Hertfordshire County Council v Secretary of State for Communities and Local Government and another [2012] EWCA Civ 1473

CA, CIVIL DIVISION

PILL, TOULSON, MUNBY LJJ

4 OCTOBER, 15 NOVEMBER 2012

15 NOVEMBER 2012

Town and country planning — Enforcement Notice — Appeal against notice — Local authority issuing two enforcement notices against second respondent company — Second respondent challenging enforcement notices — Inspector appointed by Secretary of State quashing enforcement notices — Authority appealing — Administrative Court dismissing appeal — Whether inspector erring

M Reed for the Appellant

D Kolinsky for the First Respondent

A Dinkin QC and C Parry for the Second Respondent

Hertfordshire County Council Legal Services; Treasury Solicitors; Mullis and Peake LLP, Romford

PILL LJ:

[1] This is an appeal by Hertfordshire County Council ("the Council") against a decision of Ouseley J dated 1 February 2012 ([2012] EWHC 277 (Admin)) whereby he dismissed an appeal by the Council from a decision of the Secretary of State for Communities and Local Government ("the Secretary of State") given by an Inspector on 2 June 2010. The Secretary of State allowed appeals by Metal and Waste Recycling Ltd ("M and WR") under s 174 of the Town and Country Planning Act 1990 ("the 1990 Act") against Enforcement Notices for breaches of planning control issued by the Council, finding that there had been no breach of planning control.

[2] Development controlled by the 1990 Act is defined in s 55, which provides, in so far as is material "'development', means the carrying out of . . . any material change in the use of any buildings or other land". The relevant breach of planning control complained of was a change of use of land at Wallace Way, Hitching, Herts.

[3] Upon a breach of planning control, a local planning authority may take enforcement action under Pt VII of the 1990 Act. Section 173(1) provides, in so far as is material:

> "An enforcement notice shall state –
>
> (a) the matters which appear to the local planning authority to constitute the breach of planning control;
>
> . . ."

[4] There were two Enforcement Notices, dated 11 May 2009. They each referred to the relevant land. Enforcement Notice A alleged a material change of use:

> "without planning permission the material change of use of the land from a scrap-metal yard with an average yearly material throughput of 74,500 tonnes, to a scrap-yard, (including as part of this use an end of life vehicle recycling facility), with an average yearly material throughput of 181,000 tonnes, the totality of the new use having a different nature and character from the former use."

The reasons for issuing the Notice included "While the land benefits from an extant planning permission, issued by North Herts Districts Council in 1972, for use as a scrap metal-yard, since 2004 the level of operations on the land has increased substantially." The allegedly adverse impact of the increase is then set out and is related essentially to the increase in throughput; more noise, more dust, more vehicles.

[5] Enforcement Notice B claimed that buildings had been erected without planning permission. The same reasons are given. The Inspector permitted a correction to the volumes of material stated in Notice A. The corrected Notice provided:

> ". . . the material change of the use of the land from a scrap-metal yard with an average yearly material throughput of 121,174 tonnes, to a scrap yard, (including as part of this use an end of life vehicle recycling facility), with an average yearly material throughput of 231,716 tonnes, the totality of the new use having a different nature and character from the former use."

Thus the throughput had almost doubled.

[6] It is common ground that the Notices stand or fall together. If a change of use is established, planning permission, which had not been obtained, was required (s 57(1)) of the 1990 Act) and there was a breach of planning control (s 171A). If the change of use allegation fails, Notice B fails with it.

[7] The Inspector gave her decision following an eight-day public local inquiry. By virtue of s 174(1) of the 1990 Act, M and WR had a right of appeal against the Notices. Having corrected the Notices, the Inspector allowed the appeal on ground (c) in s 174(2) of the 1990 Act, holding that "the material change of use alleged by the corrected Notice has not taken place". There was no "breach of planning control" within the meaning of s 174(2)(c) of the Act.

[8] The Council contend that there was a material change of use ("an MCU") of the land which justified the enforcement action taken. In demonstrating an error of law by the Inspector (and by the judge), it seeks to establish four propositions, first, that there can be an MCU merely by intensification of the use, secondly, that an MCU can be established merely by reference to the effect of the use on neighbouring properties, thirdly, that in considering an MCU, it is necessary to look at what is actually carried on and not at what potentially could have been carried on under the existing permission and, fourthly, that, in assessing the effect of operations on site on neighbouring land, it is immaterial whether the impact results from decisions of the operator or as a result of the actions of third parties, such as government requirements.

