Neutral Citation Number: [2025] EWHC 245 (Admin)

Case No: AC-2024-LON-001905

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2025

**Before** :

**MRS JUSTICE LANG DBE**

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**Between :**

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| **(1) SUSAN PATON**<br>**(2) KENNETH PATON** | **Applicants** |
| **- and -** | |
| **(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES**<br>**(2) MALDON DISTRICT COUNCIL** | **Respondents** |

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**Stephen Whale** (instructed under **Public Access**) for the **Applicants**
**Rowan Clapp** (instructed by the **Government Legal Department**) for the **First Respondent**
**The Second Respondent did not appear and was not represented**

Hearing date: 28 January 2025

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# Approved Judgment

This judgment was handed down remotely at 10.30 am on 7 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

**Mrs Justice Lang:**

1. The Applicants seek permission to appeal, under section 289 of the Town and Country Planning Act 1990 ("TCPA 1990") against the First Respondent's decision, made on 9 May 2024 by an Inspector on his behalf. The Inspector dismissed the Applicants' appeal under grounds (b), (f) and (g) of section 174(2) TCPA 1990 against an Enforcement Notice ("the EN") issued on 29 June 2023, and served on the Applicants in respect of the land north-west of Riversleigh, Nipsells Chase, Mayland, Essex ("the Land").

2. The sole ground of appeal under section 289 TCPA 1990 is that the Inspector erred in dismissing the appeal under ground (b) of section 174(2) TCPA 1990 which provides for an appeal on the grounds that the matters said to be a breach of planning control "have not occurred". If the appeal is successful, the applicants also seek to appeal against the Inspector's refusal to make an award of costs against the Council.

3. A person with an interest in land to which an enforcement notice relates, or a relevant occupier, may appeal against that notice on the grounds set out within section 174(2) TCPA 1990 which are as follows:

> "(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;
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> (b) that those matters have not occurred;
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> (c) that those matters (if they occurred) do not constitute a breach of planning control;
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> (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;
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> (e) that copies of the enforcement notice were not served as required by section 172;
>
> (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;
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> (g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."

4. In 2018 the Applicants applied for permission for "construction of an apple storage barn" at the Land. Permission was granted by the Second Respondent ("the Council") on 23 May 2018, and a variation was allowed on 10 August 2020.

5. On 15 June 2023, the Council issued and served an enforcement notice which it subsequently withdrew. In response, the Applicants removed the kitchen facilities and the internal walls from the building.

6. On 29 June 2023, the Council issued the EN which identified a breach of planning control, namely, "the unauthorised erection of a C3 residential dwelling house on the Land" . Enforcement was considered expedient in order to prevent the building becoming lawful as a residential dwelling after a period of 4 years by virtue of section 171B TCPA 1990. The EN required the Applicants to remove the dwelling house from the land within 3 months.

7. In a Statement of Common Ground, the parties agreed that the building had never been lived in, there were no bedrooms and beds, and the kitchen had been removed.

8. Following an Inquiry and a site visit, the Inspector dismissed the appeal and upheld the EN. On ground (b) he held as follows:

> "7. An appeal on ground (b) is a claim that the matters stated in the notice (which may give rise to the breach of planning control) have not occurred as a matter of fact. The burden of proof falls on the appellants and the relevant test of the evidence is on the balance of probabilities.
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> 8. Enforcement notices may not be issued until sometime after a breach is detected. In the meantime, appellants may make changes on site. Section 174(2)(b) of the Act is worded in the past tense, and the question is whether the breach had occurred by the date of issue of the notice. If the allegation had taken place on site, an appeal on ground (b) cannot succeed simply on the basis that activities or structures were removed or a use has ceased. An appeal Decision (APP/L3625/C/19/3233726 Nutley Dean Business Park) has been brought to my attention specifically relating to the ground (b) relevant date which the Inspector of this decision states "the appellant must satisfy me… that matters stated in the notice had not occurred… on the date it was issued". This matter, however, does not alter the wording of the Act in Section 174(2)(b) being in the past tense and whether the breach had occurred by the date of issue of the notice. I have therefore determined this appeal in accordance with the wording of the Act.
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> 9. Evidence presented confirms that the appeal building was completed in June 2021 and it is an agreed matter that the appeal building has not been lived in, therefore the building has not been used as a residential property. The breach described in the notice is the erection of a C3 residential dwellinghouse. It is not necessary for a use to have commenced for operations to have occurred and therefore in this case, the question is whether the appeal building as constructed and completed was the apple storage barn (as approved in the Original Permission and Variation Permission) or a dwellinghouse."

