The Planning Inspectorate

Appeal Decision

Inquiry Held on 10 January, 08,09 & 29 March 2023

Site visit made on 10 January 2023

by Chris Preston BA(Hons) BPl MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04/09/2023

Appeal Ref: APP/B5480/C/20/3263118
Land known as Scotch Smoked Salmon, Units B3, B12, B13 & B14, Suttons Business Park, New Road, Rainham, Essex RM13 8DE

- 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 Scotch Smoked Salmon Company Ltd against an enforcement notice issued by the Council of the London Borough of Havering.
- The enforcement notice, numbered ENF/217/18, was issued on 15 October 2020.
- The breach of planning control as alleged in the notice is described on the notice as: Without the benefit of planning permission, the change of use of the car parking area shown hatched in black on the site plan to a primary use as B2 (General Industrial Use) and B8(Storage and Distribution Use) and operational development in the form of:
  1) Erection of 2.4 metre high metal palisade fencing bordering the area shown hatched as (A) on the site plan;
  2) Installation of air conditioning and refrigeration units on the roof of the freezer unit;
  3) Siting of freezer unit shown hatched as (B);
  4) Siting of metal containers;
  5) Siting of waste disposal receptors, wheelie bins, skips and refuse disposal containers; and
  6) Siting of goods in connection with Scotch Smoked Salmon business.
- The requirements of the notice are:
  i) Cease the use of the land as a primary use as storage in connection with the Scotch Smoked Salmon business in the area shown marked hatched on the attached plan; AND
  ii) Remove the freezer unit, metal containers, wheelie bins, refuse disposal containers, skips, goods stored in connection with the business and other stored items; AND
  iii) Remove all metal palisade fencing; AND
  iv) Remove all debris and materials accumulated as a result of taking steps ii. And iii. Above.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (d) and (g) of the Town and Country Planning Act 1990 as amended.

Decision

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

2. (i) The deletion of the words "and operation development in the form of:" from the end of the first sentence in Section 3 of the notice and the substitution of the words "and associated operational development and the siting of goods in connection with and integral to that material change of use in the form of:";

(ii) The deletion of paragraph 1 of Section 4 of the notice and substitution of a new paragraph 1 with the words "It appears to the Council that the material change of use of the land to a primary use as B2(General Industrial Use) and B8(Storage & Distribution Use) including the associated operational development including the erection of palisade fencing, the siting of a freezer unit and installation of air conditioning units and the associated siting of metal containers, waste disposal receptors, wheelie bins, skips, refuse disposal containers and goods in connection with the Scotch Smoked Salmon business has occurred within the last 10 years";

(iii) The deletion of the words "hatched as (A)" in Section 3(1.) and the substitution of the following words "shown in red and marked (A)";

(iv) By the substitution of the plan annexed to this decision for the plan attached to the enforcement notice.

Subject to these corrections the appeal is allowed and the enforcement notice is quashed.

Application for costs

3. At the Inquiry an application for costs was made by the Scotch Smoked Salmon Company Ltd against the Council of the London Borough of Havering. That application is the subject of a separate Decision.

Reasons

Procedural Matters and Matters Relating to the Validity of the Enforcement Notice

4. The appellant contends that the notice is defective and should be regarded as a nullity. That view was based on a number of matters including an argument that it is not possible for a material change of use (MCU) to a mix of industrial and storage/ distribution to have taken place because that is the use permitted by the planning permission that governs the site. However, the notice is clear enough on its face to enable someone reading it to understand the nature of the allegation. The appellant's argument is not really a question of the validity of the notice in my view but is a matter that can be considered under the ground (b) and/or (c) appeal in respect of whether a MCU has occurred and whether there has been a breach of planning control in that respect.

5. Notwithstanding that, the notice does lack clarity and precision in other respects, particularly with the way the breach is described in respect of the alleged operational development and its relationship with the alleged MCU. After the description of the MCU in section 3 of the words 'and operation [sic] development in the form of' appear followed by 6 listed items. Those include palisade fencing; air conditioning and refrigeration units; a freezer unit; the siting of metal containers; the siting of waste disposal receptors, wheelie bins and skips etc; and the siting of goods in connection with the business.

