



## Appeal Decisions

Site visit made on 26 June 2024

**by Richard S Jones BA(Hons), BTP, MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 14 August 2024**

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### **Appeal A Ref: APP/W1905/C/23/3328124**

#### **Land adjacent to Darcy's Place, Little Broomfield, Church Lane, Wormley, EN10 7QF**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr John Croke (Skillform) against an enforcement notice issued by Broxbourne Borough Council.
  - The notice was issued on 27 July 2023.
  - The breach of planning control as alleged in the notice is without planning permission the material change of use to commercial use of land consisting of open commercial storage (Use Class B8), industrial purposes (Use Class B2) and waste transfer purposes and associated operational development.
  - The requirements of the notice are to:
    - (i) Permanently remove from the land all items stored including, but not limited to, scaffolding, storage containers, vehicles, portable toilets, tyres, vehicle parts, traffic cones and signage, and plastic barriers
    - (ii) Permanently remove from the land all structures, buildings and mobile homes
    - (iii) Permanently remove all skips, waste containers and ancillary paraphernalia from the land
    - (iv) Remove all internal fencing (HERAS style fencing or similar)
    - (v) Cease the use of the land to for the purposes of open storage (Use Class B8)
    - (vi) Cease the use of the land for industrial purposes (Use Class B2)
    - (vii) Cease the use of the land for waste transfer purposes
    - (viii) Remove all resultant debris, litter, and waste from the land
  - The periods for compliance with the requirements are two months for steps (i) to (vii) and three months for step (viii).
  - The appeal is proceeding on the grounds set out in section 174(2)(d), (f) and (g) of the Town and Country Planning Act 1990 (as amended).
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### **Appeal B Ref: APP/W1905/X/23/3327096**

#### **Darcy's Place, Little Broom Field, Church Lane, Wormley, EN10 7QF**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by Mr John Croke (Skillform) against the decision of Broxbourne Borough Council.
  - The application ref 07/20/1100/LDC, dated 24 November 2020, was refused by notice dated 13 July 2023.
  - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
  - The use for which a certificate of lawful use or development is sought is builders yard, open and covered storage.
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## Decisions

### Appeal A

1. It is directed that the enforcement notice is corrected and varied by:

- Deleting the breach of planning control in section 3 and substituting it with 'Without planning permission the material change of use to a mixed use of the land for open commercial storage, industrial and waste transfer purposes and associated operational development.'
  - Deleting requirements (v), (vi) and (vii) in section 5 and substituting them with 'Cease the use of the land for open commercial storage, industrial and waste transfer purposes', numbered '(v)'.
  - Renumbering requirement '(viii)' as '(vi)'.
  - Substituting 'Two (2)' with 'Six (6)' as the time for compliance in Steps (i) to (v) in section 6.
  - Deleting Steps (vi) and (vii) in section 6.
  - Substituting 'Three (3)' with 'seven (7)' as the time for compliance in final Step (vi) in section 6.
2. Subject to the corrections and variations, the appeal is dismissed and the enforcement notice is upheld.

#### Appeal B

3. The appeal is dismissed.

#### **Applications for costs**

4. Applications for costs in respect of Appeals A and B were made by John Croke against Broxbourne Borough Council. Those applications are the subject of separate decisions.

#### **Appeal A**

##### **Preliminary Matters**

5. I am aware of the appellant's claim for judicial review relating to the Council's issuance of a Stop Notice, but make no comment on it, as it is beyond the direct scope of this appeal.
6. I've noted the concerns from interested parties about issues including the commercial use of Green Belt land, highway safety, living conditions, waste water, property damage and other environmental issues, including effects on trees. I also note the background information prepared by the appellant setting out purported economic benefits, the potential use of the land by the travelling community, issues relating to trees and screening, as well as his personal circumstances.
7. However, I am unable to consider such matters, insofar as they relate to the planning merits, because the appellant has not made an application for planning permission through a ground (a) appeal, which requires payment of a fee.

##### **The Enforcement Notice**

8. The breach of planning control as alleged in the notice is, without planning permission, the material change of use to commercial use of land consisting of

- open commercial storage (Use Class B8), industrial purposes (Use Class B2) and waste transfer purposes and associated operational development.
9. However, commercial use of land is not a use in itself. What is alleged, amounts to a mixed use of the land for open commercial storage, industrial and waste transfer purposes and associated operational development. Moreover, as a single mixed use, the use is sui generis, so it is incorrect to refer to Use Classes B8 and B2. The allegation should be corrected accordingly.
  10. It logically follows that the requirements should also be corrected to require the cessation of those components of the mixed use. The numbering of the requirements and the corresponding steps setting out the time for compliance, will in turn also need to be corrected. The numbering for the final step would have needed to be corrected anyway as it should be (viii) rather than (vi).
  11. I am able to make the above corrections, which do not alter the substance of the notice, under the powers transferred to me by s176(1)(a) of the 1990 Act, without injustice to any party.
  12. At the time of my site visit it appeared that the use of the land for industrial and waste transfer purposes had ceased. Nevertheless, s181(1) of the 1990 Act provides that compliance with any of the requirements contained in an enforcement notice 'shall not discharge the notice'. Under s181(2), any requirement of an enforcement notice that a use is discontinued shall operate as a requirement that it be discontinued permanently, and so the resumption of the use at any time after discontinuance shall be in contravention of the enforcement notice.