9. The Inspector went on to find, on the balance of probabilities, that a C3 residential dwelling house was erected, not the apple store for which planning permission had been given. He was not satisfied that the building had ever been used as an apple store, but even if it had, the breach alleged was not unauthorised use. The breach described was operational development i.e. the erection of a dwelling house.

10. The Applicants' ground of appeal was that, on a proper interpretation of section 174(2)(b) TCPA 1990, the sole question is whether the matter stated in the notice to be a breach of planning control was occurring on the date of issue of the EN. Mr Whale submitted that the Inspector erred in dismissing the appeal on ground (b) on the basis of the unauthorised erection of the dwelling house when that had occurred on a date prior to the issue of the EN and was no longer operative at the date of enforcement. He wrongly interpreted ground (b) literally and in isolation, without considering its purpose and context. A local planning authority cannot properly conclude that it is expedient to take enforcement action if there is no longer a breach of planning control. The provisions are intended to be remedial not punitive.

11. Mr Whale submitted that grounds (a), (c) and (d) were inconsistent with the Inspector's construction. Ground (a) refers to a breach of planning control, for which planning permission may be granted. It would make little or no sense to grant planning permission for the June 2021 development comprising a Class C3 dwellinghouse if that development no longer existed, two years later, on 29 June 2023. As for ground (c), it would make little or no sense to conclude that a matter did not constitute a breach of planning control potentially years before the enforcement notice was issued. As for ground (d), this is expressly referable to the date of issue of the enforcement notice.

12. In my judgment, Mr Whale's interpretation of ground (b) is unarguable, for the reasons given by Mr Clapp.

13. The starting point for the interpretation of a statutory provision is to consider the natural and ordinary meaning of the words in their statutory context. Ground (b) may succeed if the matters comprising a breach of planning control "have not occurred". It is clearly couched in the past tense. It requires an appellant to show that the relevant breach did not take place at all (subject to the time limits for enforcement in section 171B TCPA 1990).

14. That interpretation is supported by a contextual reading of the enforcement regime.

15. By section 172(1)(a) TCPA 1990, a local planning authority is empowered to issue an enforcement notice where it appears to them that "there <u>has been</u> a breach of planning control" and it is expedient to enforce against the breach (emphasis added). The power to issue an enforcement notice therefore arises where a breach has taken place. Plainly, section 172(1)(a) TCPA 1990 does not require a breach to be ongoing for an enforcement notice to be served. It would be bizarre if an enforcement notice could be lawfully served under section 172(1)(a) TCPA 1990 because a breach had taken place, but successfully appealed against under section 174(2)(b) TCPA 1990 if it was not ongoing when enforced against.

16. The power to issue the enforcement notice tallies with the circumstances in which a ground (b) appeal may succeed. If a local planning authority is incorrect under section

172(1)(a) TCPA 1990, and – factually – a breach had not occurred prior to the service of the enforcement notice, then ground (b) may be made out.

17. The construction of ground (c) also supports Mr Clapp's construction of ground (b). Ground (c) is also couched in the past tense, providing a ground of appeal if the relevant factual matters "occurred" (emphasis added) but did not constitute a breach of planning control. Again, the key issue is that some enforceable matter took place prior to the service of the enforcement notice, not that it is ongoing at the time of the enforcement notice.

18. In contrast, under ground (d), the scheme expressly provides that the relevant time to apply in respect of that ground is "the date when the notice was issued." There is a presumption that words in statutes are deliberately chosen (*McMonagle v Westminster CC* [1990] 2 AC 716, at 726D-F) and that where different words are used, a different meaning is intended (*Re Globespan_Airways Ltd* [2012] EWCA Civ 1159, at [42]).

19. Mr Clapp's construction also corresponds with the wording of the time limit provisions in section 171B TCPA 1990, which use the term "where there has been a breach of planning control" (in the past tense).

20. In the case of a breach comprising operational development, the enforcement action may not be taken after the end of ten years, which begins on the date on which the operations were substantially completed (section 171B(1)(a) TCPA 1990); and in the case of a breach comprising material change of use, the same time limit applies, but time begins to run with the date of the breach (section 171B(2)(a) TCPA 1990).

21. It is clear from this that the only limitation imposed by the TCPA 1990 on a local authority's power to serve an enforcement notice is that the breach occurred (i.e. there was substantial completion of some operational development, or there was a material change of use) within the last ten years.

22. The consistent reference in the TCPA 1990 is to the factual question of whether a breach has taken place. There is no reference to a requirement that the breach 'is occurring', and the suggestion that there is, lies directly contrary to the statutory language used.