[9] It is not disputed that intensification of a use is capable of constituting an MCU. That was accepted in *Guildford Rural District Council v Fortescue*[1959] 2 QB 112, [1959] 2 All ER 111, 57 LGR 169, Lord Evershed at p 124, in *Lilo Blum v Secretary of State and another* [1987] JPL 278, by Simon Brown J, and in *R v Thanet District Council* (2000) 81 P & CR 520, [2000] EGCS 87, [2001] PLCR 22 by Sullivan J. What is necessary, however, and accepted by the parties to the present appeal, is that the test for deciding whether there has been an MCU is whether there has been a change in the character of the use. In *East Barnet Urban District Council v British Transport Commission*[1962] 2 QB 484, [1961] 3 All ER 878, 60 LGR 41, Lord Parker CJ stated "It seems clear to me that under both Acts [Town and Country Planning Acts, 1932 and 1947] what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier."

[10] In *Lilo Blum*, Simon Brown J stated, at p 280:

> "It was well recognised law that the issue whether or not there had been a material change in use fell to be considered by reference to the character of the use of the land. It was equally well recognised that intensification was capable of being of such a nature and degree as itself to affect the definable character of the land and its use and thus give rise to a material

> change of use. Mere intensification, if it fell short of changing the character of the use, would not constitute material change of use."

In *Thanet District Council*, Sullivan J stated, at para 54:

> "The question left open might well be a vexed question, for the reasons advanced by the Respondents. It is easy to state the principle that intensification may be of such a degree or on such a scale as to make a material change in the character of a use; it is far more difficult to apply it in practice. There are very few cases of 'mere intensification'. Usually the increase in activity will have led to some other change: from hobby to business, from part to full-time employment, or an increase in one use at the expense of other uses in a previously mixed use."

[11] The general test applied by the Inspector, at para 68, is, in my view, in accordance with authority:

> "In the light of judicial pronouncements, and after considering the approaches of the parties, it seems to me that what must be determined is whether the increase in the scale of the use has reached the point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in such a change in the definable character of the use that it amounts to a material change of use. It is necessary to first look at the effects of what has been done at the site."

Ouseley J, at para 46, correctly referred to ". . . the need to identify a material change in the definable character of the use of the land".

[12] The Council's attack is focussed on the findings of the judge rather than on those of the Inspector and it must be kept in mind that it is the lawfulness of the Inspector's decision which needs to be assessed. M and WR accepted, before the Inspector, that off-site effects were a material factor in considering MCU. At para 11, the Inspector summarised M and WR's submissions:

> "The question to be asked is whether the effects of that increase in throughput, including effects off-site, are such that there has been a definable change in the character of the use of the land. If off-site effects are being relied upon they must be such as to have caused some fundamental change in the character of the use of the land. Mere intensification, even with adverse side effects, is not enough."

[13] The Inspector considered "the effects of the increase in throughput", under headings accepted to be relevant, "noise", "noise from on-site operations, excluding explosions", "explosions", "noise from lorries", "other issues arising from lorry movements", and "dust".

[14] Having stated the test to be applied, the Inspector made detailed findings of fact and stated her general conclusion at para 70 "Taking all the various effects as a whole, they cannot be said, as a matter of fact and degree, to have produced a materially different situation in planning terms than previously existed." The conclusion was restated at para 71:

> "I concur with [M and WR's] general proposition that the primary way a planning authority should control the extent of any use is through the imposition of conditions. This site is a long established scrap metal yard which has been operating under an effectively unrestricted planning permission since the 1970s with no conditions attached to control matters such as the number of lorry movements or hours of operation. The effects of the intensification need to be such as to have caused a material change in the character of the use. There have been changes in the effects of the operation upon the surrounding area and, in some instances, the very substantial increase in throughput has been a contributory factor. However, many of the identified impacts upon local residents and businesses derive from extraneous factors and not the increase in throughput. I conclude that the increase in throughput has not had such materially different planning consequences as to take it, as a matter of fact and degree, beyond the normal fluctuations in activity that could reasonably be expected to be experienced by the business. It has not resulted in a change in planning effects of such magnitude so as to cause a material change in the definable character of the use of the land. I find, on the balance of probabilities, that the material change of use alleged by the corrected notice has not taken place. The appeal succeeds on ground (c)."

