The Planning Inspectorate

Appeal Decision

Site visit made on 15 April 2021

by Grahame Kean B.A. (Hons), Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 12th May 2022

Appeal Ref: APP/T2405/C/19/3226354

Land known as Whitegate Stables and Spinneyside, lying to the north-west of Aston Firs Cottage, Rosevale Park, Hinckley Road, Sapcote, Leicester LE9 4LH

- 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 Mr Anthony Peters against an enforcement notice issued by Blaby District Council.
- The notice was issued on 4 March 2019.
- The breach of planning control as alleged in the notice is: without planning permission, the material change of use of the Land to a mixed use for agriculture and the deposit, transfer and processing (including burning) of waste.
- The requirements of the notice are:
    1) Cease the use of the Land for the deposit, transfer and processing (including burning) of waste.
    2) Remove all waste, the gateposts and gates (approximate position marked with an x on the attached plan) hard surfacing, vehicles, tools and any other materials associated with the unauthorised use from the Land.
    3) Restore the levels of the land [sic] to adjacent land levels by the spreading of top soil and then re-seed with pasture seed.
- The period for compliance with the requirements is: 6 months after this notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(b) (d) and (f) of the Town and Country Planning Act 1990 as amended (the Act).

Summary of Decision

1. The appeal is allowed in part and the enforcement notice is upheld as varied in the Formal Decision below.

Costs application

2. The appeal is subject to a costs application by the appellant against the Council which is the subject of a separate Decision.

Preliminary matters

3. The appeal was made on grounds that included ground (c). After the appeal was made the appellant in its statement of case (SoC) withdrew its appeal on this ground.

4. The SoC also referred to a "hidden ground" (d) in relation to the gateposts and purported to withdraw that ground, stating however that "*it* [ie a ground (d) appeal] *is advanced in respect of the hardstanding on the land*."

5. The so-called hidden ground (d) was contained in the section of the form on ground (f), asserting that the gate post was constructed over 4 years ago but there was no mention anywhere in the form of the hardstanding being there for any period of time or that it was too late to take enforcement action against it.

6. It is therefore incorrect to imply, as the appellant does through his agent, that there was a hidden ground (d) in respect of the hardstanding, so it was not surprising that the Council made no reference to it in its SoC, but it did respond in its final comments (FC). Although no application was made to add a ground (d) appeal in respect of the hard surfacing I have considered it as such, although as shall be seen its scope is limited by matters concerning the notice.

7. The appellant requested that the appeal proceed by way of a hearing, and the Council requested a local inquiry. The Secretary of State has kept this matter under review and is satisfied, as am I that all relevant facts have been considered and that a decision can be made without recourse to an oral event.

Whether the notice was properly served

8. Broadly speaking, the appeal site consists of three parts, a northern half, a southern half and then the access track leading to it together with a strip of land alongside it.

9. In his final comments (FC) the appellant states that the notice should have been served but was not served on the owner of part of the appeal site. He makes no appeal on ground (e) that copies of the enforcement notice were not served as required by s172 of the 1990 Act but since it is raised I should consider the matter.

10. The notice was served on or shortly after 19 March 2019, most likely when it was issued as that tallies with the date when photographs were taken by the Council of the site. However the Land Registry (LR) office copy entry for that part of the land (title LT292201) shows that the owner whom the appellant states should have been served, was registered with freehold title in October 2019, ie <u>after</u> the notice was issued, in respect of the northern part of the appeal site and the access track and adjoining land. It is irrelevant to the propriety of service of a notice that someone may later acquire the land.

11. Otherwise, and in any event the notice bears names and addresses of the several persons served, including the appellant, the owner, occupier and any other person with an interest in the land described as affected by the notice. It is undisputed that the notice was also displayed on the land, handing it to persons on and around the land and by posting it to the persons identified.

12. In his FC the appellant seeks to restrict the scope of his evidence to land owned by him, Anthony Peters, said to be "*from the points of the gates leading into the first field*." It is then said that this land is within a different planning unit which I deal with later.

13. When I visited, Mr Peters, who identified himself to me, was clearly in some control of the main north and south parts of the appeal site. He appears to have been registered with title to the southern half of the main part of the appeal site in June 2018, as the LR title and plan LT292181 indicate.

14. The evidence is what it is wherever it comes from. If it points to conclusions that may be drawn in respect of land alleged not to be in the ownership or

control of the appellant, it cannot and should not be ignored on that account just because its immediate source is evidence that came from the appellant.

15. The only appeal was made by Mr Peters. However I am satisfied that the notice was properly served on persons with a relevant interest in the land in accordance with s172 of the 1990 Act.