### **Appeal on Ground (d)**

13. An appeal under ground (d) is that at the time the enforcement notice was issued, it was too late to take enforcement action.
14. I note that the appeal under ground (d) is limited to apply only to the operation of Class B8 storage uses within the area of the site that purportedly benefits from that lawful use. The appellant states that he does not seek to appeal under ground (d) 'across the wider area of the site, which includes areas where the use was on a more limited basis not benefiting from [a] material change' [of use]. It is the appellant's position that the enforcement notice should be varied, to apply only to the area beyond that subject to the claim for lawful use and only to apply to the non-Class B8 storage uses.
15. However, the breach of planning control as corrected is the material change of use to a mixed use consisting of open commercial storage, industrial and waste transfer purposes and associated operational development.
16. It was held in *East Sussex CC v SSCLG* [2009] EWHC 3841 (Admin) that, where there is a mixed use, it is not open to the local planning authority to decouple elements of it; the use is a single mixed use with all its component activities. The same will apply to the appellant, such that is not open to him to decouple a storage use from the single mixed use. Moreover, the mixed use applies to the whole of the site, as a single planning unit, rather than discrete parts of it.
17. Therefore, to succeed on ground (d) the onus lies with the appellant to demonstrate, on the balance of probabilities, that the single mixed use took

place, without material interruption, for a period of at least ten years before the date of the enforcement notice, so as to be immune from enforcement action under the time limit provisions of s171B(3) of the 1990 Act. It follows that the mixed use must have commenced by no later than 27 July 2013, and that is the material date for Appeal A.

18. However, the appellant accepts as common ground that since 2018 the use of the land has diversified and intensified, covering a larger area and a broader range of uses. He accepts that the recent use of the site has exceeded that which has purportedly become established through passage of time, again both in terms of the land area and the range of uses within the site. He further clarifies that the more intensive use of the land to which the enforcement notice relates commenced late 2018/ early 2019 and, on the basis that the lawful use has been exceeded, it is accepted that some enforcement action may be justified.
19. I note the appellant seeks to explain that the broader use has arisen out of his frustration over the time taken to resolve the lawful use of the site, nevertheless, as the mixed use of the land commenced no earlier than 2018, it falls significantly short of the 10 years required to be immune from enforcement action.
20. It therefore follows, that on the date that the enforcement notice was issued, it was not too late for the Council to take enforcement action. The appeal on ground (d) fails.

### **The Appeal on Ground (f)**

21. An appeal on ground (f) is that the requirements of the enforcement notice are excessive to remedy the breach of planning control or the injury to amenity caused by the breach.
22. In this case, the corrected requirements are, in short, to cease the use of the land for open commercial storage, industrial and waste transfer purposes and to permanently remove from the land all stored items, structures, buildings, mobile homes, skips, waste containers and ancillary paraphernalia. The purpose of the notice is therefore to remedy the breach of planning control. Accordingly, in the absence of a ground (a) appeal, any lesser step that would not remedy the breach cannot be accepted through ground (f).
23. The appellant considers the requirement to cease Class B8 storage uses within the area which has purportedly become established through the passage of time, is excessive.
24. However, as explained under ground (d), it is not possible to decouple the storage use from the single mixed use, to establish the lawfulness or otherwise of that part in isolation. So, varying the requirements of the notice by not requiring the cessation of the storage use, would not remedy the breach of planning control.
25. The appellant also argues that the requirement to remove the mobile home from the land is excessive, stating that it is not part and parcel of the alleged change of use, as it was used temporarily as a residence for his late son during the COVID-19 pandemic, and thus completely unrelated to any commercial activity.

