



Appeal Decision

Site visit made on 11 June 2019

by **Stephen Hawkins MA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 4 July 2019

Appeal Ref: APP/V2255/C/18/3205839

Land at Crown Quay, Crown Quay Lane, Sittingbourne, Kent ME10 3ST

- 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 Mr Lajos Tivosi against an enforcement notice issued by Swale Borough Council.
- The enforcement notice was issued on 30 May 2018.
- The breach of planning control as alleged in the notice is: (1) Without planning permission, the change of use of the land for the siting of static caravans, touring caravans, a mobile portacabin, trailer shower block, toilet block and laundry room on the land, used for purposes of an encampment providing refreshments, washing facilities, and sleeping accommodation on the land. (2) Without planning permission, the commercial parking of heavy goods vehicles (HGV), motor vehicles and trailers constituting a lorry and car park on the land.
- The requirements of the notice are: (i) Cease the use of the land for the siting of static caravans, touring caravans, a mobile portacabin, trailer shower block, toilet block, laundry room and any other portable buildings associated with the unauthorised encampment; (ii) Remove all caravans, mobile homes, portacabin (sic) and portable buildings set out in (i) above from the land; (iii) Cease the use of the land for the parking of heavy goods vehicles, motor vehicles and trailers; (iv) Remove all heavy goods vehicles, motor vehicles and trailers from the land.
- The period for compliance with the requirements is four months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with correction and variation.

Preliminary Matters

1. The enforcement notice alleges a material change of use of the appeal site to a mixed use, including use as an encampment providing refreshments, washing facilities and sleeping accommodation. Step (i) of the notice requires the use for the siting of static caravans, touring caravans, a mobile portacabin, trailer shower block, toilet block, laundry room and any other portable buildings associated with the unauthorised encampment, to cease. Although ceasing the use as an encampment is not explicitly referred to, for practical purposes compliance with step (i) would achieve the same end. Moreover, step (ii) requires the removal of all caravans, mobile homes, the portacabin and portable buildings in step (i) from the site. The appellant could have been in no doubt that the effect of the notice is to require the encampment use to cease. Consequently, no injustice would be caused if the notice were to be corrected to insert a step specifically requiring that use to cease, in the interests of certainty.

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2. During my visit, I observed that the far eastern corner of the site appeared to be vacant and had been fenced off from the rest of the site. However, the appellant accepted that the mixed use alleged in the notice had also occurred on that part of the site. Its deletion from the land affected by the notice would mean that a re-occurrence of the mixed use on that part of the site could not be enforced against other than by issuing a further enforcement notice. This would cause the Council injustice. Therefore, I do not intend to vary the notice in this respect.

Ground (a) appeal

Main Issues

3. The Council confirmed that reason 3 for issuing the notice was not being defended. Therefore, the main issues in this ground of appeal are:
 - The effect of the development on the risk of flooding and groundwater pollution.
 - The effect on biodiversity.

Reasons

4. The site is a large and mostly hardsurfaced area of land, formerly occupied by industrial buildings. The mixed use in the notice provides a facility for the rest and refreshment of HGV drivers travelling to and from international locations. Washing, toilet, catering and rest facilities are provided in a partly fenced compound area. There is a portacabin and attached static caravan both used as a café, a trailer containing shower facilities, a building providing toilet and laundry facilities, some static caravans used as accommodation and touring caravans used for storage, in this area. For the most part, the remainder of the site is used for parking HGVs. I am given to understand that in excess of sixty HGVs can be parked overnight at the site on occasions.
5. A tidal river known as Milton Creek runs adjacent to the northern boundary of the site. Although some active industrial uses remain nearby, the site forms part of a larger area consisting of mostly vacant industrial land which is allocated for a development consisting of a minimum of 650 dwellings, open space and habitat creation in Policy A9 of the Swale Borough Local Plan (LP). I am given to understand that the site is intended to be developed as open space in the LP allocation. Parts of the LP allocation to the south of the site are in the process of being developed.

