



Appeal Decision

Inquiry held on 1-2 October 2024

Site visit made on 2 October 2024

by R Hitchcock BSc DipCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15th October 2024

Appeal Ref: APP/P5870/C/24/3341924

268 Woodcote Road, Wallington, Surrey, SM6 0QH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Messrs Harvey and Ashley Sessford o/b Southeast Tree Care Limited against an enforcement notice issued by the Council of the London Borough of Sutton.
- The notice was issued on 28 February 2024.
- The breach of planning control as alleged in the notice is:
Without planning permission material change of use of the land to a waste storage, processing, distribution and recycling centre dealing mainly with Timber waste. The unauthorised installation of shipping containers on the land, dog kennel, mobile home, Earth bunds. The erection of metal fencing in excess of 1 metre adjacent to the Highway (Woodcote Road). The erection of structures for the purpose of displaying adverts. The installation of a new hard surface without express planning consent throughout the site and the installation of large security lights.
Additional unauthorised operation development involving the [sic] and the associated erection of a covered scaffolding building on the land and the unauthorised, associated change of use to a commercial gym and leisure facility (Use class E).
- The requirements of the notice are to: i) Cease the use of the land edged red on the site location plan as a waste storage, processing, distribution and recycling centre. ii) Cease the use of the land edged red on the site location plan, for the use of the land as storage and distribution including storage of heavy goods vehicles including tractor units, excavators and trailers, and remove all heavy goods vehicles, tractor units, excavators and trailers, from the land. iii) Cease the use of the land edged red for the storage of industrial/commercial vehicles and remove all industrial/commercial vehicles from the land. iv) Cease the use of the land edged red for the storage of industrial/commercial plant machinery and other paraphernalia, and remove all industrial/commercial plant, machinery and any other paraphernalia from the land. v) Cease the use of the land as shown in the green shaded area in the Enforcement Map as a commercial gym, leisure facility. vi) Demolish the scaffolding structure building labelled green in the Enforcement Map and remove all associated materials including all associated gym equipment, structures and plant enclosed within the building. Remove all associated scaffolding equipment including storage racks and portable units/containers from the land. vii) Remove the unauthorised metal fence shown as a black dotted line on the Enforcement Map. viii) Remove all of the hard-core aggregate, sub-base and materials used to form the hard-standing area from the land edged red on the site location plan. ix) Remove all advertising boards within the land edged red on the site location plan, marked as blue diamonds on the Enforcement Map. x) Remove the security lights within the area edged red on the site location plan. xi) Following completion of steps i)-x) above, remove any fencing and dismantle the earth bunds as indicated on the site location plan and marked as blue dashed lines in Enforcement Map and redistribute the earth in order that the state and level of the land is restored to the state it was prior to the breach of planning control, as shown on plan Drawing.[sic].
- The period for compliance with the requirements is: four months.

- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (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. An application for costs was made by Southeast Tree Care Limited against the Council of the London Borough of Sutton. That application is the subject of a separate Decision.

Preliminary Matters

3. Prior to the Inquiry, on 20 June 2024, I wrote to the main parties and later held a case management conference on 13 August 2024. This included requests to review the status of the Notice in the light of the appellants' reference to a tree surgery business. This was claimed to have been active on the site when the Notice was served, but absent from the allegation within it.
4. The appellants subsequently mounted a ground (b) appeal - that the allegation in the Notice had not occurred. Additionally, their evidence also extended into ground (d) – that no action could be taken in respect of parts of the hardstanding on the site.
5. Following the opening of the Inquiry and the main parties' openings, I held a discussion on the status of the Notice. To assist, the Council provided a document¹ that acknowledged that the Notice was invalid as served. However, along with a proposed variation to the site location plan, the Council highlighted various potential amendments and detail as to why they would not cause injustice to the main parties if I were to incorporate them.
6. The document identified that if a tree surgery/urban forestry business was present and not deemed incidental to off-site operations (such that it formed part of a mixed use on the site), then the Council conceded that to include reference to it would cause injustice and the Notice would remain invalid. The Council sought clarification on this at the earliest opportunity. The appellant agreed with the Council, that a ruling on this matter would assist proceedings.
7. To inform any ruling, I subsequently heard oral evidence from the appellant, two interested parties as neighbours of the site, and a professional witness on behalf of the appellants. Additionally, a site visit attended by the main parties was conducted on the morning of the second day of the Inquiry.
8. After providing a ruling, I heard the Council's response to the appellants' application for costs before closing the Inquiry late afternoon on Wednesday 2 October 2024 with the agreement of the main parties.

