Town and Country Planning Act 1990 ("the 1990 Act") Section 174 Planning Enforcement Notice Appeal

Local Planning Authority reference: ENFO/2016/00136

Without planning permission the material change of use of the land to a mixed sui generis use ("the Development")

at Land at Birchfield Springs, Rushton Road, Desborough, NN14 2NQ ("the Site")

Mr Lyndon Thomas, Mrs Sam Thomas and Lyndon Thomas Limited ("the Appellants")

Date: 24 May 2018

SUMMARY GROUNDS OF APPEAL

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1. **Introduction**

1.1. The Appellants are the registered freehold owners and occupiers of land at Birchfield Springs, Rushton Road, Desborough, NN14 2NQ ("the Site"). The Site is currently in development under planning permission granted on 19 August 2010 by Kettering Borough Council which allows "*the formation of no.2 specimen trout fishing lakes, a junior lake, stock pond, the erection of a facilities building, a machinery store, hatchery, the change of use of land for the siting of a mobile home for the occupation by the site manager, a formation of car parking and access areas, plus landscaping*" ("the 2010 Permission").

1.1 On 12 March 2020 Kettering Borough Council ("the Council") served an Enforcement Notice on the Appellants alleging breaches of planning control. Following correspondence with the Council this notice was withdrawn on 9 April 2020.

1.2 On 1 May 2020 the Council issued the current Enforcement Notice alleged unauthorised development consisting of:

"Without planning permission the material change of use of the land to a mixed sui generis use comprising of:

A) The use of the land for the winning, working, storage and sale of minerals;

B) The use of the land for the unauthorised importation, storage, processing, sorting, transferring and depositing of waste materials;

C) The use of the land for the storage of plant, machinery and vehicles associated with uses A and B above (processors/crushers)

D) The use of the land for the storage of plant hire machinery and storage of parts for the purpose of hire;

E) The residential use of the land through the stationing of a timber lodge marked A on the Plan with decking, a shed and a caravan;

F) The use of the land for a fishing lake business;

G) The erection of a building, patio, and boundary walls hatched in yellow on the Plan which is part and parcel to the mixed use

H) The use of the land for mechanical repairs, vehicle maintenance, plant maintenance and the storage of mechanical tools

I) The erection of a building hatched in blue on the Plan which part and parcel to use H

J) The unauthorised formation of a pond and two lakes, laying down hardstanding and access roads, pillars and toppings, perimeter walls and gates about 1m adjacent to the high road and part and parcel with use (F) above

K) The creation of a haul road that is shown on the plan hatched in orange, that is part and parcel of the mixed use; and

L) The siting and stationing of a portacabin on the land marked B on the plan for the purposes of an office which is part and parcel of the mixed use.".

(together "the Development") ("the Notice").

1.3 The requirements of the Notice are set out in paragraph 5 of the Notice.

1.4 The Appellants have lodged an appeal against the Notice on grounds (a), (b), (c), (d), (f) and (g). The summary basis for these grounds is set out here. For clarity we will deal with the "legal" grounds of appeal first, before coming on to the deemed planning application and then the residual grounds (f) and (g).

2. **Ground (b): that those matters have not occurred;**

2.1 The Appellants will produce evidence that despite assertions from the Council there is no operations relating to the winning and working of minerals on the Site. Whilst some soil extraction occurred in the implementation of the 2010 Permission this did not amount to mineral extraction but was simply authorised engineering operations in the furtherance of a granted planning permission.

2.2 Further, there is no storage, processing, sorting, or transferring of any waste materials. Again, some inert soil has been imported onto the Site for the purposes of amending levels and properly implementing the 2010 Permission, but this is fundamentally not a waste storage, processing, sorting or transferring operation.

2.3 No plant or machinery is stored on the Site. Plant and machinery is at the Site for use in relation to the ongoing implementation of the 2010 Permission. The Appellants do not operate a plant hire business from the Site. The plant on the Site is used in relation to the ongoing works on the Site. The Appellants do own a plant hire business, and do use their own plant on the Site which means that sometimes pieces of plant leave the Site to go on hire before returning to the Site, but they only return to the Site for use, not for storage.

2.4 The Appellants will argue that it would be unjust and prejudicial for the Inspector to remove only these elements of the alleged breach and leave the remaining elements intact. Not only do the majority of the other elements benefit from separate planning consent under the 2010 permission, but the Appellants have been put to defending a minerals and waste enforcement notice due to overreach by the Council. This has included allegations in relation to EIA development. The effect of removing the minerals, waste and plant hire elements of the alleged breach are fundamental and must result in the quashing of the Notice.

3. **Ground (c): that those matters (if they occurred) do not constitute a breach of planning control**

3.1 In the event that the Appellants are unsuccessful on ground (b) they will provide evidence that substantial elements of the alleged breach benefit from planning consent by virtue of

the 2010 Permission. The Council argue that this permission was not implemented and has therefore lapsed. However, this is a relatively new position for the Council to take. Previously the Council have accepted that the 2010 Permission was validly implemented. This is evidenced from the Council's own conduct.

3.2 The 2010 Permission is subject to the statutory time limit condition. This is expressly set out at condition 1 of the 2010 Permission and requires that implementation of the permission is required within 3 years of the date of grant. Therefore implementation was required by 19 August 2013. In July 2015 the Council accepted, validated, and granted, a non-material amendment to the 2010 Permission on an application my by the Appellants. These actions confirm that the 2010 Permission must have been validly implemented and is still a "live" consent.

3.3 The Council offers no explanation for this change in position. Consequently, elements of the alleged breach set out at (f) to (k) in the Notice each benefit from planning permission and do not, therefore, represent a breach of planning control.

