

Appeal Decision

Hearing Held on 20 January 2021

Site visit made on 21 January 2021

by M Madge DipTP, MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24th February 2021

Appeal Ref: APP/D1590/C/20/3247457

39 Vanguard Way, Shoeburyness, Essex SS3 9QY

- 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 Peter Hills of DD Property Investments LTD against an enforcement notice issued by Southend-on-sea Borough Council.
- The enforcement notice, numbered 19/00254/BRCN B, was issued on 24 January 2020.
- The breach of planning control alleged in the notice is without planning permission and/or in breach of conditions of planning permission 18/02157/FUL dated 15 February 2019 the following: unauthorised installation of metal storage sheds and scaffold structures forming storage areas; overnight residential occupation of a caravan (Breach of condition 07 of 18/02157/FUL); access to the site and work activity outside the permitted hours (Breach of condition 08 of 18/02157/FUL); failure to provide acoustic perimeter fence (Breach of condition 10 of 18/02157/FUL); burning of fires on site (Breach of condition 12 of 18/02157/FUL).
- The development to which the permission relates is use of the land as commercial storage yard (B8) incorporating 12 bays with storage outbuildings, erect lighting columns, erect fencing/gates within and around the site boundary and lay out hardstanding area together with the formation of an additional vehicular access from Vanguard Way (retrospective). The conditions in question are Nos 7, 8, 10 and 12 which state that: (7) No part of the site shall be occupied for overnight residential accommodation, including within vehicles and caravans. (8) No vehicles shall enter or leave the site and no work or activity shall take place on the site on Sundays or Bank Holidays and all work and other activity and vehicle movements on other days shall be confined to the following hours: 0700 to 1900 Monday to Fridays; 0800 to 1300 Saturdays. (10) Within 12 weeks of the date of this planning permission, details of an acoustic fence, together with a timetable for its construction, to be erected along the east and south boundaries of the site, shall have been submitted for approval to the local planning authority. The fence shall thereafter be constructed in accordance with the agreed details and timescale and permanently retained thereafter. (12) No burning of materials shall take place within the site at any time.
- The requirements of the notice are:
 - (a) Remove the unauthorised containers from the site as identified A, B & C shown at **Appendix 'C'**.
 - (b) Remove the unauthorised shelters constructed from scaffold as identified by D, E & F **shown at Appendix 'C'**.
 - (c) To cease the overnight residential use on site in breach of Condition 07 of planning permission 18/02157/FUL.
 - (d) To cease the use of the site outside of permitted hours stated in Condition 08 of planning permission 18/02157/FUL ie No access on Sundays or Bank Holidays and all work and other activity and vehicle movements on other days shall be confined to the following hours: 0700 to 1900 Mondays to Fridays; 0800 to 1300 Saturdays.
 - (e) Cease the use of the site as a Commercial Storage Yard (B8) until such time as an acoustic fence has been erected on the east and south boundaries as required under the original terms of Condition 10 of planning permission 18/02157/FUL in

accordance with details which have previously been submitted to and approved in writing by the Local Planning Authority.

(f) To cease the burning of materials on site in accordance with Condition 12 of planning permission 18/02157/FUL.

- 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), (c) and (f) 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 s177(5) of the Act.
-

Decision

1. The appeal on ground (a) succeeds in so far as it relates to storage containers and scaffold structure F, and it is directed that the notice be corrected by:

The deletion of the words "metal storage sheds" and the substitution of the words "storage containers", and the deletion of the words "burning of fires" and the substitution of the words "burning of materials" from paragraph 3: THE BREACH OF PLANNING CONTROL.

The deletion of the words "shelters constructed from scaffold" and substitution of the words "scaffold structures", and the deletion of the words "overnight residential use on site" and substitution of the words "overnight residential occupation of a caravan" in paragraph 5(b): WHAT YOU ARE REQUIRED TO DO.

2. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the installation of storage containers B and C and scaffold structure F, as shown on the plan attached to the notice numbered 19/00254/BRCN B, issued on 24 January 2020 in respect of land at 39 Vanguard Way, Shoeburyness, Essex SS3 9QY.
3. The appeal is dismissed on grounds (b), (c), and (a) in so far as it relates to access and work activity in breach of condition 8 of planning permission 18/02157/FUL. The notice is upheld in respect of the breach of conditions 7, 8, 10 and 12 of planning permission 18/02157/FUL.

Preliminary matters

4. Planning permission 18/02157/FUL (**"the 2018 PP"**) was granted on 19 February 2019. It was the subject of 12 conditions, all but one of which sought to protect the environment of people in neighbouring residential properties.
5. Since the notice was issued, details of the acoustic fence required by condition 10 of the 2018 PP have been submitted to and approved by the Council. An acoustic fence has now been erected along the east and south site boundaries. It was agreed at the Hearing that, on the balance of probability, this acoustic fence complies with the detailed scheme approved by the Council and condition 10 of the 2018 PP has been discharged.
6. The ground (f) appeal relates to requirement (e) only, which seeks the cessation of the use of the land as a commercial storage yard (B8) until such time as condition 10 of the 2018 PP has been discharged. The appellant withdrew the ground (f) appeal at the Hearing.