Procedural matter: the site visit

16. Notification was given that the site inspection would be unaccompanied on an "access required" basis. The appellant was requested to ensure that provision (with any gates or barriers left open) was made available to access and conduct the site inspection unaccompanied. On arrival by car I was confronted by a dangerous looking and vociferous Alsatian dog chained to the entrance with a long chain. Mr Peters appeared and beckoned me through. I drove inside the site and found another Alsatian of similar disposition, chained to a fence. I walked around the site with Mr Peters who was at a distance, but "on hand" so to speak, should assistance be required in negotiating parts of the site within the sectors in which the dogs patrolled.

17. The only points of engagement were twofold. I identified with Mr Peters various reference points to orient myself in relation to the site. Secondly, he was content for me to take photographs site to use as an aide memoire, however he objected to photographs being taken of his own van and car and those of his brother. He stated these vehicles were there as he and his brother had returned to give me access and would be shortly moved off the site.

18. Thus I was able to view the site essentially unaccompanied. On several occasions Mr Peters sought to inform me of various matters relating to the site and its history. I explained that I could not take account of these matters, and that I was there to view the site without discussing the appeal. At the end of the site visit I further explained the limited purpose of the site inspection and the need for fairness in the execution thereof, which Mr Peters understood.

The enforcement notice: nullity argument

19. It is suggested that Nigel Wicks of Enforcement Services Ltd (ESL) being a "third party contractor" did not have the authority to issue the enforcement notice, which was signed by him, and therefore the notice was a nullity. In the Council's constitution and delegation scheme, enforcement action is stated to be the function of the Planning and Economic Development Group Manager (PEGM), the Planning Enforcement Manager and others.

20. On 24 July 2018 the full Council considered a PGEM report and resolved that:

    "the Strategic Director be granted delegated authority to appoint external third party contractors, to deal with all enforcement and compliance matters at this specific site. Reason: Due to the nature and specific circumstances of the site, site owners and breaching of planning control, it is appropriate that the Strategic Director be given delegated authority to appoint external contractors."

21. Strategic Directors in the absence of the Chief Executive, had overriding authority in respect of any delegation to Officers not reserved solely to a formal post by virtue of statutory requirements. It appears undisputed that the appointment itself was made in accordance with the minute, although the site

was unnamed. However the appellant was later advised in writing that the subject of the report was Whitegate Stables and the only contractor was ESL.

22. That does not satisfy the appellant who alleges that the Council minutes could be used in an untoward way to establish authority to take enforcement action in a case where there was no such authority. The appellant has not laid any foundation to any allegation of dishonest manipulation of the records, and I see no good reason why it is necessary to disclose the report given the sensitivity of the issues that were clearly considered. There has for example been supplied an ESL report of 25 October 2018 detailing unlawful activities on several sites in the area including the appeal site which is described as the "Injunction Land". Some parts of the report are, unsurprisingly, redacted. It recommended issuing planning contravention notices (PCN) to establish any breaches before more formal action was taken. It added that liaison should occur with the County Council as "another relevant planning authority".

23. So, as to the report to the Council, the public were excluded from the meeting for that item since it involved the likely disclosure of "exempt information", as defined in paragraph 1 of Part 1 of Schedule 12A of the said Act.

24. Paragraph 1 deals with personnel issues, for a "particular employee, former employee or applicant". The minute references "third party contractors" and not ESL specifically. However the item clearly deals with anticipated enforcement action as well as appointment of contractors, and from experience of such matters (although not a point taken or responded to by either party) it is likely that paragraph 13 was also in play, whether or not paragraph 1 is also correct. Paragraph 13 reads:

"Information which, if disclosed to the public, would reveal that the authority proposes (a) to give under any enactment a notice under or by virtue of which requirements are imposed on a person; or (b) to make an order or direction under any enactment."

25. If ESL were a "third party" as alleged by the appellant, they cannot be an employee. It is in fact common knowledge that ESL act for several Councils in enforcement work, and I imagine that each authority may have its own particular mechanism for engaging their services. However I have been given no good reason to suppose that their appointment in this matter was improper.

26. The email from the PEM confirms that ESL was appointed to be responsible for all aspects of the enforcement case. I am satisfied from the available evidence, including the nature of "enforcement activity" described at section 5 of the report to the Lead Member, that the authority delegated includes service of the enforcement notice and that it relates to the appeal site.

27. The Kendals Cottage appeal decision APP/N1920/C/15/3005612/3 (2015 appeal decision), in which the enforcement notice was found to be a nullity, is cited by the appellant. The crux of the decision in that case was that, against an overall background of imprecision over the signing of the relevant delegated authority, the Inspector was prepared to believe that such an authority was in fact signed but not before the notice was issued. Whilst one might ask what it was that made him question the timing, given that he accepted it was in fact signed, the Inspector (paragraph 11) explained that as it was a sub-delegation it was not imperative that it were done expeditiously, and moreover the chief officer had authority to issue the notices in any event.

