



Penderfyniad ar yr Apêl

Ymchwiliad a gynhaliwyd ar 30/06/21

Ymweliad safle a wnaed ar 01/07/21

gan Hywel Wyn Jones BA(Hons) BTP MRTPI

Arolygydd a benodir gan Weinidogion Cymru

Dyddiad: 17/01/2022

Appeal Decision

Inquiry Held on 30/06/21

Site visit made on 01/07/21

by Hywel Wyn Jones BA(Hons) BTP MRTPI

an Inspector appointed by the Welsh Ministers

Date: 17/01/2022

Appeal Ref: APP/B6855/C/19/3242574

Site address: Spring Mills, Berthlwyd, Penclawdd Road, Gowerton, Swansea, SA4 3RB

The Welsh Ministers have transferred the authority to decide this appeal to me as the appointed Inspector.

- 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 Bethan and Joseph Furlong against an enforcement notice issued by the City and County of Swansea Council.
 - The enforcement notice, numbered ENF2019/0238, was issued on 8 November 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised change of use from an established Oil Storage Depot (Sui Generis) to provide a mixed use site for storage (Use Class B8) and office accommodation (Use Class B1).
 - The requirements of the notice are:
 - i) Cease the mixed use of the site for storage and office accommodation.
 - ii) Remove all material associated with the storage use and all demountable buildings and storage containers, identified as SC1-3 on Appendix A, from the Land.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) and (d) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is allowed and the enforcement notice is quashed.

Procedural Matter

2. As the issues in dispute concerned matters of fact the evidence of all witnesses at the inquiry was given under affirmation.

Preliminary and Background Matters

3. The appeal site lies between Gowerton and Penclawdd close to the Loughor Estuary. The site has been subject to various industrial and commercial uses, including activities associated with brick workings and coal storage and distribution, since the mid-19th
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century. Prior to the appellants' purchase of the site in 2007 the site had been used as an oil storage and distribution depot and there is some evidence that it was subsequently used by a waste management company.

4. The site is accessed from Penclawdd Road. Surrounding vegetation provides effective visual screening. In addition to 6 large oil storage tanks within a bunded enclosure there is a dwelling, a static caravan and various other structures sited around a large hard-surfaced yard which also provides open storage and parking facilities. There are 2 large outbuildings that lie next to the dwelling the nearest of which is used as a workshop and has a patio area on its roof which is accessed from the first-floor level of the dwelling. The other building is open fronted and is used for storage and as a workshop. Facing these buildings is a small two-storey building used as an office and an artist's studio which is flanked by the static caravan and a row of 3 shipping containers. On the other side of the caravan there is a pair of large lorry trailer body container units and another row of 3 shipping containers. Since the serving of the enforcement notice a pair of lorry trailer body container units has been sited on the other side, to the west, of the oil tanks. Separated from the yard there is another outbuilding served by a short track which is used for storage, mainly furniture and building materials.
5. On taking occupation of the site the appellants initially resided in the static caravan and subsequently erected a dwelling on the land which was granted a certificate of lawful development (LPA Ref: 2014/1955) by the Council on 14 July 2016.
6. The shipping and lorry body containers have been brought onto the site in recent years several of which are used as a lock-up storage facility by local businesses. When alerted to this activity the Council considered that a material change in the use of the land had occurred. It explained that it served an Enforcement Warning Notice (Ref: COM2016/0194) on 19 February 2018 as a means of encouraging the appellants to apply for planning permission to regularise the use and as a means of imposing conditions to control the future scale of the activity. The appellants did not submit an application, seemingly on the basis that it considered that no permission was required.
7. The appellants and others are critical of the Council's decision to instigate enforcement action and its conduct in pursuit of the associated investigations, but these are not matters relevant to the determination of this appeal. Of the significant number of expressions of support received in response to the appeal many refer to the planning merits of the activities undertaken in comparison with previous activities. However, as no appeal has been lodged on the basis that planning permission should be granted, I must confine my deliberations to the legal grounds pleaded.

