

LPL1259, New Forest Court (Gundrys Farm), Gundry's Farm, School Lane, Three Legged Cross, Wimborne

LPA Ref: ENF/17/0094 – Issued on 4th October 2022. Effective Date: 4th January 2023

Grounds of Appeal

Defects in the notice

Nullity

1. The notice is a nullity for three reasons; alternatively these are errors in the notice which cannot be corrected without causing injustice.

Human habitation

2. The notice alleges the unlawful stationing of caravans 'for human habitation'. The stationing of caravans for human habitation is the principal part of the statutory definition of caravan site.¹ Human habitation encompasses permanent residential and holiday occupation, including use of a caravan site for exempt organisations. As set out in the notice, the allegation is that there has been a change from a use including the stationing of caravans for human habitation to a use including the stationing of caravans for human habitation. That is not a change of use, let alone capable of being a material change of use. It is simply unclear what is being alleged in section 3 A.

Planning unit A

3. The notice (section 3) refers to twice land 'marked as "Planning Unit "' on the attached plan. There is no area marked as 'Planning Unit A', or even as 'A'. It is therefore not apparent on which land the alleged material change of use and operational development is said to have taken place. Consequently the notice fails to state the matters which constitute a breach of planning control, contrary to the Town and Country Planning Act 1990, s 173(1)(a). The plan itself refers to elements which are not identified as such in the notice, in particular two facilities buildings.

Existing use rights

4. Requirement 5 A of the notice requires the cessation of the use of the land for the stationing of caravans, but says:

¹ Caravan Sites and Control of Development Act 1960, s 1.

“*The notice does not affect any existing use rights or uses that are not development of land or any applicable permitted development under the Town and Country Planning (General Permitted Development) (England) Order 2015.”

5. In *Duguid v Secretary of State for the Environment, Transport and the Regions*,² the Court of Appeal held that an enforcement notice which prohibited markets and car parking on land did not need to specifically safeguard the permitted development rights to use the land for markets on up to 14 days a year. There was no need to specifically preserve the rights in the notice. Whilst in *Mansi* there was an established use and there was a benefit in defining what it was, permitted development rights are set out in the development order and are readily identified.³ However the *Mansi* doctrine does not allow any existing lawful use of the land to be raised in a later defence to proceedings under an enforcement notice, even if it is backed by a lawful development certificate. If not raised as a ground of appeal, the right might be lost. Keene LJ said in *Challinor v Staffordshire County Council*:⁴

“what this line of cases indicates is that an enforcement notice will be interpreted so as not to interfere with permitted development rights under the General Development Permitted Order or with rights to use land for a purpose ancillary to a principal use which is itself not being enforced against. The authorities go no further than that and certainly do not establish any general right to assert existing use rights at a time when the enforcement notice has come into effect after an unsuccessful appeal or in the absence of an appeal. Such rights must be asserted at the time of appeal against the enforcement notice. If the landowner sleeps on those rights, he will lose them.”

6. The preservation of permitted development rights and acts which are not development follows from the nature of an enforcement notice, as subject to the *Mansi* doctrine. That did not need to be mentioned in the notice, but that is not a difficulty.
7. However the notice expressly preserves ‘any existing use rights’. That is a change to the effect of the enforcement notice as the notice would otherwise remove any ‘existing use rights’ which are subject to the terms of the notice: see *Challinor*. The notice is though drafted to remove from its requirements the cessation of the stationing of caravans and so on where this is an existing use right. It leaves wholly unclear what that is. A person who has to comply with the notice cannot know therefore what they have to do.

² (2001) 82 P & CR 6.

³ *Duguid* at para 28 per Ward LJ, following *R v Harfield* [1993] 2 PLR 23.

⁴ [2007] EWCA Civ 864, [2008] JPL 392 at para 52.

8. The notice therefore fails to state the steps required with sufficient specificity, contrary to the Town and Country Planning Act 1990, s 173(3). The notice is therefore a nullity and incapable of correction.⁵

Water/waste water facility

9. The enforcement notice alleges a breach of planning control by the installation of 'a water/waste water facility'. The notice however goes on to require the demolition of 'water/waste water facilities'. On its face the notice's requirements go beyond the alleged breach of control. The error also renders the notice a nullity as it is not apparent what is the alleged breach or what is required to be done. If there are more than one facility then it is not apparent which is said to be unlawful. If there is only one facility, or only one facility which is said to be unlawful, then it is not possible to comply with a notice requiring facilities in the plural to be demolished. This is a mismatch between the breach alleged and the steps required which renders the notice a nullity.

Nullity principles

10. Upjohn LJ said in *Miller-Mead v Minister of Housing and Local Government* in respect of planning enforcement notices:⁶

"Supposing then upon its true construction the notice is hopelessly ambiguous and uncertain, so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or in what respect it was alleged that he failed to comply with a condition or, again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches. The notice would be bad on its face and a nullity"

11. An enforcement notice cannot be a nullity in part, with the remainder being valid. A nullity error renders the whole notice unlawful: *Payne v National Assembly for Wales*.⁷ The present case is even more 'hopelessly unclear' than an enforcement notice which identified as a breach of planning control an unauthorised single storey side extension but the steps required the removal of a (non-existent) two storey side extension and made no mention of the single storey side extension.⁸

Corrections

⁵ *Miller-Mead v Minister of Housing and Local Government* [1962] 2 QB 196 at 226 per Upjohn LJ.