6. It is plain that some of those listed matters do not constitute operational development at all. The Planning Authority's Statement of Case notes that; '*The Council will show that the siting of containers, skips, waste receptacles and storage of goods in connection with Scotch Smoked Salmon are a material change of use of the car parking area and the only items which are of themselves operational development are the installation of palisade fencing and the attachment of the AC and refrigeration units onto the freezer container'*.

7. The discrepancy between what the notice lists as operational development and what the Council now considers to be operational development is a matter of importance when one looks at the stated 'Reasons for Issuing the Notice' at Section 4. That states that '*the MCU of land for the storage of goods in connection with the Scotch Smoked Salmon business has occurred within the last 10 years whilst the operational development including the installation of air conditioning and refrigeration units on the roof of the freezer unit and erection of 2.4m high metal palisade fencing occurred within the last 4 years*'. Although not mentioned explicitly those time periods appear to be a reference to the time limits for taking enforcement action as set out in s171B of the Town and Country Planning Act 1990 (the Act).

8. A reasonable person reading the notice could therefore be forgiven for thinking that it was necessary to demonstrate that any operational development had been in situ for more than 4 years if making an appeal on ground (d) whereas matters pertaining to the MCU would require a continued period of use of 10 years from the date of the breach. That is the clear inference in the way the notice is framed. There is no mention at all of items 3, 4, 5 & 6 and the notice is silent on the matter of when the Council considered those elements had been carried out and what the relevant time period for taking action may be.

9. The Council's position is that the operational development was integral to and facilitated the alleged MCU. In those circumstances the time period for taking enforcement action is within 10 years from the date of the breach. Having regard to established caselaw that is correct but it is not how the notice is presently framed. The present drafting causes confusion in terms of what is considered to be operational development and the relevant time period for compliance.

10. It is incumbent upon me to get the notice in order and make any necessary corrections, providing that doing so will not lead to injustice for any party. In many cases it may be difficult to correct such matters without causing injustice because making clear that the compliance period is actually ten years in relation to the operational development and not four may disadvantage an appellant if they were not aware of the correct period for acquiring immunity when preparing their evidence.

11. However, the appellant in this case was represented, understood the implications and was able to present evidence on the relevant timescales at the event and no such injustice will arise by me correcting the notice to bring clarity in that respect. Thus, I shall correct the notice to make clear that the operational development and the siting of items were considered to be integral to and facilitated the alleged MCU and to identify the correct time period for compliance as 10 years and not 4.

12. It also became apparent at the Inquiry that the plan attached to the notice was inaccurate in terms of precisely where different elements were located. In particular, the base plan shows units B12, 13 and 14 to have an L-shaped footprint with the freezer unit identified as "B", projecting beyond the "bottom of the L" further into the car parking and loading area. In fact, the original building had a flush frontage and the freezer unit is essentially the element which now forms the "bottom of the L" on the base plan. The inaccuracy in that respect has knocked on to similar inaccuracies in identifying the precise location of palisade fencing. However, although the plan is inaccurate it is not so deficient that those looking at the notice are unable to identify which elements are referred to. Consequently, no injustice will arise on account of

my decision to correct the plan to give a more accurate representation of where the freezer unit and fencing is located.

13. At the Inquiry, the Council invited me to correct the notice to refer to a breach of condition (BoC) if I found against it in respect of its argument that a MCU has occurred. I shall deal with that point at the outset because there are fundamental reasons why it would not be appropriate to take that course of action. Doing so would have the clear opportunity to cause injustice to the appellant.

14. Planning permission was granted on 26 June 1990 for the estate at Sutton's Business Park (the 1990 permission). The decision notice describes the development as *"Three blocks comprising 29 units for B2 (General Industrial) & B8 (Storage and Distribution) Revised plans rec'd 14/05/90"*. Nine conditions were imposed. Of relevance in this case, condition 2 required the car parking area to be laid out and surfaced prior to the occupation of the buildings, retained permanently thereafter for the accommodation of vehicles visiting the site and not to be used for any other purpose. Condition 3 required an area within the site to be provided and retained for the loading, unloading and turning of vehicles. Condition 7 stated that there should be no external storage of goods whatsoever, nor the stationing of skips or other waste disposal receptacles on the designated parking spaces shown on approved plan No. 01(B), (Job No. MOD/3).