[15] The Inspector's detailed assessment, under the headings stated above, followed that approach. She accepted, for example, that "the increase in early morning traffic has seriously impacted upon the living conditions of residents in Cadwell Lane" (para 45). As a planning judgment, the Inspector was in my view entitled to reach the conclusion at para 70, already cited, of her determination. I agree with the Respondents' submissions, as did the judge. Ouseley J stated, at para 33 "The Inspector looked at those impacts which she concluded were attributable to the increase in throughput, but reached her unassailable and well reasoned conclusion on that point adverse to the County Council." The increase in tonnage was very substantial but, the test being as to whether the character of the use had changed, the Inspector was entitled to conclude that it had not. On a consideration of the increase in throughput simpliciter, the Notices failed. The premises were used as a scrap yard, albeit on a larger scale.

[16] Where the Inspector's conclusion may be open to challenge is in some of the Inspector's reasoning, as to whether she was entitled to take into account, for example, the impact of early morning movements of vehicles, that "are likely to be due to extraneous factors that are outside the control of the site, rather than on-site operational reasons".

[17] The Council now seeks to rely on a combination of factors, throughput combined with factors such as the increased use of gas bottles and canisters and legislation involving drivers' hours of work. These, it is submitted, together give rise to an MCU.

[18] In relation to explosions, the Inspector stated, at para 29 ". . . The increase in explosions cannot simply be regarded as being derived directly from the greater intensity of the use." She continued at para 30:

> ". . . [M and WR] accepts that [explosions] have the potential to impact on the amenity of the local community when they occur. However, it must be borne in mind that explosions only occur intermittently and each individual event is relatively short-lived. Taking this factor into account and given the questionable relationship between throughput and explosions, I am unable to conclude that the increased throughput has materially changed the level of impact resulting from explosions."

[19] Lorry use was considered at paras 41 and 45:

> "41 It is necessary to consider the impact of this increase in HGV traffic upon the living conditions of local residents. Some residents have complained of noise from HGVs during normal working hours. However, the impact of the increase in HGVs during the day must be considered against the background of the general increase in traffic, including HGVs not connected with the site. When considered in this context, the increase in two-way movements across the day is not such that it is likely to impact significantly upon residents' living conditions. The main concerns of the Council and local residents relate to sleep disturbance experienced by local residents caused by HGV vehicles arriving during the early hours.
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> 45 [M and WR] acknowledges the potential for disturbance to be caused by early morning movements. The increase in early morning traffic has seriously impacted upon the living conditions of residents in Cadwell Lane. Whilst not all such incidents can be attributed to vehicles travelling to and from the site, any such exceedance must be regarded as a significant event in terms of amenity. However, the Appellant submits that the increase in night time/early morning HGV movements and queues in Wallace Way is not related to throughput. He contends that the problem is caused by new legislation as to how long drivers can drive before taking a break, significant changes in tachograph regulations and changes of practice in the haulage industry. It seems to me that whilst it is wholly regrettable that vehicles associated with the site arrive at these unsociable times, the available evidence suggests that there is no causal link between this unfortunate practice and the increase in throughput. In my view, these early arrivals are likely to be due to extraneous factors that are outside the control of the site, rather than on-site operational reasons. There is no substantial evidence to suggest that they relate to the capacity of the site to accept the increased levels of material to be processed during normal working hours. I conclude that there has not been any material change in the impact of noise disturbance from HGVs that can be attributed to an intensified scrap yard use."

[20] It becomes necessary to consider an objection raised by the Secretary of State and M and WR. The Council's case before the Inspector was based on an "intensification of use which has had significant effects on the locality" (Inspector's report para 10). That is consistent with the contents of the Enforcement Notice. That being so, it is submitted, it is not now open to the Council to introduce different arguments to establish a change in the character of the use, such as the increasing use of gas bottles and canisters, which are more vulnerable to explosion, and changes in legislation which have required vehicles associated with the site to arrive at unsociable hours.