28. The particular basis for the nullity claim in the current appeal, as in the 2015 appeal decision, is whether the required delegations were in place when the notice was issued. However the appellant fails to have regard to case law subsequent to the 2015 appeal decision which he submits is relevant. It has been held that this basis does not fall within the scope of what can amount to a nullity argument (*Beg & Others v Luton BC [2017] EWHC 3435 (Admin)*).

29. The Inspector did point out in the 2015 appeal decision that a notice issued without proper authority must be ultra vires and a nullity; it was no notice at all, not dependant on a court order and there would be nothing to quash. What Holgate J subsequently said in *Beg* was that "*The points taken by the appellants in this case could not fall within the scope of what can amount to a nullity argument as defined in [80] of Koumis*." In paragraph [80] of *Koumis v Secretary of State for Communities and Local Government [2014] EWCA Civ 1723* Sullivan LJ had explained that given the wide powers to correct errors on appeal, the Miller-Mead approach to nullity would only be correct where failure to comply with statutory requirements appears on the face of the notice.

30. Therefore it seems to me that the appellant's points are matters of invalidity, not nullity, which could have been pursued, if not here, by way of a judicial review claim. The factual matrix of the 2015 appeal decision was quite different. ELS issued the notice in accordance with the delegated authority given to it by virtue of the report to the Lead Member. In the present case the chain of delegation appears tolerably clear and no point is taken on the precise date the notice was issued. I am confident that authority was properly delegated to ELS before the notice was issued.

31. The Courts have not specifically addressed whether alleged procedural errors to do with delegated authority and the like, must be challenged by way of judicial review, however many Inspectors rightly in my view would consider they have no jurisdiction to deal with submissions as to whether the LPA acted outside their powers in issuing the EN where, as here, no failure to comply with the statutory requirements in s173 are apparent on the face of the notice.

32. For the reasons given, I conclude that the notice is not a nullity.

The notice: waste transfer matters

33. The second issue taken by the appellants in relation to the notice is that it improperly includes matters reserved to the County Council on which to take enforcement action. The allegation in the notice is of a mixed use that includes certain waste matters, namely the deposit, transfer and processing (including burning) of waste. The relevant regulations, taken with the 1990 Act[1], state that certain prescribed uses of land are in effect the province of county councils, therefore the appellant would have it that the Council had no business taking enforcement action in respect of such uses.

34. The prescribed uses include recovering, treating, storing, processing, sorting, transferring or depositing of waste. The important qualification is that the land must be used wholly or mainly for such purposes before it is deemed to be a county matter. In fact the appellant emphasises in his SoC that the Council accepts the deposit, transfer and processing of waste is one element of the mixed use and not a main use of the site. The Council does not use exact

[1] Regulation 2 of Town and Country Planning (Prescription of County Matters) (England) Regulations 2003 and paragraph 1(1)(j) of Schedule 1 to the Town and Country Planning Act 1990.

terminology but in its reply of 3 April 2019 to the appellant's query, in my view it intends to convey the fact that the site does not have only the predominant characteristic of use for waste related purposes.

35. It appeared to the Council that such a breach of planning control had taken place, and it is nothing to the point to assert that a ground (a) appeal might have been made that may have resulted in permission for a county matter (ie a site used "mainly" for the prescribed matters). The notice has neither alleged that the site is mainly used for such purposes nor, as I find below on ground (b), was it in fact used only predominantly for such purposes.

36. The exchange between the parties of 3 April 2019 begs the question of the proper construction of "*wholly or mainly*". The appellant says the allegation is confused in that, on the one hand it is a mixed use, where the components would by definition be main or primary uses such as the alleged waste matters but, so it is said, since the degree of each component fluctuates over time, that is at odds with the Council's position that the waste element of the mixed use is not a "main" use.

37. The mischief sought to be addressed by the legislation is in part surely the confusion caused by potentially overlapping functions in two-tier authorities. Schedule 1, paragraph 11 seems to me to be drafted to enable pragmatic choices that authorities may have to make in specific cases. For example whilst sub-paragraph (4) is clear that minerals matters shall only be exercisable by the county planning authority, whenever county and district planning jurisdictions do overlap paragraph 11 provides for co-operation between them through consultation and issue of notices by the district rather than the county.

38. I note the use of "land" in Regulation 2 of the 2003 Regulations, not "planning unit". Also, there is no mention of a "primary use" or "main use" of land. "Wholly or mainly" in this context could arguably refer to a more generalised appraisal of the land use.

39. This point has not been considered judicially although interestingly, in *R. (on the application of East Sussex CC) v Secretary of State for Communities and Local Government [2009] EWHC 3841 (Admin)* the possibility was noted that "*as a matter of reasonable judgment, the breach could properly be considered in the round as solely a county matter e.g. by reference to its predominant character"* but that such an argument was not before the inspector or Court.