15. Unfortunately, the file relating to the 1990 permission has been lost along with the plans relating to it. That creates obvious difficulties in assessing whether there has been a breach of the above conditions. Firstly, in the absence of the approved plans it is not readily obvious whether the area identified in the enforcement notice falls within the designated parking area identified in conditions 2 & 7 and/or the turning and unloading area identified by condition 3. That is a fundamental issue.

16. As identified by the Council's advocate at the Inquiry, it would not necessarily preclude an enforcement notice alleging a BoC from being served but in the absence of the original documentation, one would need to assess and interpret documentation that is available and make a balanced judgement on the facts. However, any arguments in that respect would need to be properly formulated in writing and the appellant would need the opportunity to respond having carefully considered the Council's position. It is potentially a complex matter and is a very different proposition to the case currently presented which relates to a MCU and associated development. The fact that the Council chose not to serve a notice alleging a breach of condition in the first instance is perhaps an indication that it realised such an approach would not be straightforward.

17. Whilst the potential to change the description of the breach was discussed at the Inquiry those discussions were very much on the hoof. For example, the Council produced a site layout plan and associated letter the day before the Inquiry resumed which related to a proposal to change the use of one of the units in the estate to a gym. The correspondence was from 1991 so closely following the grant of permission for the estate as a whole. The Council contend that the plan can be taken as a reflection of what the car parking layout approved under condition 7 would likely have been. The plan has a different reference number and it would therefore be a matter of interpretation.

18. I make no comment on that interpretation but if faced with such arguments, the appellant would have a rightful expectation to consider the matter carefully

before responding. He may wish to make further enquiries and investigation of his own to try to find contemporaneous documents. There would be clear opportunity for prejudice if I were to correct the notice without giving the parties the opportunity to properly consider and formulate their arguments. That alone is sufficient to persuade me that correcting the allegation to a BoC would not be appropriate.

19. In addition, it was clear at my site visit that the appeal site is not the only unit within the estate where outdoor storage is occurring. In assessing any options for appeal in relation to BoC an appellant may want to examine whether any conditions have been breached for more than ten years, not just at the appeal site but elsewhere in the estate and consider a ground (a) appeal having looked at the situation in respect of parking across the estate as a whole. These are all matters that could not be considered properly in the current appeal and that compounds my view that correcting the allegation would have clear potential to cause injustice.

20. Consequently, I shall consider the allegation as it stands, with corrections described above, based on MCU and associated operational development and works.

The Appeal on Ground B

21. There is often an overlap between appeals on grounds (b) and (c). In this case, the appellant contends that the alleged MCU has not occurred based on his view that the permitted use of the land in question already falls within Use Class B2 & B8. In that sense, the argument that the breach in respect of MCU has not occurred falls to be considered under ground (b).

22. The starting point in considering whether a MCU has taken place is to identify the relevant planning unit and establish the present and previous primary use of that unit such that an assessment can be made as to whether any change is material.

23. The Council's case, as it transpired at the event, was that the car parking and servicing area within the estate represents a primary use of itself. A sui-generis use in the words of Mr Stathers when giving evidence. In its view the whole estate is the relevant planning unit and that unit is in a mix of B2, B8 and car parking[1]. Whilst that scenario was presented at the event there is little evidence that the Council grappled with the concept of what the appropriate planning unit was prior to serving the notice, within its Statement of Case or subsequent proofs of evidence. Within his proof Mr Stathers addressed the appellant's argument that the car parking was of an ancillary nature to units B12-14[2]. He did so with reference to the imposition of condition 7 of the 1990 permission which sought to prevent the external storage of goods in areas designated for parking.