[21] The Council submits that if those factors had been taken into consideration, the finding of fact as to the material change of use would have been different. The Respondents submit that, on the wording of the Enforcement Notice and the way the case was presented to the Inspector, the Council can rely only on the increase in throughput in seeking to establish a change in character of the use which would amount to an MCU.

[22] The court gave indications favourable to the Respondents' view in the course of submissions. The court also gave indications that, in considering the interrelationship of throughput with other factors such as the frequency of explosions and the change to early morning arrivals, the Inspector's reasoning may have been suspect. As a result,

Mr Reed, for the Council, in his submissions in reply, sought leave to amend the grounds of appeal to add a new paragraph, later supplied in writing:

> "It was unreasonable of the Secretary of State to find, having identified an increase in disturbance from explosions at paragraph 28 of the decision letter and an increase in early morning HGV traffic noise at paragraph 45 of the decision letter, that an increase in operations did not materially affect the increase in such occurrences. An increase in throughput or intensity of use necessarily increased the prospect of such occurrences and the Inspector could not have reasonably found otherwise."

[23] Both Respondents oppose the application to amend because of the very late stage at which the application is made, because the case was put to the Inspector in a different way and for the basic reason that the further factors were not included in the alleged "breach of planning control" in the Enforcement Notice, as required by s 173(1) of the 1990 Act. Only throughput was relied on.

[24] I have no hesitation in upholding the Respondents' objections and refusing the application to amend. It is not appropriate to give the Council an opportunity at this stage of the procedure to seek enforcement on other grounds.

[25] The judge went on to hold that, even if other considerations are taken into account, the Inspector was entitled to conclude that a change of use was not, on the evidence, established. Much of the Council's criticism is directed to those parts of his judgment dealing with the extent to which changes in effect are capable of creating a material change of use and with the materiality of changes affecting the use of the site which are extraneous to the operator's activities. I do not find it necessary to consider those issues in any detail. M and WR rightly accept that it is permissible to consider off-site effects when assessing whether an MCU has been established. In assessing whether there is a change of character in the use, its impact of the use on other premises is a relevant factor. It is necessary, on the particular facts, to consider both what is happening on the land and its impact off the land when deciding whether the character of the use has changed.

[26] When the judge said, at para 41, that: "of itself, an increase in noise impact, however severe, cannot be a material change in the use of the land", he was, in my view, saying no more than that impact cannot be considered in isolation from what is happening on the land. As Elias J put it in *R (on the application of Stephen John Manning) v South Lakeland District Council*[2005] EWHC 242 (Admin), at para 8:

> "Perhaps the key point here is that the impact of a particular use is an integral part of the character of that use, so that even though the relevant use itself may not change, save in the intensification itself, that will, in an appropriate case, be capable of constituting a change in character."

[27] I do respectfully question some of the Inspector's reasoning when considering the combined effect of, and relationship between, throughput and other factors affecting impact. Having accepted, for example, that an increase in explosions was the result of the increasing percentage on site of gas bottles and canisters, the failure, at para 30, to conclude that the increased throughput had contributed to the level of impact resulting from explosions is questionable. Increased throughput would appear to mean more gas bottles and canisters and consequently more explosions. But if the change to gas bottles and canisters, and changes resulting from legislation on lorry timings were to be relied on by the Council, they should have been identified in the Notices as contributing to the material change of use. If it did occur, it was not caused by throughput alone. Issues as to the relevance of changes beyond the control of the operator could then have been considered.

[28] Any flaws in dealing with factors other than increased throughput do not in the circumstances entitle the Council to obtain a quashing order. I add that it may be unlikely in any event that the decision would have been quashed on the facts found. In reaching conclusions on explosions and in relation to noise from lorries, the Inspector also relied on other relevant factors, for example, the limited impact of explosions (para 30) and the general increase in traffic, including HGVs not connected with the site (para 41), when concluding that there was not "a materially different situation in planning terms".

[29] I would dismiss this appeal.

TOULSON LJ:

[30] I agree.

MUNBY LJ:

[31] I also agree.

Appeal dismissed.

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