26. The appellant states that moving forward, if the appeals are allowed and the land remains within his ownership and is in need of maintenance, the use of the mobile home would be ancillary to that maintenance, providing toilet facilities, a hand wash area, tea/coffee making facilities and space for the storage of any necessary maintenance equipment. He says it would clearly fall to be considered as 'associated' or 'ancillary' use and not 'fundamental' to the alleged unlawful change of use.
27. The appellant further argues that there would be no material change of use arising from the retention of the mobile home, nor does it constitute operational development, so the requirement to remove it from site is unjustified.
28. Although those arguments are straying into an appeal on ground (c), in the case of *Murfitt*<sup>1</sup> it was held that that where an enforcement notice is issued in respect of a material change of use, and works were carried out to facilitate the same, the notice may require that the 'ancillary' works are removed in order that the site is restored to its previous condition and the breach remedied. It follows from *Murfitt* that an enforcement notice so concerned may require the removal of facilitating works, even if those works otherwise would have been immune from enforcement action or are permitted development.
29. It was further held in *Somak Travel*<sup>2</sup> that an enforcement notice could require the removal of works which did not amount to development at all but had facilitated an unauthorised material change of use.
30. I very much sympathise with the appellant over the terrible tragedy of losing his son to a crash during the lockdown for COVID-19, and appreciate that the mobile home has a sentimental value to him. However, the ground (f) appeal is restricted to whether the requirements are excessive to remedy the breach. Moreover, the COVID-19 pandemic was over by the time the enforcement notice was issued on 27 July 2023, and it is not shown that on that date it was used for residential purposes, rather than as an ancillary use, facilitating the material change of use.
31. Consequently, the notice can require the removal of the facilitating mobile home.
32. I find that the corrected requirements tally with the corrected breach and are not excessive for the purposes of remedying the breach of planning control. The appeal on ground (f) fails.

### **The Appeal on Ground (g)**

33. The ground (g) appeal is that the two months given to cease the use of the land for storage is too short.
34. The appellant requests a period of six months as the site presently accommodates several local businesses and demand for commercial space within the local area outweighs provision, so there are few options for their relocation. The appellant also seeks to highlight that prior to vacating they will need to secure alternative premises as well as arranging the logistical relocation of equipment and containers etc. It is argued that requiring their

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<sup>1</sup> *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598

<sup>2</sup> *Somak Travel v SSE & Brent LBC* [1987] JPL 630

dispersal from the site with limited available and affordable options for local relocation, risks loss of employment and potentially the complete loss of those businesses.

35. The Council argues that the appellant has not provided any detail showing that attempts have been made to secure alternative locations. However, he is entitled to assume success on any ground in an appeal under s174 of the 1990 Act. Consequently, any suggestion that the period for compliance should not be extended because of time afforded during the appeal proceedings must be rejected.
36. Whilst I have no evidence of lack of alternatives and potential employment losses, I agree that a period of two months to comply with the notice is too short. The six months requested would strike a reasonable and proportionate balance between any difficulties and disruption the appellant and other businesses may encounter and the public interest in this case.
37. The effect of that variation is that the period to remove all resultant debris, litter and waste from the land should be increased to seven months.
38. The appeal on ground (g) succeeds.

### **Other matters**

39. I note the appellant's submissions relating to his dealings with the Council, his attempts to resolve the situation through the possibility of two dwellings on the land and the reasons why he decided to expand the use of the site. However, those are not matters for this appeal, which I have considered afresh and on the basis of the facts and evidence before me.

### **Conclusion**

40. For the reasons given above, I conclude that the appeal should not succeed, save in relation to ground (g). I shall uphold the enforcement notice with corrections and variations.

### **Appeal B**

#### **Preliminary Matters**

41. The application has been made under s191(1)(a) of the 1990 Act and seeks to establish whether the use of land for a builders yard, open and covered storage is lawful.
42. Planning merits form no part of the assessment of an application for a LDC which must be considered in the light of the facts and the law. The burden of proof lies with the appellant and the relevant test is 'the balance of probabilities' (that it is more probable than not). If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, that is enough.
43. The LDC appeal site and the area of land subject to the enforcement notice (Appeal A) are the same.

#### **Main Issue**

44. S191(2) of the 1990 Act explains that uses are lawful if no enforcement action may be taken in respect of them because they did not involve development or

require planning permission or because the time for enforcement action has expired, and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

45. It is not argued that the use of the land for builders' yard, open and covered storage did not involve development, or that planning permission has been sought or granted for the same. Moreover, the enforcement notice, subject to Appeal A, was issued after the LDC application was determined, so the uses did not amount to a contravention of any of the requirements of any enforcement notice then in force.
46. Therefore, the main issue as to whether the Council's decision was well-founded turns on whether the builders' yard, open and covered storage uses took place without material interruption for a period of at least ten years before the date of the LDC application and have not since been supplanted by any other use, so as to be immune from enforcement action under s171B(3) of the 1990 Act. It follows that the use must have commenced by no later than 24 November 2010, and that is the material date for Appeal B.