Flood risk & pollution

6. The approach to managing flood risk set out in section 14 of the National Planning Policy Framework (the Framework) is to avoid inappropriate development in areas at risk of flooding by directing development away from areas at highest risk, but where development is necessary, making it safe without increasing flood risk elsewhere.
7. The Council referred to the site as being within Flood Zone 3a and it is therefore at a high risk of flooding. It is likely that HGV drivers visiting the site in conjunction with the use and wishing to sleep there would mostly do so in their vehicles. I also understand that the appellant, his partner and some staff sleep in the static caravans. Therefore, the flood vulnerability of the use is

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incompatible with Flood Zone 3 and should not be permitted, according to Tables 2 and 3 of the Planning Practice Guidance (PPG) 'Flood risk and coastal change'. The Environment Agency (EA) objection to a 2014 planning application (subsequently refused) for a similar use of the site¹ on grounds of the flood risk associated with sleeping in vehicles, reinforces my findings.

8. Moreover, development in Flood Zone 3a involving change of use to a caravan or camping site requires a site-specific flood risk assessment (FRA) which deals with the sequential and exception tests set out in the Framework at section 14. The absence of an FRA in respect of the use means that in any event, it is not possible to determine whether the sequential test and, if required, the exception test have been satisfied and whether flood risk will be increased elsewhere. Nearby development taking place as part of the LP allocation is likely to have been included in a Strategic FRA which supported preparation of the LP and/or subject to a site-specific FRA.
9. The Council indicated that the risks of groundwater pollution from the use could be addressed by imposing conditions. This was also the view of the EA in the 2014 application. Suitable conditions were suggested in the Council's statement. Consequently, there is no firm evidence to indicate that there is an unacceptable pollution risk due to the use.
10. Nevertheless, for the above reasons the use is unacceptable on flood risk grounds. Therefore, the use does not accord with criterion in LP Policy DM14, as it does not respond to the constraints and opportunities posed from climate change and natural processes. Also, the use does not accord with LP Policy DM21 as it represents inappropriate development in an area at risk of flooding. Furthermore, the use is inconsistent with the approach to managing flood risk set out in section 14 of the Framework.

Biodiversity

11. The use has resulted in human and vehicular activity at the site and associated disturbance including noise and lighting, in proximity to Milton Creek. I am given to understand that the creek is designated as a local wildlife site. No wildlife survey has been carried out to assess the effects of the use on protected species on or the near the site and on the wildlife interest of the creek. Consequently, I cannot be assured that the use has not had an adverse impact on biodiversity. It follows that the use does not accord with criterion in LP DM14, as the natural environment has not been conserved. Also, the use does not accord with LP Policy DM28, as it has not been shown that any adverse impacts on biodiversity have been minimised.

Other matters

12. According to the appellant, the site has a long history of continuous use for commercial and industrial purposes including parking HGVs. However, the appellant accepted that planning permission was required for the use. There was no appeal on ground (d)-that it was too late to take enforcement action. In any event, relevant case law makes it clear that where as in this instance, there is a material change from one mixed use to another, the result is a different mixed use. Where individual components of the mixed use have subsisted for more than ten years prior to the issue of an enforcement notice,

¹ Council Ref: SW/14/0353.

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they nevertheless cannot be treated as separate and unaffected by the new use². Therefore, a previous use of the site for HGV parking cannot be decoupled from the totality of the unauthorised mixed use. Accordingly, past uses of the site do not represent a realistic fallback position and carry limited weight in favour of permitting the use to continue.

13. The PPG 'Use of planning conditions' suggests that granting a temporary planning permission might be appropriate where it enables use of otherwise vacant land for a temporary period, pending longer term regeneration plans coming forward. There is no firm evidence to suggest that granting a temporary permission for a period of 3-4 years would prejudice redevelopment of the site in accordance with LP Policy A9. However, the material considerations to which regard must be had in granting planning permission are not limited or made different by a decision to make the permission temporary. Consequently, a temporary permission would not overcome the planning harm identified above. For similar reasons, a completed Planning Obligation requiring the appellant to vacate the site when it is required for redevelopment would have been afforded limited weight.
14. I am given to understand that neither the Council or Kent County Council have made provision for HGV driver rest facilities in the area. However, no firm evidence was supplied concerning any identified shortfall in such facilities in the immediate and wider surrounding areas, or the extent of any problems associated with a proliferation of roadside HGV parking. According to the Council, some of the problems associated with roadside HGV parking in the vicinity can be attributed to the use of this site. Consequently, I can only give limited weight to any benefits arising from the use in respect of it addressing a shortage in HGV driver facilities.
15. According to the appellant, the use employs a number of people and it contributes to the Council's rates income. Therefore, there is a modest economic benefit arising from the use of what is likely to otherwise be a vacant site. I acknowledge that upholding the notice and refusing planning permission is likely to have a significant effect on the ability of the appellant to continue his business, leading to its relocation, scaling down, or possible closure, with staff having to seek alternative employment. However, the small scale economic benefits of the use do not outweigh the planning harm caused.
16. The appellant, his partner and staff are settled in the area and it is entirely understandable that they would wish to remain there. However, based on the available evidence any interference in their Human Rights is a proportionate response to the breach. A fair balance is struck between their rights and the public interest of upholding LP policies and national policy preventing flood risk and safeguarding biodiversity. These policy objectives could not be achieved if there were a lesser level of interference.
17. There is no firm evidence to indicate that there is a significant shortage in employment opportunities available in the area. Therefore, I am not persuaded that anyone employed at the site would have to leave the UK to find alternative employment or that upholding the notice and refusing planning permission would restrict their freedom to work in this country.

