



Appeal Decision

Hearing and site visit held on 19 February 2013

by **A U Ghafoor BSc (Hons) MA MRTPI**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 1 March 2013

Appeal Ref: APP/N5090/C/12//2180444

Land at GBN Site, Railway Sidings, Oakleigh Road South, London N11 1HJ

- 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 GBN Services Limited against an enforcement notice issued by the Council of the London Borough of Barnet.
- The Council's reference is ENF/01184/09B.
- The notice was issued on 27 January 2012.
- The breach of planning control as alleged in the notice is without planning permission, the erection of a 'Trommel' rubbish sorting conveyor.
- The requirements of the notice are demolition of the 'trommel' rubbish sorter conveyor and the removal of the resultant materials permanently from the land.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a correction and variation.

Preliminary Matters

1. There are a few matters relating to the wording of the notice, which I raised with the appeal parties ('the parties'), that require consideration prior to the determination of the appeal with a view to correct the notice. The correction would be possible using the powers under Section 176 (1) of the Town and Country Planning Act 1990 as amended, (the '1990 Act'), provided this could be done without causing injustice to any party.
2. The planning history of the site (which I will refer to as 'the GBN site') is set out in the written submissions. The relevant aspect of that history relates to a planning permission granted in 2007 for the change of use of the GBN site from a scrap yard to a waste transfer station subject to conditions¹. The approved plans show that the materials recycling facility (known as 'the MRF'), which includes the trommel, conveyor belts and a picking station, should be located within an open fronted building. Instead, the MRF is located partly within the building and partly outside. The unchallenged evidence is that the open-air location of the MRF is not in accordance with the 2007 permission.
3. Subsequently, a planning application to retain the trommel in its current location, and to increase the height of the fence approved along south-western boundary from 5m to 5.5m, was refused permission and dismissed on appeal².

¹ See the full description of the development in planning permission ref: N15069A/07 ('the 2007 permission').

² Appeal was dismissed on 1 November 2011 appeal ref: APP/N5090/A/11/2155427.

4. Turning to concerns about the allegation, to comply with the relevant legislative provisions, the alleged breach should enable any person on whom a copy of a notice is served to know what the matters alleged to constitute the breach are. In *Miller-Mead v MHLG* [1963] 1 A11 ER 459, Lord Justice Upjohn said that the test in deciding whether a notice satisfied the statutory requirement must be: *'Does the notice tell him fairly what he has done wrong and what he must do to remedy it'*.
5. The appellant did not lodge an appeal on ground (c) nor was it pursued at the Hearing. Nonetheless, the claim was that the allegation is vague. The trommel is a screened cylinder used to separate waste materials which are conveyed by linked belts to a picking station. The picking line is an enclosed structure where materials are separated; it is erected above ground level and sits upon steel joists. There is a generator located nearby, which operates the trommel, but it is also used to supply power to other plant not covered by the notice. The reality is that the MRF is made up of the trommel rubbish sorting conveyor and the picking station.
6. Section 336 (1) of the 1990 Act defines the word *'building'* to include any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building. The trommel rubbish sorting conveyor and picking station are physically attached to the ground; they cannot be moved around the site without dismantling all of the equipment by specialist tools. Given the size of this equipment, the degree of permanence and physical attachment to the ground, the MRF is a permanent structure. The assembly of the MRF required a degree of engineering skill and pre-planning. As a matter of fact and degree, the installation of the trommel rubbish sorting conveyor and picking station amounts to the erection of a building, which may have involved significant engineering operations. For development control purposes, the structure is a *'building'* and its erection amounts to development as defined in S55 (1) of the 1990 Act³.
7. For greater precision, the allegation should state the following: *'without planning permission, the erection of trommel rubbish sorting conveyor and picking station'*. However, that does not necessarily mean the notice is fundamentally flawed. I am satisfied that the appellant has not been substantially prejudiced by the wording of the issued notice. This is because the notice broadly specifies the alleged breach and requirement. The reasons for issuing the notice clearly refer to the effect of noise upon nearby residents from the operation of the trommel rubbish sorting conveyor. It is clear from the written and oral submissions that the issued notice has not caused significant confusion. In my view, the intended correction would not undermine the basis of the notice.
8. Therefore, I concur with the parties that the correction of the allegation would not cause injustice to any party. Accordingly, I will correct the notice.