7. It was also confirmed at the Hearing that storage container A, scaffold structures D and E and the static caravan have been removed from the land. I saw this to be the case during my site visit.

The notice

8. There is disparity between the description of the alleged operational development and what is set out in requirements (a) and (b). The appellant and Council agreed that the **"metal storage sheds" were in fact "storage containers"** and **that "scaffold structures"** is a more concise description than **"shelters constructed of scaffold"** set out in requirement (b).
9. There is also disparity between the description of the alleged breach of condition 7 and the wording of requirement (c). It was confirmed that the wording of the allegation was correct in that, prior to the service of the notice, a static caravan had been used as overnight residential accommodation.
10. The allegation also states 'the burning of fires **on site**', as opposed to the **'burning of materials on site'** stated in requirement (f). The wording of the condition is consistent with the wording of the requirement and the allegation should be corrected.
11. No injustice would be caused by the corrections set out above. For consistency purposes, I shall correct the notice accordingly.

Ground (b)

12. To succeed on this ground, the appellant needs to show, on the balance of probability, that the matters alleged in the corrected notice have not occurred.
13. The appellant does not dispute that the overnight residential occupation of the caravan and the burning of materials had occurred but claims that they had instructed tenants to comply with conditions 7 and 12 when it was first brought to their attention. The appellant also claims he was not made aware of any further occurrences of the overnight residential occupation of the caravan or the burning of materials on the land. The appellant therefore claims that these alleged breaches were not occurring at the time the notice was issued.
14. S174(2)(b) of the 1990 Act is however worded in the past tense, and the question is whether the breach had occurred by the date of issue of the notice. **The appellant's evidence confirms that** a breach of conditions 7 and 12 had occurred before the notice was issued and as such the breach occurred as a matter of fact.
15. For this reason, the appeal on ground (b) fails.

Ground (c)

16. To succeed on this ground, the appellant must show that the matter alleged does not constitute a breach of planning control.
17. The Council claim that, by virtue of their size, weight and permanence, the storage containers constitute operational development. The appellant however advises that the storage containers were placed on site by the tenants of the specific bays. The appellant also advises that the storage containers are not fixed to the ground or connected to services. Furthermore, the appellant confirmed that when tenants vacate the land, their storage containers are

removed, as corroborated by the removal of storage container A. The appellant therefore claims that the siting of the storage containers is a use of land, which falls within the lawful use of the land.

18. For the storage containers to be operational development they would need to be buildings. **'Building' is defined in s336(1) of the 1990 Act, which includes 'any structure or erection, and part of a building, as so defined, but does not include plant or machinery comprised in a building'.** From the information before me, **the storage containers have not been 'erected'.** There are 3 primary factors as to whether something is a building: size, permanence and physical attachment. No single factor is decisive.
19. In respect of size, I acknowledge that the storage containers can be transported from one site to another. However, their size is such that they are unlikely to be relocated within the land with any regularity. Furthermore, while the storage containers may not be physically attached to the land, their weight is sufficient to signify a form of affixation. While the storage containers are owned by tenants, and they would be removed from site when the tenancy ends, if not before, their presence has not been identified as being temporary. The storage containers could therefore be on the land for years, depending on the tenancy period. Having regard to all 3 factors, these storage containers represent structures and are therefore buildings. The storage containers represent operational development and a breach of planning control has therefore occurred.
20. For these reasons, the appeal on ground (c) fails.

Ground (a) and the deemed planning application

21. For the purposes of ground (a) and the deemed planning application the 'development' is the matters alleged to have occurred, which is the installation of storage containers and scaffold structures, identified as A, B, C, D, E and F as shown on the plan attached to the notice, and access to the site and work activity outside the permitted hours identified in condition 8 of the 2018 PP. The main issue is the effect of the development on the living conditions of occupiers of nearby residential properties, with regard to visual intrusion and noise disturbance.
22. **It is the appellant's case that**, storage container A and scaffold structures D and E have been removed, in compliance with the notice, and storage containers B and C, and scaffold structure F (**"SS F"**) do not cause visual intrusion. The appellant also contends that allowing access to the site and work activity between the hours of 1100 and 1400 on Sundays, in order that lorries can be loaded with scaffolding and/or portable toilets on bays 4, 11 and 12 only, would not cause significant noise disturbance to neighbouring residential occupiers.
23. The appellant provided evidence in the form of a Noise Assessment prepared by Sharps Gayler LLP and Mr Sharps also gave evidence at the Hearing. Now that the acoustic fence has been erected, the technical evidence states that noise generated by the movement, loading and unloading of scaffolding and portable toilets, would not significantly exceed background noise levels, regardless of what day of the week it is. While the Council provided anecdotal evidence in respect of noise associated with the loading and unloading of

portable toilets, this does not sway me to disregard the empirical evidence provided.