The Notice and the Ground (b) Appeal

9. The notice alleges a material change of use to a waste storage, processing, distribution and recycling centre, and a commercial gym. In addition, it

¹ Annex to Opening Submissions: Legal Matters.

references operational development, items and paraphernalia claimed to be used in association with those alleged uses.

10. Following the established caselaw of *East Sussex*², in mixed use cases it is necessary for the allegation in the notice to refer to all the components of the mixed use, even if all are not required to cease. The appellant's statement, submitted on 5 June 2024, referred to Southeast Tree Care Limited's tree surgery/urban forestry contractor's use of part of the site.
11. The appellant's oral evidence to the Inquiry confirmed that the established tree surgery business had relocated to the Land from a site owned by their father before the other uses alleged in the Notice followed. The retained business includes the use of the site for administration and storage of equipment, towable plant, vehicles, trailers and similar items. The majority of those activities take place on the yard close to the Woodcote Road boundary and extend to the rear of the residential properties. In addition, it was claimed that the northern field and a tree belt close to the southern site boundary were also partly used in conjunction with that business.
12. At the Inquiry, it was the Council's position that the use of the land in association with tree care was ancillary to that businesses' operations taking place elsewhere. However, the observations of Lord Bridge on *Westminster Council v British Waterways Board* [1985] AC 676 found it a misapplication to treat the use or uses of a single planning unit as ancillary to activities carried on outside the unit altogether.
13. The evidence indicates that the tree care use of the site by the appellants is probably as an operational yard in much the same way as a builder's yard, haulage yard or other contractor's yard might operate. It is a quasi-storage use with comings and goings and perhaps some degree of maintenance, but the main operations of the business occur elsewhere.
14. The aerial photos provided by the Council show a distinct change in the appearance of the land when the tree care use was introduced. I heard that the use involved the formation of a hardstanding, staff activity, parking of vehicles and storage. This was confirmed by neighbours at the Inquiry who explained that they noted a change in the character of the use of the land and were aware of a new use taking place there.
15. Following principles set out in *R (oao Kensington and Chelsea RLBC) v SSCLG & others* [2016] EWHC 1785 (Admin) it was probable, therefore, that a material change of use of the land had occurred and was 'development' for the purposes of s55 of the Act. The evidence indicates that that change has since been extended by the introduction of other uses to become part of a mixed use.
16. Although there was subsequently some interrelationship between the tree care business and the later waste operations insofar as felled timber, cuttings and other waste vegetation are disposed of on the western part of the site, neither is of an incidental nature to the other. Despite being operated by the same company, I find the nature of those uses to be distinct.
17. The Council highlighted that the tree care business use may initially have been incidental to the occupation of No268, at the time when one of the appellants

² *R (oao East Sussex CC) v SSCLG & Robins & Robins* [2009] EWHC 3841 (Admin).

lived there. Even if that was the case, at the time the Notice was served, it seems probable that the tree care activity was part of a wider mixed use and of a scale exceeding one deemed normally incidental to a residential use.