The Notice

8. At the inquiry I raised several concerns regarding the wording of the Notice, which are dealt with below.
9. There is some dispute over the former authorised use of the site. Despite the appellants providing copies of historic planning permissions, the Council has not provided details of the more recent permissions. The Council and appellants agree that it was used as an oil storage and distribution depot, utilising the several large fuel tanks that remain on site. Prior to the appellants' purchase of the site they explain that the site was used for some 7 years by a waste management company. The Council disputes that this affects the lawful use of the site but little evidence has been provided by either party on the use to which the site should revert. However, as it is not necessary for the notice to refer to a previous use

this is a matter that can be rectified by omitting the reference to the former use from the allegation.

10. During the course of the inquiry the Council accepted that the appellants' dwelling and an adjoining ground level garden area formed a separate planning unit and should be removed from the red line area depicting the land the subject of the notice. At the inquiry the appellants confirmed that it is within this dwelling that the workshop/classroom activities referred to by the Council have been undertaken.
11. It is evident that a flat roof over an adjacent outbuilding is used as a garden area to the dwelling. The parties agreed that, in the interests of precision, this use should be reflected in the mixed use allegation, although the Council would not wish to take steps to pursue its removal.
12. The static caravan is also included within the red line of the enforcement notice plan. It was brought onto site soon after the appellants' purchase and was used as their home until they moved into the dwelling. Since then it has been rented out on a commercial basis as a separate residential unit. The Council confirmed that as this did not form part of the mixed use allegation that it should be omitted from the red line boundary. The latest amended red line plan (version 3) which was submitted to the inquiry amends the extent of the land the subject of the notice to reflect these changes.
13. The Council accepted at the inquiry that references to Use Classes B1 and B8¹ in the alleged breach of control should be deleted given that a mixed use cannot fall within any of the individual use classes set out in the Order.
14. There are workshop facilities on the site that have been used for the fabrication, repair and maintenance of items stored on the site, mostly in conjunction with the travelling entertainment enterprises based there. During my site visit after the inquiry it became evident that the extent of the workshop facilities, including one building used exclusively for the working of wood and metal and containing a wide range of specialist machinery and tools, and part of an open building which also had workshop facilities, was at such a scale that it constituted an element of the mixed use of the site rather than being an ancillary activity.
15. In post-inquiry correspondence with the main parties I suggested that the allegation would be more accurately described as *Without planning permission, the unauthorised change of use to provide a mixed use site for storage and associated workshop use, office accommodation and domestic garden*. Neither party raised objection to this revision to the description and it is on this basis that I have considered the grounds of appeal. Given my decision to allow the appeal and quash the notice it has not been necessary for me to formally correct the notice or the associated site plan.

Ground (c) appeal

16. The appellants contend that their use of the site has not constituted a breach of planning control on the basis that no material change in use of the site has occurred.
17. Whilst, as already explained, the exact nature of the previous use of the site is not clear, it is evident that, whatever its precise nature, it was materially different to the mix of uses that began on the site after the appellants' occupation.

¹ The Town and Country Planning (Use Classes) Order 1987 (as amended)

18. In support of their case the appellants focus on a letter received from the Council's Principal Planner in 2007 and on which they based their decision to purchase the property. They interpret the letter as confirming that their use of the site falls within the same Use Class as the oil storage depot, even though they suggest that the last use was related to waste management.
19. In response the Council, by reference to the Land Use Gazetteer, suggests that the oil depot is a sui generis use ie one that falls outside any of the Use Classes. The appellants take issue, preferring the advice of the Principal Planner. Given the specific nature of the storage of fuel compared to general storage, including the potential hazard, the fumes, and the risk of pollution I can find no reason to take issue with the sui generis description afforded by the Council to the previous use.
20. Whatever the status or classification of the previous use of the site, it is clear that the appellants' use of the same land has involved uses that were not part of the storage use, nor were they ancillary to such use. As a matter of fact and degree the introduction of office/artist studio and the activities of fabrication, repair and maintenance has resulted in a mixed use of the site. These considerations demonstrate that, even had the storage and distribution elements of the new activity been the same as the previous one, the introduction of a mixed use resulted in a materially different use of the site. A second significant consideration in this respect is the introduction of the residential uses, in the form of the caravan and the dwelling. As a consequence, the effective planning unit has been altered which represents a new planning chapter for the land. Had I found that the planning unit was unaffected by the introduction of the residences, then the site's mixed use would include such uses further reinforcing the materiality of the change that has occurred.
21. Referring to the legal concept of estoppel the appellants contend that the Principal Planner's letter of 2007, which they consider confirms that their use did not require planning permission, effectively prevents the Council from pursuing enforcement action. That letter is open to a different interpretation on its relevance to the appellants' use but I do not need to consider that further given that the letter does not prevent the Authority from pursuing the action it has taken. Caselaw has established that there can be no estoppel by representation in such circumstances. At the time of the appellants' informal enquiry to the Council there was in place the option of seeking a formal determination under section 192 of the 1990 Act. As no such determination was sought the appellants cannot seek to rely on the informal advice of a Council officer. Indeed there is a general principle that establishes that a public authority cannot be estopped in such circumstances from performing their statutory duties.
22. In light of the above I find that the character of the use of the land in question materially changed when the appellants moved onto it, such that it constituted a breach of planning control. It follows that the ground (c) appeal must fail.