23. Mr Clapp also relies upon the statutory purpose of the enforcement regime.

24. An enforcement notice is required to specify the steps which the authority requires to be taken, or activities required to cease, to achieve the purposes within section 173(4) TCPA 1990 (per section 173(3) TCPA 1990). Those purposes include remediation of any breach (section 173(4)(a) TCPA 1990), which may include "restoration of the land to its condition before the breach took place". There is no suggestion that a breach need be ongoing for such a requirement to be imposed, and indeed such a requirement would inhibit restoration from being effected in certain circumstances. For example, a local authority could not require damage caused during subsequently ceased unlawful material change of use to be remedied, if they could only enforce whilst that use was ongoing. This is in accordance with the Applicants' reliance on the nature of the enforcement regime as remedial rather than punitive.

25. Mr Whale's construction of section 174(2)(b) TCPA 1990 would frustrate the statutory purpose of the enforcement regime because it would prevent authorities from

effectively enforcing against breaches of planning control. If local authorities could only enforce against breaches which were ongoing at the time an enforcement notice was issued, then those engaging in protracted breaches of planning control could cease the breach immediately prior anticipated enforcement action, appeal against any enforcement notice on ground (b), on the basis the conduct complained of was technically not ongoing, and then resume the breach. That is why the enforcement notice is not required to catch the breach of planning control 'red handed' but may enforce against an identified breach of planning control to ensure that it either ceases, or does not recur whilst the enforcement notice is in place.

26. Mr Whale has referred to two other Inspectors' appeal decisions.

27. In the *Nutley Dean Business Park* appeal (APP/L3625/C/19/3233726), Inspector Andrew Walker said at paragraph 3, that for the appeal to succeed under ground (b) "the appellant must satisfy me on the balance of probabilities that matters stated in the notice had not occurred as a matter of fact on the date it was issued". However, there was no analysis as to why the Inspector had departed from the actual wording of ground (b), presumably because the Inspector's conclusions did not turn on that point. The Inspector's conclusions were that the Council had simply mischaracterised the relevant breach of planning control (not that they had attempted to enforce against a breach which was not ongoing) which is why the ground (b) appeal succeeded in that case. The allegation in the relevant enforcement notice was "without planning permission, the material change of use of the land from agricultural land within the designated Green Belt, to land used for storage." The Council's position at the hearing, however, was that the relevant "pre-existing use of the planning unit was in fact a mixed use of agricultural and B2 general industrial and B8 storage uses" and the present unlawful use was a mixed use including agricultural land and B2 and B8 use. Accordingly, Inspector Walker found the notice allegation was "wholly wrong" (paragraph 9) as to a change of use taking place "from a single primary agricultural use" and "a change of use having been made to a single use of storage" (paragraph 6). The ground (b) appeal succeeded because in the material change of use allegation, the Council had mischaracterised both the starting and the end point: the alleged change of use that was alleged had not factually occurred (paragraph 6).

28. In the *Abbey Glen* appeal (APP/J4423/C/24/3340817), Inspector A. Walker stated at paragraph 12:

> "The wording of section 174(2)(b) of the Town and Country Planning Act 1990 is in the past tense. It is only concerned with whether the breach has occurred, not whether it was occurring at the time the notice was issued."

29. The Inspector subsequently found:

i) The appeal site was in unlawful Class B2 use up to November 2022 (paragraph 39).

ii) The appeal site was in lawful Class E(g)(iii) use on 13 February 2024, the date of issue of the enforcement notice (paragraph 41).

30. Ground (b) succeeded because the enforcement notice alleged Class B2 use on the date of issue (paragraph 41). However, it only did so because in the enforcement notice itself the breach relied upon was an ongoing material change of use rather than a historical one which had ceased. He made that point very clearly at paragraph 13:

> "under paragraph 4 of the notice there are numerous references to the 'current use.' There is no reference to the use being historical. Within the four corners of the notice it is plainly clear that the allegation refers to the current use of the site (at the time the notice was issued). It does not allege the use has historically taken place and seeks to prevent it from occurring again."

31. The Inspector made it clear why the specific alleged breach in the enforcement notice limited him to consideration of whether the breach was ongoing rather than had simply occurred within the statutory time limit. At paragraph 14, he explained that the notice must enable persons to know what the matters said to constitute the breach are and as such "if the notice was alleging an historical use of the Site in Class B2 use then it must say so."

32. On a proper analysis, neither of these decisions support Mr Whale's construction of ground (b), or undermine Mr Clapp's construction.

33. For these reasons, I conclude that the Applicants' grounds of appeal are unarguable and permission has to be refused.