³ See the definition of the word *'development'* in S55 (1) of the 1990 Act which says the following: *'Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'*.

Ground (a)

9. The terms of the deemed planning application are directly derived from the alleged breach. Therefore, planning permission is sought for the erection of the trommel rubbish sorting conveyor and picking station.
10. The **main issue** to consider is the effect of the development upon the living conditions of nearby residents having particular regard to noise and general disturbance.
11. In September 2012, the Council formally adopted its Local Development Framework Core Strategy (CS) and Development Plan Documents (DPD), which replace Policy ENV12 of the London Borough of Barnet Unitary Development Plan 2006. CS Policy 13 relates to ensuring the efficient use of natural resources and Policy DM 04 of the DPD relates to environmental considerations. The supplementary planning document (SPD) titled: '*Sustainable Design and Construction*,' which was adopted after public consultation in June 2007, is a material consideration. The SPD requires that the operation of any plant and machinery shall ensure that noise generated is '*not audible*' outside the nearest residential premises⁴. A development proposal will need to provide calculations that show that the plant noise level is 10 decibels (A) below the lowest background level (LA90 (15 minutes)) 1 metre from the nearest residential window over the proposed operating hours.
12. Also relevant to the determination of this appeal is the National Planning Policy Framework. A core principle of the Framework is that planning decisions should be plan led. Paragraph 9 indicates that pursuing sustainable development involves seeking positive improvements in the quality of the built environment, as well as in people's quality of life, including but not limited to improving the conditions in which people live, work, travel and take leisure. Paragraph 123 says that planning policies and decisions should aim to avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of new development.
13. The GBN site extends to some 0.4 hectares and is located to the west side of the former sidings adjacent to a mainline railway on higher ground. It is located within an industrial part of the area, which includes a builders' merchant and another waste transfer station known as 'the Winters'. On the other side of the railway line, there is a block of flats (Chaville Court). Although slightly further away from the site, there are houses on Oakleigh Road South and other nearby roads. The surrounding locality is mainly residential in character due to the make up and the layout of the area.
14. At the time of my site visit, the trommel was in operation and I visited Chaville Court and the properties in the vicinity of Oakleigh Road South. The trommel's exposed position emitted a fairly constant level of noise with the motor and conveyor providing consistent broadband noise. Additionally, in combination with sound from industrial-related activities, regular impulsive sound from the picking station as a result of the sorting of materials is also noticeable from Chaville Court and the immediate vicinity of the GBN site. This is broadly consistent with the findings stated in the appellant's own noise report⁵.

⁴ See page 22 of the SPD.

⁵ GBN Services assessment of noise from trommel 14 February 2012 carried out in accordance with British Standard 4142: '*Method for rating industrial noise affecting mixed residential and industrial areas*' (1997).