24. At that stage the view seems to have been taken that a material change of use had occurred on the basis of the change in character between what the Council considers would have been a designated car parking area and the activity that was taking place within that area, including external storage and the siting of various containers and the freezer unit etc. As explained in Mr Stathers' proof of evidence Condition 7 was imposed to prevent the storage of goods, stationing of skips or waste disposal receptacles on the designated parking

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[1] As summarised at paragraphs 5 and 9 of the Council's Closing Submissions
[2] Paragraphs 5.12 to 5.17 of Mr Stathers' proof of evidence

spaces shown on plan No.01(B) (Job No. MOD/3). He then goes on to state that the condition was imposed to control the planning use of the land and that the Council considers that the change in character in the area amounts to a material change of use.

25. However, that appears to me to represent a misunderstanding of what was approved by the 1990 permission. The decision notice described the development for which permission was being granted as "Three blocks comprising 29 units for B2 (General Industrial) & B8 (storage and distribution) Revised plans rec'd 14/05/90". That description is essentially the operative part of the permission and clearly sets out that what was being approved was an estate of 29 units for B2 & B8 use. There is no mention of car parking as a free-standing use of itself in the description.

26. In short, the operative part of the permission described what was being permitted and the conditions were imposed to regulate or provide a limitation on the way that use could operate across the site. The fact that conditions 2 and 7 were imposed to retain specific areas for car parking does not dictate that car parking was a primary use of itself. On the contrary, the purpose of the car parking was clearly an incidental or ancillary function relating to the primary use within Class B2 and B8. Condition 2 states that the parking area shall be retained *"for the accommodation of vehicles visiting the site".* The parking was not there for its own sake but as a function of the primary use.

27. There is an obvious functional link between the car parking and the units and the car parking was clearly ancillary to the primary approved use. Vehicles do not park there for any other purpose than visiting the units in question. That is entirely different than, for example, a pay and display car park where the primary function is the parking of cars. Or car parking associated with a railway station or public transport hub as referred to by Mr Stathers where members of the public will park, often for the day, whilst travelling on to their eventual destination by train. That is more akin to a public car park where parking is the primary use. In this instance, the parking is solely there to serve the needs of the businesses in the estate. Thus, when read properly the 1990 permission was for a primary use of B2 and B8 across the site. Conditions were necessary for the regulation of the approved use but did not introduce another primary use.

28. The Council contends that to take such a position would "make a mockery"[3] of the wide variety of planning consents across the country for similar business parks. That is not the case in my view. Conditions seeking to prevent outdoor storage on parking spaces are routinely imposed on planning permissions for industrial estates and similar developments because no MCU would be involved and without such conditions there would be no means to prevent the use of the land in association with the primary use in designated parking areas. The problem for the Council in this case is that it has lost the file and associated plans. However, in most instances the conditions on estates like this remain perfectly enforceable and clear and are the established mechanism for providing limitations on how a primary use may operate across a site.

29. I would add that the Council's own suggestion would have significant consequences for the operation of the planning system. In effect, any planning unit where car parking is included to serve the use of a site would be in mixed use following the Council's rationale. That could apply not just to business

[3] Paragraph 6b of Closing Submissions

parks but retail uses, schools, hospitals etc. Most uses and new developments have associated car parking. If a planning unit is in a mixed use it does not fall neatly within one use class or another, having regard to the Town and Country Planning (Use Classes) Order 1987. Allied to that Order, the Town and Country Planning (General Permitted Development) (England) Order 2015 sets out permitted development rights for a whole range of changes of use between different identified use classes and often development rights for extensions and associated development. A development that was in a mixed use would not benefit from any permitted development rights in that respect because it would not fall into an identified use class.

30. However, the reality is that car parking associated with most developments is an ancillary function of the primary use. The permitted use of the estate was for B2 and B8 units. The car parking, estate roads and servicing areas were ancillary to that use and conditions were considered necessary such that storage associated with the primary use did not spill out onto external areas. In my view that is the correct way to view what was approved by the 1990 permission.

31. The concept put forward by the Council that car parking was a primary use of itself is not a convincing proposition when one examines how the estate actually functions. I am not swayed by the argument that the external areas and car parking on the approved development were not ancillary on account of the proportion of the space taken up by them. By their nature, access roads and parking generally require significant space, particularly where access and turning space for lorries and HGVs is necessary. That doesn't dictate that the purpose of that space is a primary use, the function remains ancillary to the intended use of the estate as a whole.