18. Neither the requirements nor the reasons for serving the Notice refer to the tree care business as part of the mixed use of the site. It was held in *East Sussex* that 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 component activities.
19. The absence of reference to the tree care business in the allegation excludes it from consideration under the ground (a) appeal and prevents the appellant from obtaining planning permission through the appeal procedure. It may also be material to representations made by both parties on the other grounds of appeal. Accordingly, I find its omission unduly constrains the considerations and basis on which grounds might be pleaded such that injustice would arise if I were to correct the Notice to include it. This is not disputed by the Council. On that basis alone, I find the development alleged in the Notice has not occurred as a matter of fact. The appeal on ground (b) succeeds, the Notice cannot be corrected without injustice and must therefore be quashed.
20. Although the preceding issue was the basis on which to find the Notice invalid, and the ground on which to provide the requested ruling, for completeness, I continue here to consider other matters arising with respect to the content of the Notice.
21. At the Inquiry, I heard some dispute as to the extent of the relevant planning unit/s, including whether the alleged uses were part of a mixed use, or consist of separate planning units.
22. In consideration of an alleged material change of use of land, Bridge J in *Burdle*³ highlighted 3 broad categories of distinction in considering the relevant planning unit. These are:
 - 1) a single PU where the unit of occupation is used for one main purpose and any secondary activities are incidental or ancillary;
 - 2) a single PU that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and
 - 3) the unit of occupation comprises two or more physically separate areas that are occupied for different and unrelated purposes.
23. Bridge J went on to state that 'It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally'.
24. The site location plan attached to the Notice defined the land subject of its requirements edged in red. It included the residential property at 268 Woodcote Road; a surfaced yard area to the rear and south of both 266 and 268 Woodcote Road; an access alongside No268; a wider operational area to the west for timber waste processing and distribution bordered by

³ *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

planting and surfaced tracks; and part of a field used as a tree nursery in the northern part of the site ('the northern field').

25. The amended plan provided by the Council removed No268, including the whole of its rear garden and that of the adjoining No266. An encroachment into the roadside verge of Woodmansterne Lane on the western boundary of the site was corrected to realign with the highway boundary. The northern extent of the site was reduced to include only that part of the northern field lying to the south of a track running through its centre.
26. The correction to remove the residential land and road verge, which were neither explicitly referred to in the Notice and reduced the site boundary, are corrections that could be made without injustice to either party. This is because No268 is functionally and physically separate to the uses alleged to be taking place on the site. There was no dispute that it is a planning unit in its own right. The removal of highway land where none of the alleged breaches take place could similarly be corrected without injustice.
27. The areas of contention between the main parties relate to where the northern extent of the site lies and the status of land alongside No266 extending to the edge of Woodcote Lane. The appellant's evidence to the Inquiry asserted that the hardstanding alongside No266 to the east of the northern field was used for staff parking. It was also claimed that the entirety of the northern field, between established conifer screens, was used in conjunction with two businesses operated at the site.
28. Although I heard the appellants' oral evidence in respect of the claimed use of the northern field and access, no representation was heard from the Council at the Inquiry to enable a fair conclusion to be reached on the balance of probability. Whether or not the plan should be extended to include the access alongside No266, the whole of the northern field, or be reduced to exclude the northern field, is unclear. While I acknowledge the appellants' claims that any variation to the land edged red (other than in relation to Nos266/268 and the western boundary) would lead to injustice, that is not necessarily the case. Without more, I am unable to accurately determine whether correction of the location plan to extend or reduce the red line of occupation would cause injustice.
29. Setting my finding on ground (b) aside, the allegation in the Notice referred to two distinct uses. Although addressed in a single notice, absence of reference to a mixed or composite use in the Notice was unhelpful as it lacked clarity. Nevertheless, as each use is specified in the allegation and there are corresponding steps to remedy the alleged breaches, there is sufficient for a recipient to know what they have done wrong with reasonable certainty and what is required to resolve it. Having heard evidence that the gym function includes use of the access, yard area and the track to the west of the scaffold building, it seems to me that the notice should have alleged a mixed use and, following *Burdle* and *East Sussex*, required the mixed use to cease. Notwithstanding, the Council's approach was not fatal to the Notice in that respect.
30. The allegation in the Notice refers to a number of matters such as the installation of shipping containers, a dog kennel and a mobile home. However, their purposes are not explicitly defined to allow a recipient to know whether

these are regarded as primary uses, used incidentally to some other use taking place on the Land, or considered as operational development.