4. **Ground (d): that no enforcement action can be taken against the breach of planning control alleged in the Notice**

4.1 The Notice alleges a number of elements of operational development. Section 171B(1) of the 1990 Act provides that "Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed".

4.2 The Notice claims that each of the elements of operational development is "part and parcel" of the alleged mixed use. In doing so it is trying to incorporate the *Murfitt* principle, as clarified by the *Kestral Hydro* decision. This confirms that "provided that the works concerned are integral to or part and parcel of an unauthorised use then the relevant enforcement time limit is that contained within s171B(3) of the 1990 Act, i.e. that "no enforcement action may be taken after 10 years, beginning with the date of the breach. The Notice states that the breach of planning control has occurred within the last 10 years.

4.3 The Appellants will demonstrate that the elements of operational development are not integral to or part and parcel of the alleged mixed use, but instead are part and parcel of the implementation of the 2010 Permission. Even if the 2010 Permission has subsequently lapsed (as seems to be the case put forwards by the Council) the elements of operational development should still benefit from the four year immunity period.

4.4 The Appellants will demonstrate in evidence that those elements of operational development have been complete for more than four years as at the date of enforcement and therefore are immune from enforcement action.

5. **Ground (a): that planning permission should be granted for what is alleged in the Notice**

5.1 In the event that the above grounds fail, or are insufficient to cover the alleged breaches, It is respectfully submitted by the Appellants that planning permission should be granted for any residual breaches as alleged in the Notice.

5.2 For the avoidance of doubt, no ground (a) appeal is advanced in relation to breaches relating to the winning and working of minerals; the importation, storage, processing or transfer of waste; or the use of the Site as a plant hire company. It is the Appellants firm case that these elements are simply not happening on the Site. However, if the Inspector were to find that the 2010 Planning Permission has lapsed for any reason, or that immunity has not been

accrued, then it is respectfully requested that planning permission is granted for those elements of the alleged breach that would otherwise be permitted by that grant. This includes:

(a) The use of the land for a fishing lake business including the formation of a pond and two lakes and associated operational development;

(b) The erection of a facilities building in the location hatched in yellow on the Notice Plan for a use which is ancillary to the fishing lake business;

(c) The erection of a repair and maintenance building in the location shown blue on the Notice Plan for a use which is ancillary to the fishing lake business; and

(d) The creation of access roads and paths throughout the site.

5.3 In addition, evidence will be produced to demonstrate that the fishing lake business generates an essential need for full time occupation of the site such that the residential use of the timber lodge (marked A on the Notice Plan) should be granted planning permission.

5.4 The statutory framework is provided for under section 38(6) of the Planning and Compulsory Purchase Act 2004, which requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise. Furthermore, Section 70(2) of the Town and Country Planning Act 1990 also states that the authority dealing with the planning application should have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.

5.5 In essence, it is the view of the Appellants that the development of the land is not inappropriate, and in fact has policy support in both existing and emerging National Policy and within the Kettering Local Plan. Further, the development of the land was granted planning permission in 2010 for largely the same development which is a material consideration which should be given substantial weight.

5.6 It will be open to the Inspector to impose other conditions as appropriate that will make the development acceptable in planning terms should it be deemed necessary.

6. **Ground (f): 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**

6.1 As set out above, there is significant over enforcement in the Notice where elements of the alleged breach are either not occurring as a matter of fact, or do not constitute a breach of planning control.

4.2 The requirements set out in the Notice at paragraph 5 steps 1 to 10 exceed what is necessary to remedy any breach of planning control or any injury to amenity having regard to what is already lawful by virtue of the 2010 Permission.

4.3 In addition, it is noted that the alleged breach only refers to the use of the timber lodge at (E) does not cover any associated operational development. Consequently, the requirement in paragraph 5 step 3 to remove the timber lodge, decking, shed from the land are not necessary to remedy the breach that is alleged.

7. **Ground (g): The time given to comply with the Notice is too short**

7.1 Insofar as the individual times for compliance allowed are concerned it is submitted that given the need for the Appellants to source an alternative site in order to continue setting

up their business, the period allowed is manifestly short of what would be reasonable. Further, requirements relating to the removal of operational development will be difficult to comply with in the timescales allowed given the ongoing effects of the Covid-19 pandemic. Finally, it is noted that the requirements that the use cease immediately on the effective date of the Notice is a tacit acceptance that some elements of the alleged breach are incorrectly stated.

7.2 In the circumstances, given the likely upheaval associated with relocation, the Appellants submit that a period of 12 months would be more appropriate.

8. Conclusion

8.1 It is respectfully submitted that significant aspects of the breach alleged in the Notice are simply not occurring on the Site as a matter of fact. The appeal on ground (b) should succeed in relation to these elements.

8.2 Further elements of the alleged breach benefit from planning permission thanks to the 2010 Permission and the appeal on ground (c) should succeed in relation to these elements.

8.3 Still more elements of operational development immune from enforcement in that they have been complete for in excess of 4 years and do not fall foul of the *Murfitt* principle and therefore the appeals should succeed on ground (d).

8.4 Where any aspects of the breach remain after the application of those grounds, then there is sufficient policy support in both existing and emerging national policy, in local policy and within identifiable material considerations that the Ground (a) appeal should also succeed.

8.5 In the event that the appeal fails on ground (a) significantly less onerous steps should have been sought by the Council that would have dealt with the breach of planning control. These steps should be substituted in to the Notice under the ground (f) appeal.

8.6 Finally, in the event that the ground (f) appeal also fails, an extended time limit for compliance should be allowed in relation to the requirements of the Notice.

8.7 For the avoidance of doubt, these Summary of Grounds shall be expanded upon in the Appellants' Statement to be submitted during the course of the Appeal.

Thrings LLP
May 2020