32. Moreover, if the Council was of the view that the estate as a whole was a single planning unit in mixed use between B2, B8 and car parking, the way it assessed whether there had been a MCU was flawed. In effect, the officer reports, statement of case and proofs of evidence only examined the change in character on the land identified within the enforcement notice. That is a small proportion of the estate as a whole. If their proposition was that the planning unit was the wider area one would have expected analysis of the way that area was functioning in its entirety in order to understand whether any change was material. As noted above, having been to the estate it is clear that the appeal site is not the only location where external storage and development has taken place.

33. There is no analysis in the Council's evidence of how the wider area is used, the focus is solely on the change in character of the area to the front of Units B12-14. To my mind, that is an indication that the Council didn't properly grapple with the concept of what the relevant planning unit was at the time the notice was served.

34. Even though the land at the appeal site is no longer used for car parking, the mix of uses across the planning unit as a whole, as suggested by the Council, is still B2, B8 and car parking. There is slightly less parking/ outdoor servicing manoeuvring space in one small area of the estate but the Council has failed to explain how that would result in an MCU if the relevant planning unit was the estate as a whole. The result would be a marginal increase in the B2 and B8 component and marginally less car parking but the broad mix of uses would remain the same. No "intensification" argument was presented to suggest that the slight increase in the B2 and B8 component altered the character of the

wider planning unit to an extent that there had been a MCU across the planning unit. That affirms my view that the issue isn't one of MCU at all and highlights the inherent problem of seeing ancillary parking as a primary use.

35. I have been referred to extensive caselaw[4] in relation to the concept of the planning unit, including the well-established principles laid down in *Burdle*[5]*.* I am mindful of those principles but also recognise that an assessment of the correct planning unit in any given case will be sensitive to the site-specific circumstances that prevail and a degree of judgement is required.

36. In the course of the following 30 years or so since the estate was constructed, the various units have been let and/or sold and now operate independently of one another. As noted, the gym operates under a separate planning permission with allocated parking spaces to serve it. That was the situation as far back as the early 1990s when that permission was approved.

37. The appellant in the present appeal owns the units relating to his business and the Land Registry details show that ownership extends to the area to the front of the units covered by the enforcement notice. The business has operated since 1994, initially leasing the units and associated outdoor space and subsequently purchasing the freehold. Thus, the units and the external space have long been associated with the use of the land by Scotch Smoked Salmon.

38. Moreover, rather than being available to serve the whole estate that is an area under the control of the business in question. Upon visiting the estate it is clear that similar arrangements are in place on other units. The parking arrangements appear to correspond directly to the adjacent units with certain spaces allocated to each business. Signage making clear that spaces are private is common, including warnings in some instances that vehicles parked not in association with the relevant units may be clamped. The car repair/ fitting business to the front of the site has bollards and gates to demarcate its individual parking area. When looking for somewhere to park the hard and soft signals direct you to the particular unit you are visiting as opposed to car parking being seen as a free for all within the wider estate.

39. Given the way the external space is physically and functionally related to the units in question and the independent nature of the Smoked Salmon business I am of the view that the relevant planning unit is made up of the units themselves (B3, B12, B13 & B14) and the associated external space that is allocated to those units and directly adjacent to them.

40. Taking words from *Burdle,* it is possible to recognise a single main purpose of the occupier's use of the land and that is the processing, packaging and distribution of smoked salmon falling within the remit of general industrial, storage and distribution, as governed by the 1990 permission. That is the primary use of the land. There is no suggestion that the use of the units themselves is unauthorised or operating outside the terms of the 1990 permission.

41. Having regard to the close association between the external space and the units the original use of that space for parking, manoeuvring is clearly incidental or ancillary to the units and has been for the entirety of the time the business has been in operation. Given that the external space was ancillary in nature it follows that no MCU occurred as a result of the use of that space for

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[4] Authorities bundle provided by the LPA in the lead up to the Inquiry
[5] Burdle v SSE (1972) 1 WLR 1207

the purposes associated with the primary use of the planning unit. In other words, the lawful use of the land was already the use alleged in the enforcement notice.