² *Beach v SSETR & Runnymede BC* [2001] EWHC 381 (Admin).

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Conclusion on ground (a)

18. The use is on a site with a high risk of flooding and it fails to conserve biodiversity. Based on the available evidence, none of the other matters outweigh the planning harm caused. Therefore, the use does not accord with the Development Plan and it is inconsistent with the Framework.

Ground (f) appeal

19. The ground of appeal is that the requirements of the notice exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any injury to amenity.
20. At s173, the Act sets out two purposes which the requirements of an enforcement notice can seek to achieve. The first (s173(4)(a)) is to remedy the breach of planning control that has occurred. The second (s173(4)(b)) is to remedy any injury to amenity caused by the breach. The Council did not specify in the notice whether it was one or both above purposes that it sought to achieve. However, the Council identified a harmful risk of flooding and harm to biodiversity in its reasons for issuing the notice. The above clearly goes beyond what could just be described as an injury to amenity. The notice requires the use to cease in its entirety and removal of all associated structures from the site. Therefore, the purpose of the notice must be to remedy the breach of planning control by restoring the site to its condition before the breach took place.
21. The consequences of upholding the notice and refusing to grant planning permission for the use were dealt with on ground (a). The appellant did not suggest any alternative, lesser steps that could remedy the breach. Accordingly, nothing stopping short of the steps set out in the notice as corrected would remedy the breach.
22. Consequently, the required steps do not exceed what is necessary to remedy the breach and the ground (f) appeal must fail.

Ground (g) appeal

23. The ground of appeal is that the time for compliance is unreasonably short.
24. The Council specified a compliance period of four months. This gives the appellant limited time in which to search for and secure alternative premises whilst retaining business continuity, which includes maintaining staff employment, as far as possible. Due to the size of the site, alternative premises enabling facilities of a similar scale to be provided are unlikely to be in abundant supply in the area. The appellant may also have to seek and obtain planning permission before he can move to an alternative site.
25. The twelve month compliance period sought by the appellant would perpetuate the planning harm caused by the use. However, a period of nine months would strike an appropriate balance between remedying that harm whilst also allowing the appellant enough time to relocate his business to any alternative premises found in an orderly fashion and/or to wind the business down, and to remove associated structures from the site. It would also allow affected staff sufficient time to seek alternative employment and accommodation if necessary. In turn, this would help to minimise the extent of disruption to the business and its staff as far as possible. Moreover, nine months would enable

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more advanced warning of the ceasing of use of the site to be given to customers, the majority of whom I understand are based internationally. This would minimise the risk of any disruption caused by an influx to the area of HGV drivers who had insufficient time to make alternative rest stop arrangements.

26. Accordingly, the ground (g) appeal succeeds to that limited extent.

Conclusion

27. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and variation and refuse to grant planning permission on the deemed application.

Formal Decision

28. It is directed that the enforcement notice be corrected by:

- Inserting in paragraph 5 ("What You Are Required To Do") after step (i), the following step (ii): "Cease the use of the land as an encampment providing refreshments, washing facilities and sleeping accommodation".
- Paragraph 5 steps (ii)-(iv) are to be renumbered (iii)-(v) accordingly.

and varied by:

- At paragraph 6 ("Time For Compliance") replacing "4 (four) months" with "9 (nine) months".

Subject to the above corrections and variation the appeal is dismissed and the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Stephen Hawkins

INSPECTOR