Storage Containers B and C

24. The 2018 PP granted planning permission for the permanent installation of 3 storage containers and, in **the Council's opinion**, the retention of storage containers B and C would intensify the commercial storage use on the land. The Council concede however that, with the erection of the acoustic fence, the intensification of the commercial storage use would not cause visual intrusion, noise nuisance or disturbance to neighbouring residents. Condition 10 of the 2018 PP secures the permanent retention of the acoustic fence. Also, as storage containers B and C are located adjacent to commercial properties rather than residential properties, I concur with the Council.
25. The retention of storage containers B and C would cause no significant harm to the living conditions of neighbouring residents and as such there is no conflict with policies DM1, DM3, DM10 and DM11 of the Development Management Document (July 2015) ("the DMD"), which seek amongst other things, to protect the amenity of immediate neighbours having regard to outlook, noise and disturbance, and to retain small to medium sized employment enterprises.

Scaffold structure F

26. SS F is located adjacent to the eastern site boundary, and prior to the erection of the acoustic fence, it would have been visible from the neighbouring residential properties due to the open nature of the former boundary treatment. The acoustic fence now obscures most of SS F, with only the topmost part visible from adjacent residential properties. SS F is a light-weight structure consisting of vertical and horizontal scaffolding poles forming a framework structure. While part of the vertical poles forming SS F are visible, this causes no significant visual intrusion when viewed from the adjacent residential gardens.
27. SS F is used to store scaffolding and it was suggested that the movement of poles into and out of this structure could cause noise disturbance. Given the lawful use of the site for open storage, which includes scaffolding and ancillary paraphernalia on bay 4, some noise and disturbance would be generated as a matter of course during the movement of equipment and the loading and unloading of vehicles. There would also be nothing to prevent the storage of scaffolding up against the eastern boundary, should SS F be removed.
28. The appellant has suggested that noise associated with the use of SS F could be reduced by the provision of timber shelves, which could be secured by a suitably worded condition. As any noise or disturbance resulting from the use of SS F would be negligible in comparison to the lawful use of the site, such attenuation would not be necessary, and the condition would not meet the relevant tests.
29. The retention of SS F would cause no significant harm to the living conditions of neighbouring residents and as such there is no conflict with policies DM1, DM3, DM10 and DM11 of the DMD, which seek amongst other things, to protect the amenity of immediate neighbours having regard to outlook, noise and disturbance, and to retain small to medium sized employment enterprises.

Access and work activities

30. The appellant claims the breach of condition 8 relates to the tenants of bays 4, 11 and 12 loading and unloading vehicles on a Sunday to facilitate a timely exit of loaded vehicles from the site on Monday mornings. The appellant is not seeking for condition 8 to be removed, only for it to be varied to allow a 3-hour window for access and work activities on a Sunday within bays 4, 11 and 12. The appellant suggests the hours of 1100 to 1400 on Sundays be added to the hours permitted by condition 8 of the 2018 PP.
31. Condition 8 was imposed to “**protect the environment of people in neighbouring residential properties**”. The council also reiterated at the Hearing that nearby residents have an expectation that they are entitled to the quiet enjoyment of their homes and gardens at times, such as Sundays and Bank Holidays, when they would not suffer noise and disturbance generated by commercial activity on the site.
32. The **appellant’s** empirical evidence confirms that, with the acoustic fence in place, there would be no discernible difference in noise levels if access and work activity were to be permitted in bays 4, 11 and 12 during the hours of 1100 and 1400 on Sundays. The appellant contends that such arrangements could be controlled by suitably worded conditions, such as those found in paragraph 5.38 of their Statement of Case, which includes reference to a plan identifying the relevant bays.
33. Notwithstanding that noise and disturbance levels may be within acceptable parameters, neighbouring residents’ awareness of access and work activity taking place on Sundays, would have the potential to adversely affect the peaceful enjoyment of their properties. Furthermore, while the suggested conditions seek to restrict the hours and location where such access and work activity could take place, monitoring compliance would be unreasonably onerous and, as such, I find them unenforceable.
34. For these reasons allowing access and work activity on a Sunday would conflict with policies DM1 and DM3 of the DMD, which seek amongst other things, to protect the amenity of neighbouring occupiers.

Conclusion on ground (a)

35. For the reasons given above, storage containers B and C and scaffold structure F are acceptable in planning terms. The appeal on ground (a) succeeds to this limited extent and planning permission is granted on the deemed application for storage containers B and C and scaffold structure F. The requirements shall cease to have effect so far as inconsistent with the planning permission which I will grant by virtue of s180 of the Act. The appeal on ground (a) fails in respect of access and work activity taking place between the hours of 1100 and 1400 on Sundays and planning permission is refused on the deemed application for the original development without compliance with condition 8, which precludes access and work activity on Sundays.

M Madge

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Stewart Rowe Dip TP, MRTPI	The Planning & Design Bureau Ltd
----------------------------	----------------------------------

Doug Sharps CEng FIMech E FIOA	Sharps Gayler LLP
--------------------------------	-------------------

Danielle Fox	DD Property Investments Limited
--------------	---------------------------------

FOR THE LOCAL PLANNING AUTHORITY:

Patrick Keyes	Planning Team Leader, Southend-on-Sea Borough Council
---------------	---

Steve Jones	Enforcement Officer, Southend-on-Sea Borough Council
-------------	--