Ground (d) appeal

23. The relevant period for establishing immunity from enforcement action in this case is 10 years prior to the serving of the Enforcement Warning Notice on 19 February 2018.
24. The appellants both gave evidence to the inquiry which I found was generally consistent with that of the 2 other witnesses and the documentary evidence submitted in advance. Both those witnesses were long-standing friends of the appellants since before they moved on to the site. They demonstrated detailed knowledge of the site and how it operated since the Furlong's occupation of it.

25. Mr Edgar Stephens referred to work he has carried out on the site for the appellants since they first took occupation, including property maintenance, which he undertook in exchange for being allowed to store items on the site. The storage included house clearance items which formed part of his business of renting out houses as student accommodation. He vividly recalled a particular incident in October 2007 when he was clearing brambles from the site to facilitate his storage of a trailer when an accident left him hospitalised for several days. He also recalled that the Sol Cinema enterprise had begun their storage use of the site almost immediately on the appellants taking occupation. Others were also using the site at that time for storage including the storage of trailers.
26. Mr Paul O'Connor explained that he manages digital media events and is owner of the Sol Cinema, which facilitates media and community events. The cinema uses a touring caravan which was converted to a self-contained cinema room by Mr Furlong. When not on the road, it has been stored on the site along with extensive associated paraphernalia such as projectors, screens, tables and chairs for customers, costumes, rolled-up carpets, solar panels and batteries. Mr O'Connor recalled that the Furlong's purchase of the property coincided with the setting up of the cinema project, providing the storage facility required to establish the enterprise. Mr Furlong has been employed by Sol Cinema in various capacities since then, and Mrs Furlong has also been employed on occasions including the ornate painting of the cinema ceiling.
27. Prior to purchasing Berthlwyd the Furlongs explained how they had been looking for a year or so for a property that could serve their needs. Mrs Furlong was an established artist at that point working from her father's studio and wanted her own space to paint and run her artist business. Mr Furlong had established a business which involved travelling to perform theatrical shows which required a large quantity of bulky equipment, costumes and so on. Mr Furlong's evidence that he sought to repair and replace the roofs on some of the outbuildings as soon as he could after purchase is consistent with the Council's aerial photographs which suggests that in 2006 one of the roofs had large holes whereas the 2007 image suggests that a new roof had been provided. It was explained that the storage activities began almost immediately following their purchase and, in response to problems then experienced with the security of the stored items, they soon brought a mobile home onto the site from their previous home in Lampeter to provide surveillance of the premises as well as a residence.
28. The caravan was immediately connected to water, electricity and telephone line supplies that were already on site. At the beginning waste was carried to a pre-existing septic tank situated within the site and a sewer pipe connection was subsequently installed. The caravan was the appellants' home until they moved into their house. Mr Furlong recounted that they enjoyed a Christmas day meal in the caravan in 2007 which was attended by extended family.
29. Mrs Furlong explained that she began using the small two-storey 'Tower' building as an artist's studio where she painted and ran the administration of her business on the first floor and stored associated materials and equipment below. Facilitated by an existing electricity connection she began this use within a few weeks of taking occupation of the site to ensure the continuation of her business.
30. The Tower was described as being in a poor condition initially with some rubbish left by the waste management business use as an office. Mrs Furlong explained that it was initially a very cold building. New uPVC windows were fitted within a few weeks and other improvements undertaken over time.

