to show that the matters alleged in the notice do not constitute a breach of planning control, the available evidence showing otherwise.
29. The ground (c) appeals fail.

Ground (d) appeals

30. The ground of appeal is that it was too late to take enforcement action against any breach of planning control alleged in the notice.
31. The available evidence suggests that the use commenced in or around early 2021, i.e., well within the period for taking enforcement action in s171B(3) of the Act. The length of time that the previous, lawful use of the site was in operation has little relevance to this ground of appeal.
32. The ground (d) appeals also fail.

Conclusions

33. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with a correction.

Stephen Hawkins

INSPECTOR

⁴*Cardiff Rating Authority v Guest Keens* [1949] 1 KB 385; *Barvis v SSE* [1971] 22 P&CR 710; *Chester CC v Woodward* [1962] 2 WLR 636, 2 QB 126; *Skerritts of Nottingham Ltd v SSETR & Harrow LBC* (No. 2) [2000] EWCA Civ 556; *R (oao Save Woolley Action Group Ltd) v Bath & North-East Somerset Council* [2012] EWHC 2161 (Admin)