15. In an urban environment such as this, background noise levels are likely to be dominated by noise from passing traffic and from the usual hustle and bustle of daily life. However, I heard first hand evidence from residents living in Oakleigh Road South and Falkland Avenue. They were particularly concerned about noise from the exposed location of the trommel at the GBN site in association with other industrial activities.
16. On the other hand, in response to a revised planning application which is pending determination⁶, the Council's environmental health officer says that noise from the GBN site does not make a significant contribution to the noise climate experienced by residents in Oakleigh Road South. It is likely that occupiers of properties further away from the GBN site are also materially unaffected. The Council's own observations found that the GBN site is largely screened by physical features such as buildings on the Winters' site and a belt of trees. On the basis of the available evidence, I concur that residents in Oakleigh Road South and Falkland Avenue are not materially affected by unacceptable levels of noise from the operation of the trommel and picking line at the GBN site.
17. Nonetheless, I am concerned about the effect of noise upon residents of Chaville Court, which is closer to the GBN site than properties in Oakleigh Road South and Falkland Avenue. Some of the flats, even at ground floor level, have clear views of the buildings and plant associated with the industrial activities at the GBN site. Noise related complaints from Chaville Court's residents have not been received, but that is not determinative of the issue.
18. In this location, I observed that ambient noise levels are dominated by sound from passing trains, however, in between train movements sound from the trommel and its associated equipment dominates. Noise from the operation of the trommel and picking station is audible to the naked ear at Chaville Court. It is reasonable to assume that the flats' residents are adversely disturbed and affected by the level of noise originating from the operation of the trommel and its associated machinery given its exposed positioning. The unmitigated operation of the trommel and picking line in this location would be likely to cause justified complaints, due to the unacceptable level of noise and disturbance. Accordingly, the development carried out fails to comply with CS Policy CS 13 and DM 04 of the DPD. In its current location, the trommel rubbish sorting conveyor and picking station would conflict with the main aims and objectives of the SPD. The development would conflict with advice contained in paragraph 9 and 123 of the Framework.
19. To address these concerns, the noise report recommends mitigation measures. Essentially, the report suggests the erection of an 8m high sound barrier with a cantilever at high level (the construction of which is shown in drawings submitted with the appeal documents). The visual impact of the barrier would be ameliorated by landscaping. This measure would address the previous Inspector's concerns regarding the effect of noise upon the residents of the upper floor flats at Chaville Court. The appellant's agent suggested that noise attenuation and landscaping measures could be required by the imposition of suitably worded conditions.

⁶ Planning application has been submitted to the Council and at the time of the Hearing the officer's planning committee report had been published. In broad terms, that proposal seeks planning permission for the retention of the trommel in the position it is currently erected and the installation of an acoustic wall as mitigation against the impact of noise on Chaville Court.

20. I have considered the wording of the suggested conditions handed to me at the Hearing in the light of guidance contained in Circular 11/95: *'The use of conditions in planning permissions'* and paragraphs 203 to 206 of the Framework. However, given the potential size and scale of the proposed sound barrier, I take the view that the imposition of conditions would fundamentally alter the nature of the development originally enforced against. This is because the sound barrier would be a substantial structure involving significant building operations, and it would not be the subject of public consultation and scrutiny as opposed to a planning application. In any event, the retention of the trommel and picking station in its current location with the erection of an 8m high wall is the subject of a pending planning application. I make no further comment on that scheme.
21. The appellant has advanced other considerations which he considers go in favour of the proposal. The gist of the arguments will be underlined and evaluated as follows:
- (a) The development is supported by local waste planning policies: That may be so, but the notice does not relate to the use of the GBN site as a waste transfer station. The notice attacks the location of the trommel rubbish sorting conveyor and picking station which is inappropriately sited. I attach little weight to this argument in support of the scheme.
 - (b) The 2007 permission is a 'fallback'. Even if the MRF is sited within the open front building, the SPD guidance would not be met: I attach limited weight to this line of argument. The 2007 permission permits the erection of the open front building. The submitted plans show that the MRF should have been located within that building; it is not and its mainly open-air positioning makes the noise climate worse.
 - (c) In considering the planning merits of the 2007 planning application, the Council acknowledged that the SPD guidance was not strictly met. However, a realistic and pragmatic approach was taken with the proposed use of the GBN site as a waste transfer station and the Council cannot be criticised for that approach. This was because of other material considerations such as the need to provide recycling facilities in the Borough.
 - (d) The relocation of the trommel would mean the storage of waste materials on the outside of the building thereby causing harm to the environment: Little, if any, weight can be given to this argument. This is because the layout plan approved as part of the 2007 permission indicates that the trommel and picking line can practically be located within the building. The plan also shows the location of waste materials, bays for metals and wood, and other sundry items. Given the design and location of the building, it is reasonable to assume that noise from the trommel and picking line would be reasonably mitigated because of its location within the building.
22. On the particular facts of this case, I find that the other material considerations advanced by the appellant do not, either on their own or in combination, overcome the local and national planning policy objections to the development carried out.

23. For all of the above reasons, I conclude that the development has a materially harmful effect upon the living conditions of nearby residents because of unacceptable noise and general disturbance. These findings are consistent with the previous Inspector's conclusions.