⁶ [1963] 2 QB 196 at 226.

⁷ [2006] EWHC 597 (Admin), [2007] 1 P&CR 4 at para 31 per Wyn Williams J.

⁸ *Sarodia v London Borough of Redbridge* [2017] EWHC 2347 (Admin).

12. Even if these errors did not render the notice a nullity, they would require correction, but be incapable of being remedied. They involve changing the nature of the alleged breach or the response to it in ways which would change the parties' cases and so be prejudicial.

The regulation 37 notice and Environmental Impact Assessment

13. The regulation 37 notice refers to the 2021 enforcement notice, not the new enforcement notice. It does not therefore apply to the present enforcement notice. If the Council was of the view that the 2022 enforcement notice comprised or included EIA development then the failure to produce a regulation 37 notice is in breach of regulation 37(3) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. Since the 2021 enforcement notice has been withdrawn, the regulation 37 notice is of no legal effect.
14. Additionally the 'Annex' in the provided documents says that 'A copy of the Council's screening opinion has been attached to this Notice at Appendix A'. There is no Appendix A. It is not apparent from the documents whether the screening opinion has been omitted or is said to be contained in the very brief reasoning in the regulation 27 notice.
15. The justification for requiring EIA in the notice itself contains multiple errors: the Enforcement Notice land is an existing lawful tourism and leisure development; the assessment is of a larger site, since the land to the east is included in it; the assessment is based on 'likely capacity', when it has to be based on the actual existing planning use of the land which is being enforced against; the assessment fails to take into account the lawful use identified by the Council, including by exempt organisations; the infrastructure being enforced against is the current infrastructure rather than any more which is said to be necessary; and traffic movements must relate to the use being enforced against. The reasons provided are the same as those in the 2021 notice, despite the allegations being different.
16. It is noted that there is no requirement to submit an Environmental Statement with the appeal notice, it can follow at a later date.⁹
- (a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;*
17. The Council accept that the land has a lawful mixed use which includes the siting of caravans. In those circumstances the material change of use of the land to the alleged unlawful use (or

⁹ Town and Country Planning (Environmental Impact Assessment) Regulations 2017, reg 41.

any amended use) would preserve the openness of the Green Belt and not conflict with the purposes of including land within it (NPPF, para 150e)).

18. The buildings on the site replace previous buildings, are in the same use and not materially larger. They are therefore not inappropriate development under NPPF para 149(d). The other works preserve the openness of the Green Belt and do not conflict with the purposes of including land within it. They are either appropriate facilities for outdoor recreation (NPPF, para 149b)) or engineering operations (NPPF, para 150b)).
19. In respect of habitats, any complained about impact arises from the accepted lawful use in any event. There is no prohibition on residential development (or anything equivalent to it) between 400 m and 5 km of a heathland site. Any necessary SANG provision can be made on the enforcement notice site.
20. There are no harmful impacts on residential amenity, noise, disturbance and traffic. That the enforcement notice refers to 'potential' impacts shows the errors in the Council's analysis: the notice has to be against the current use of the site, and so concerned with actual effects rather than potential future effects.

(b) that those matters have not occurred;

21. The site is part of a larger planning unit containing land to the west and the east, as was common ground in the previous appeal. The use of that planning unit was accepted to be a mixed use comprising occupation of caravans for holiday purposes, caravan storage and agriculture.
22. The original use (agriculture and caravanning by exempt organisations) claimed by the Council is therefore incorrect. It is notable that it was not put forward as being the previous use of the land in the earlier notices.
23. There has therefore been no change to the use of the land.

(c) that those matters (if they occurred) do not constitute a breach of planning control;

24. If the land was in a lawful mixed use for agriculture and as a caravan site for exempt organisations, then a change to a mixed used for agriculture, caravan site for human habitation, caravan storage and donkeys is not a material change of use. The essence of the complaint is that the site has been occupied by caravans other than by exempt organisations. That is not a material change of use.

25. The presence of donkeys does not amount to a material change of use of the planning unit.
26. Waste water facilities to serve the eastern parts of the caravan site are required by conditions on the caravan site licence. Those facilities within the enforcement notice site are therefore permitted development under Part 5, Class A of the GPDO.

(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

27. The land has been in its current use for more than 10 years.
28. The operational development is also lawful by the passage of time. If there was an unlawful material change of use, then the operational development complained about was for the purpose of the 'original' mixed use, as a caravan site for exempt organisations, or as part of the use of the land to the east for the lawful caravan site activities. They would not therefore be part of the claimed unlawful use and so would be subject to the four year period for enforcement rather than 10 years.

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

29. The steps required are unclear for the reasons given above.
30. Separate to that problem, the steps are excessive. The notice requires the cessation of the use for the siting of caravans for human habitation, when the lawfulness of siting for some forms of human habitation is accepted as being lawful. The operational development which is required to be removed is all required as part of the use of the land as a caravan site for exempt organisations.

(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.

31. The three month period for compliance with the notice is too short. The previous, withdrawn, enforcement notices set longer periods.