### **Reasons**

47. The appellant explains that the purpose of the appeal is to confirm the established lawful use of the site for open and closed storage of scaffolding and building materials, as it operated between 2007 and 2018.
48. However, as set out under Appeal A, the appellant accepts that since 2018 the use of the land has diversified and intensified, covering a larger area and a broader range of uses. He also accepts that the recent use of the site has exceeded that which has purportedly become established through the passage of time, again both in terms of the land area and the range of uses within the site.
49. He further clarifies that the more intensive use of the land to which the enforcement notice relates commenced late 2018/ early 2019 and, on the basis that the lawful use has been exceeded, it is accepted that some enforcement action may be justified. Indeed, the appellant's appeal against the enforcement notice (Appeal A) did not seek to argue, under ground (b), that a material change of use to open commercial storage, industrial and waste transfer purposes (the mixed use) did not occur.
50. The level of activity and nature of the use of the land at the time of the application would therefore likely have been significantly different to that which took place previously. In that context I note that the appellant states that:  
  
'The unneighbourly issues raised by Mr McKinlay are regrettable and it is accepted that they were caused by activities which do not benefit from the claim for lawfulness. To confirm, the Certificate of Lawfulness is sought on the basis of use across part of the site only and on the basis of use that occurred between the years 2007-2018. It is accepted that the post-2019 intensification of the use of the site is not lawful and since the Enforcement Notice was issued the Appellant has sought to comply with it, in so far as reducing operations within the site to occupy on the part of the site which he considers to be lawful...'

51. The appellant further states:

'The communication sent by Mr Leech to the LPA in December 2020 relates to the intensified activities taking place on site at that time. As stated in previous appeal submissions, the CLEUD does not seek to regularise those activities – it focuses on the less intensive use that occurred on a reduced site area between the years 2007 and 2018.'

52. It is therefore likely that the changes to the use of the land resulted in different and additional off-site effects.

53. The Council state that from approximately 2019 onwards the site was completely cleared to accommodate a new mix of commercial storage activities as well as waste processing. Its photographs from August 2019 corroborate that the site was largely cleared by that time.

54. Moreover, the appellant states that an aerial photograph provided by the Council<sup>3</sup> 'relates to the site before its clearance, demolition of buildings and intensification of activity that occurred since 2018.'

55. The timescale for the intensification and diversification of the use of the land, as referred to by the appellant, is also reflected in the substantial change in the appearance of the site which can be seen by comparing the 2018 aerial photograph with that of 2020. In the latter photograph, the bank of trees along the south-eastern side of the site appears less dense and a great deal of the trees have been removed from the area around the front of the site, and a vehicular entrance onto Church Lane is clearly visible. The copse of trees towards the centre of the site had also been removed and all of the grassed areas appear to have been stripped away and replaced with hardstanding.

56. Moreover, the Google Streetview image from June 2017 shows a relatively narrow, low-key access to the site with three posts and a pole positioned in front of what appears to be an agricultural style gate. That arrangement is largely unrecognisable from the wider, splayed access shown in the Council's photograph from March 2020, with the security type gates and fencing and an appearance more akin to an industrial type facility.

57. Therefore, the works facilitating the intensification and change to a mixed use evidently resulted in a substantial change in the character and appearance of the land.

58. Consequently, it is highly probable that the mixed use of the land resulted in a significant difference in the character of the activities from what had gone on previously as a matter of fact and degree. It follows that a material change of use occurred, for which planning permission was required.

59. There are two important implications arising from the above. Firstly, an application made under S191(1)(a) of the 1990 Act seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful. It is likely, based on the appellant's own timeline of events, that at the time of the application (24 November 2020), the land was in mixed use. Although storage was part of that mixed use, along with industrial and waste uses, for the reasons explained under Appeal A, that was a single, sui generis

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<sup>3</sup> Figure 2 of the appellant's August 2023 statement

use. A certificate cannot therefore be granted for a single storage use that wasn't existing at the time of the application.

60. The appellant accepts that unlike the current operations within the site, the extent of the purported lawful use does not encompass the whole of the land parcel. Nevertheless, the area sought for the LDC amounts to a significant part of the overall appeal site and which is not shown to have operated as a separate planning unit as part of the expansion and intensification since 2018.
61. The second implication is that, even if it were demonstrated that the use of the land for builders' yard, open and covered storage gained immunity from enforcement action during the period between 2007 to 2018, that would likely have been lost having been supplanted by the subsequent material change of use to a mixed use. That represents a new chapter in the planning history of the site, such that it is no longer open to the appellant to go back and cherry pick a period of time between 2007 and 2018.
62. I therefore find that the use of the land for builders yard, open and covered storage would not have been immune from enforcement action on the date of the application, on the balance of probabilities.

### **Other Matters**

63. I note the appellant's criticisms of the Council's actions and the weight attributed to certain evidence. Nevertheless, I have considered the appeal anew and on the basis of the facts and evidence before me.

### **Conclusion**

64. For the reasons given above I conclude that the Council's refusal to grant a LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

*Richard S Jones*

INSPECTOR