31. The Council had previously suggested that the storage activities that were taking place in the early days of the appellants' occupation, which it described as work vehicles and associated equipment, were ancillary to their residential use of the site. However, at the inquiry, Mr Latham effectively conceded that the nature and scale of such activity was greater than could be described as ancillary to a residential use. It was, from the outset, a commercial activity albeit that some of that activity was operated by the residents of the static caravan. Moreover, there were other storage uses as described by the other witnesses.
32. There is no documentary evidence of the use of the site during the early period of occupation. Mr Furlong explained that at that time they had faced difficulties in registering the postal address of the premises which had resulted in postal items going astray. However, no cogent evidence has been presented to me that seriously undermines that which has been presented on behalf of the appellants in relation to this early part of the relevant 10-year period.
33. Over time the nature of the use has evolved such that the Council considers that between 2015 and 2018 the nature of the use had changed materially. There are 2 changes identified and discussed at the inquiry, one is the change in the use of the Tower, the second is the introduction of shipping containers brought onto the site and used as lock-up containers.
34. The storage containers that are not used by the appellants are rented to local people for the storage, mainly of items associated with their trade (including mechanic, builder, upholsterer, engineer) as well as some domestic items, including by a landlord of rented housing. The appellants own storage includes domestic items, building materials as well as vehicles, equipment and other items associated with the travelling entertainment businesses based on the site.
35. Mr Latham explained that the Council's concern was that there may be further developments on the site that may be objectionable, accepting that such a point had not yet been reached. He confirmed that its case was that intensification had occurred such that it had resulted in a material change of use but accepted that the concept of intensification had not formed part of the case it presented in advance of the inquiry.
36. The gradual introduction of additional storage containers during the 10-year period has increased the undercover storage capacity of the site. However, I am satisfied that the storage has remained low key in nature. Some of the containers are used by Mr Furlong as part of his ongoing business use and the others are typically local tradespeople using a unit as a lockup facility for overspill storage requiring infrequent visits, sometimes only a few visits a year. It is evident that third party use of the site for storage had commenced shortly after the appellants occupation in late 2007.
37. Whilst the physical capacity of the covered storage on the site has increased during the relevant 10 year period the nature of such use has not demonstrably changed. When asked, the Council could not point to any planning effects attributable to the increase in storage capacity, such as a material increase in visual impact, traffic or noise, that could indicate that the character of the use had materially changed by virtue of intensification.
38. The Tower has been in office use since Mrs Furlong first moved in towards the end of 2007 albeit in association with an artist's studio for most of that time. It was rented out as an office space for a period whilst Mrs Furlong was undertaking academic studies but I am satisfied that such a use of this small building did not amount to a material change in the mixed use of the planning unit.

39. I have already explained that the breach alleged in the enforcement notice does not describe the mixed use activity that was taking place at the time that the notice was served. I have however assessed this ground of appeal on the basis of the use that was in fact taking place at the time the notice was served, satisfied that to do so would cause no injustice to any party. As that breach of planning control has been undertaken for the requisite 10 year period the ground (d) appeal succeeds.

Conclusions

40. For the reasons set out above I find that the breach of control the subject of the enforcement notice, as amended in the way described in The Notice section of my reasoning above, has occurred. As I have found that the use had taken place for a 10 year period preceding the commencement of formal enforcement proceedings it is immune from enforcement action and thus lawful by virtue of Section 171B(3) of the 1990 Act. Accordingly, I shall allow the appeal and quash the enforcement notice.

Hywel Wyn Jones

INSPECTOR

APPEARANCES

FOR THE APPELLANTS:

Mr J Furlong Represented himself, assisted by Ms C Furlong
and Ms H Harvey, and also gave evidence

He called

Ms B Furlong Appellant

Mr P O'Connor Appellants' friend and site user

Mr E Stephens Appellants' friend and site user

FOR THE LOCAL PLANNING AUTHORITY:

Mr C Davies Solicitor to the Council

He called

Mr R Latham BSc MSc Senior Planning Officer (Enforcement)

DOCUMENTS

- 1 Amended plans to accompany enforcement notice showing revised red line boundary
- 2 Final version of amended enforcement notice plan (Version 3)