Ground (f)

24. The Council told me that the notice seeks to remedy the breach of planning control by restoring the land to its condition before the breach occurred, which is squarely derived from S173 (4) (a) of the 1990 Act. That purpose should be reflected in the wording of the notice's requirements.

25. Under this ground of appeal, the gist of the appellant's main argument is that the word '*demolition*' in paragraph 5 of the notice is inappropriate. In addition, the use of the word '*permanently*' in the requirement is both unnecessary and inappropriate having regard to the provisions of S181 (1) of the 1990 Act, which state that compliance with a notice shall not discharge the notice. The parties agreed that the word '*demolition*' should be replaced by '*dismantle*' for clarity's sake. This would flow from the corrected allegation and does not make the steps any more onerous than first issued. I am satisfied that, if the requirements were so varied, no injustice would be caused to any party.

26. The appellant's planning agent argued that the terms of the notice could be varied to require the trommel to be located within the building in compliance with the 2007 permission. I consider the form of under-enforcement advanced would potentially require the substantial rewording of the requirements. Such a variation would change the nature of the development originally enforced against and introduce a significant amount of uncertainty in the terms of the notice.

27. I have reviewed all of the arguments under this ground (f) appeal, but the lesser steps advanced would not remedy the breach and the step required does not exceed what is necessary to do so. However, as I am varying the steps required to comply with the notice as set out in paragraph 28 above, the appeal succeeds on ground (f).

Ground (g)

28. Under this ground, the challenge is that the compliance period of two months is too short. The submission is that six months would be required so that alternative options are discussed with the Council.

29. Effective enforcement is important as a means of maintaining public confidence in the planning system⁷. The notice was issued on 27 January 2012, but the stated effective date was 1 August 2012. The Council stated that the long effective date was given on the basis of negotiations between the parties. Given that the notice affects a business, this was considered reasonable. Nonetheless, the breach of planning control should not be allowed to continue longer than necessary given the development's harmful effect upon the living conditions of nearby residents, due to noise and disturbance. In this case, the varied notice would require the dismantling of the trommel and picking line and the information does not suggest that the nature and type of this work involved cannot be reasonably achieved within the specified compliance period.

⁷ See paragraph 207 of the Framework.

30. If additional time is necessary because of negotiations between the parties, under S173A (b) of the 1990 Act, the Council may waive or relax any requirement of a notice and, in particular, may extend any period specified in accordance with S173(9). This would be a matter for the appeal parties to negotiate.
31. For all of the above reasons, two months is a reasonable compliance period and so the appeal on ground (g) fails.

Decision

32. I direct that the enforcement notice is corrected by the deletion of all of the words in paragraph 3 apart from the paragraph number and heading the matters which appear to constitute the breach of planning control, and the substitution therefor of the following words: *'without planning permission, the erection of a trommel rubbish sorting conveyor and picking station'*.
33. I direct that the enforcement notice is varied by the deletion of all of the words in paragraph 5 apart from the paragraph number and heading what you are required to do, and the substitution therefor of the following words: *'Dismantle and remove from the land the trommel rubbish sorting conveyor and picking station'*.
34. Subject to the correction and variation, the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under Section 177(5) of the 1990 Act as amended.

A U Ghafoor

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Graham Simpkin DipTP MRTPI	Graham Simpkin Planning
Susan Hurst BSc MIOA	RPS P & D
Tony Dickens	Director GBN Services

FOR THE LOCAL PLANNING AUTHORITY:

Ian Sutherland	Enforcement Officer, the Council of the London Borough of Barnet
Lisa Cheung	Planning Officer, the Council of the London Borough of Barnet

INTERESTED PERSONS:

David J Thomson	}
Maria Cann	} Local residents
Stella Cavanagh	}

DOCUMENTS

- 1 Hearing notification and list of people notified
- 2 Approved plan for planning permission ref: N15069A/07
- 3 Extract copy of Council's SPD
- 4 Suggested conditions submitted by the appellant's planning agent
- 5 Officer's planning committee report for planning application pending determination by the Council.