31. While I heard the Council advise that those matters could be deleted from the allegation without injustice (despite Section 4 of the Notice identifying associated harm to the Green Belt and the character of the locality) this appears to have been on the premise that the containers were incorrectly regarded as incidental to a lawful use elsewhere, and that the caravan had a nil use. Unless the Council set out to intentionally underenforce, the requirements in the Notice should square up with the allegation.
32. There was no dispute between the main parties on the 'nil' status of the caravan. However, the appellants' advised that, although unused, it was brought on for use as a tea-room for the tree care business. It also supports a dilapidated building containing storage in association with that use, such that it might be regarded as ancillary to it⁴. Notwithstanding, it is unclear why a caravan would otherwise not be regarded as a storage function. In both cases, as either an incidental use or primary use of the Land, it was not sufficiently clear in the Notice. Even if there was no intention to enforce against it, it should appear in the description to benefit from the provisions of s173(11) in the event that the Notice were upheld and complied with. This adds weight to my concerns over the validity of the Notice.
33. At the Inquiry, I heard the appellants' claim that any requirements in relation to the shipping containers were unclear. It was the appellant's interpretation that removal of containers was required only in association with the gym use. Indeed, the wording at step VI of Section 5 is unhelpful if removal of all containers was intended. In referencing 'containers' (plural) but 'associated' with other elements of development contained in step VI, which relate only to the gym use within a defined area, there is some ambiguity in the Notice.
34. Aside from the primary uses identified in the allegation, some uncertainty is introduced in the Notice by the wording 'Cease the use' in requirements II-IV of untitled Section 5. This alludes to storage and distribution of vehicles and plant as functions not necessarily or explicitly linked to the primary uses. However, as that defect could be removed by deletion of references to the initial 'use' clauses, leaving only the requirements to remove the subject items referred to in steps II-IV, then, in my view, this could have been corrected without injustice.
35. I note the appellants' concerns regarding inconsistencies between the border of a site location plan - identifying the boundary of the Land subject of the Notice, and an 'Enforcement Map' identifying individual items across the site. However, I find this of little consequence. The latter merely identifies the locations of referenced development that the Notice seeks to address.
36. The appellant also raised concerns in relation to a lack of identification of the 'new' hard surfacing alleged in the Notice. However, as the ground (d) evidence was not heard in its entirety, the extent of any necessary correction or variation remains unclear.
37. There is a mismatch in an allegation relating to the erection of structures for the purpose of displaying adverts and the associated requirement to remove

⁴ See *Restormel BC v SSE & Rabey* [1982] JPL 785

only the advertisement displays. At the Inquiry, the Council conceded that this element of the allegation could be removed as, if considered expedient, enforcement against adverts can be dealt with under other powers. Removal of the relevant sections would not cause injustice to either party.

38. As the requirement in Step XI in Section 5 required the restoration of the land to its state prior to the breach of planning control, the omission of a Drawing number could be corrected by deletion of reference to it. It is well established⁵ that the requirement to restore a site to its previous condition is a valid requirement and is not bad in law.
39. There were a number of other typographical and minor phrasing errors in the Notice. However, as these did not affect the substance of the Notice within its four corners, they would be correctable without injustice to the parties. Although not determinative, the cumulative and wide-ranging requirement for corrections described above adds further weight to my concerns over the validity of the Notice.

Conclusion

40. For the reasons given above, I conclude that the appeal should succeed on ground (b). The enforcement notice will be quashed.
41. In these circumstances, the appeals on grounds (c), (d), (a), (f) and (g), and the application for planning permission deemed to have been made under s177(5) of the 1990 Act (as amended) do not fall to be considered.

R Hitchcock

INSPECTOR

⁵ *Lipson v SSE* [1976] 33 P&CR 95 and *Ormston v Horsham RDC* [1965] 17 P&CR 105

APPEARANCES

FOR THE APPELLANT:

Alexander Greaves	Counsel
Harvey Sessford	Appellant, Southeast Tree Care Ltd
Andrew Baker	Baker Consultants Ltd.

FOR THE LOCAL PLANNING AUTHORITY:

Annabel Graham-Paul	Counsel
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INTERESTED PARTIES:

Mr Duncan Munn	Resident
Mr Andrew Weeden	Resident

Documents Submitted at the Inquiry

1. Appellants' Opening Statement
2. Council's Opening Statement
3. Council's Annex to Opening Submission: Legal Matters
4. Photograph set from neighbour Mr Weeden
5. Copy of email letter from Tim North & Associates Ltd. to LB of Sutton, dated 24 June 2024
6. Appellant's Costs Application.