42. In that respect, the situation is quite different to the circumstances in the two appeals put forward by the Council. The St. John's Nursery case[6] involved a garden centre and the question was whether the sale of an increased range of 'imported goods' and not plants grown at the site had reached a point where the retail element was no longer ancillary to the garden nursery element. In the Thompson Brothers case[7], the issue was similar but related to whether the introduction of general car repairs into a unit where the permitted use was for retail and wholesale sales of motor accessories, with a specific allowance for the fitting of tyres at the premises. In both those cases, the increase in the ancillary activity i.e. retail sales or car repairs was deemed to change the nature of the use across the entire planning unit such that a material change of use had occurred.

43. However, both of those cases involved an increase in the scale of activities that had hitherto been considered ancillary. In the current appeal the issue is the opposite, the space occupied for ancillary purposes has diminished and storage associated with the primary use within the units has expanded onto the external space. That has resulted in a change in character of the external space but it has not introduced a new primary use into the mix. The primary use of the planning unit as a whole remained unaltered and no MCU has occurred.

44. It follows that there has not been a MCU and that the breach identified within the enforcement notice in that respect has not taken place. The appeal on ground (b) succeeds in that respect.

45. In light of my conclusions in that regard I have given careful consideration as to how I should proceed. For the reasons given at the outset of my decision I can not alter the allegation to an alleged BoC without causing injustice to the appellant.

46. That leaves the question of whether I should quash the notice in its entirety or proceed to consider the individual items referred to as operational development in the notice. The way in which the Council presented its case was that the operational development, along with other items stored on the land were integral to or had facilitated the alleged the MCU. In other words, the Council's assessment and decision to issue the enforcement notice looked at the combined effects of all of those elements.

47. There was no individual analysis of the specific items that the Council considers to be operational development. Thus, it is not clear in the absence of a MCU whether they would consider it expedient to serve a notice targeted at those specific items alone in the absence of a MCU. Likewise, the appellant's grounds of appeal may well have been different if faced with that scenario rather than defending the allegation as served.

48. In addition, I am mindful that the Council may wish to consider its position in respect of any breach of condition. If I proceed to consider the individual items of operational development, having declined to correct the notice as requested

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[6] APP/P1560/C/18/3214046
[7] APP/W0205/A/88/086295

by the Council, injustice may arise due to the differing time periods for taking enforcement action between operational development and BoC.

49. Considering all of those matters in the round, and in the interests of avoiding injustice to both parties, I consider that the most appropriate course of action is to quash the notice in its entirety on account of the success of the appeal on ground (b). Fundamentally, the notice was based on an unsound premise that MCU had occurred. Given that is not the case I shall allow the appeal and quash the notice.

50. In the light of my conclusion in that regard it is not necessary for me to consider the appeal under grounds (c), (d) and (g).

Chris Preston

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Ian Rees Phillips	of Counsel
He called:	
Mr Michael Chilver	Employee, Scotch Smoked Salmon.
Mr Simon Wane	Appellant
Mrs Jaqueline Wane	Partner, Scotch Smoked Salmon
Mr James Wane	Employee, Scotch Smoked Salmon

FOR THE LOCAL PLANNING AUTHORITY:

Ms Sasha Blackmore	of Counsel
She called:	
Mr Christopher Stathers	Principal Planning Enforcement and Appeals Officer

Documents Submitted to the Inquiry

1) LPA reply to Inspector's Note
2) Bundle of authorities and appeal decisions provided by the LPA
3) Summary of relevant authorities provided by LPA
4) Letter from Clark Smith Partnership, dated 09 September 1991, relating to proposal for a gym in Unit A, Suttons Business Park
5) Plan No. MOD13/101B relating to parking spaces for the proposed gym
6) Signed witness statement from Mr James Wane
7) Text identifying suggested changes to the EN should I be minded to correct the allegation to refer to Breach of Condition.

ANNEX:

The Planning Inspectorate

Plan

This is the plan referred to in my decision dated:

by Chris Preston BA(Hons) BPl MRTPI

Land at: Scotch Smoked Salmon, Units B3, B12, B13 & B14, Suttons Business Park, New Road, Rainham RM13 8DE

Reference: APP/B5480/C/20/3263118

Scale: Not to scale