40. I have noted that in *R. v Berkshire CC Ex p. Wokingham DC (1997) 73 P. & C.R. 430 [1997] J.P.L. 461* the Court of Appeal was dealing with somewhat similar issues but in the context of a planning application. The situation there was of course not parallel to what is now under consideration, however it is interesting that the court saw:

"no support anywhere in the legislation for the proposition that an application could be treated as a number of different applications each relating either to separate planning units, or separate developments. He thought that to construe the Schedule in that way would produce an administrative nightmare as the developer, district council and county council each tried to determine how many applications, from what development and in what planning unit were subsumed within the one overall application…."

"The words are not qualified but clearly, to adopt the words of Lord Bridge from the excerpt cited from the case of Burdle v. Secretary of State, a planning authority receiving an application for planning permission directed to it would ask itself in the ordinary way, is this application in substance an application for permission to develop land in a county matter."

41. The court had regard to the judgment at first instance where it was said that on a proper construction of the relevant wording (*"in whole or in part" after the word "relates")* that Parliament intended there to be an overall relationship between the application and a "county matter", ie whether or not the application included a county matter, and if so whether the predominant purpose of the application was a county matter. However the Court of Appeal said that it was unnecessary to consider relative purposes and the judge below had put the matter too high by importing the concept of "predominant purpose" into the test to be applied. That application was quite clearly an application which in substance related to a county matter.

42. In the appeal before me the wording contains a phrase very similar to *"in whole or in part"* introduced by the predecessor to the 2003 Regulations, ie the Town and Country Planning (Prescription of County Matters) Regulations 1980.[2] But whatever may be the position with applications, in *East Sussex* it was emphasised that "*unless otherwise provided by sub-paras 11(2) to 11(4), enforcement notices must be served by the district planning authority*". There the breach of planning control was the material change to a single, though mixed, use comprising waste and related uses. The narrow ratio of the case was that where a single mixed use comprises the sole breach alleged by a county planning authority, it is not open to it to decouple elements of it which are considered to fall within the jurisdiction of another planning authority.

43. This interpretation of paragraph 11 was later held to be correct in *Thomas, Thomas and Lyndon Thomas Ltd v North Northamptonshire Council (formerly Kettering BC) J.P.L. 2022, 2, 221-239* and the court at paragraph [60], endorsed the judgment in *East Sussex*, that:

"the effect of para.11 of Sch.1 to the 1990 Act is that in a two tier authority, the only circumstance in which the function of issuing an enforcement notice under s.172 may not lawfully be exercised by a district planning authority is where the alleged breach of planning control relates wholly to a county matter within the subset identified in para.1(1)(a) -(h) of Sch.1."

44. In any event the appellant does not dispute that district and county councils have the power to issue enforcement notices under s172 of the 1990 Act save that insofar as they relate to county matters, those functions should not be exercised without first consulting the county planning authority. However, and as was clearly confirmed in *East Sussex*, the validity provisions of the 1990 Act do not allow notices generally to be invalidated just because the wrong planning authority issued the enforcement notice.

45. In fact the appellant openly acknowledges the bar to invalidity posed by s286(2) but states "*serious consideration needs to be given to the apparent*

[2] They prescribed the deposit of refuse or waste materials as affected uses, whereas the term "wholly or mainly" appeared only in connection with buildings, plant or machinery to be used for waste related purposes. The Explanatory Note states that waste related matters were now being added to county councils' functions. But it is explained that then, as now, the power of district authorities to serve enforcement notices would remain although they are required to consult the relevant county council beforehand.

failure to consult…and take advice from the County Council or those with the appropriate qualifications in relation to waste operations."

46. It is unclear what remedy he expects from the Secretary of State in this appeal if there were lack of consultation but as appears to be accepted, if there were no consultation it is not fatal to the notice. Furthermore, the ESL report that recommended PCNs before formal enforcement action noted that liaison should occur with the County. No evidence suggests it likely that it did not take place.

47. In these circumstances I do not find the notice to be a nullity or invalid on this issue.

Ground (b) - that the breach of planning control alleged has not occurred as a matter of fact

48. The appellant himself states he is using the land for the purposes of agriculture. Although expanding at length on *Burdle* the appellant fails to state his own view in the SoC as to the correct planning unit but I do not think it matters a great deal here. His point is not that the material change of use must be judged against a wider area of land than that owned by him, far from it as he seems focussed on detaching himself from responsibility for anything on that wider area of land whereas, as I have noted if the notice were upheld, liability is a separate matter from this appeal. I have found that the notice was properly served on the owners and occupiers of the appeal site.

49. In stating that the waste matters were an element of the mix with agriculture being the main use, I am satisfied that the Council did not mean to convey any view that the waste use was ancillary to any other use, whether on the appeal site itself or other area of land. Had this been an ancillary use I would have found as such but I have not and the allegation does not need to be altered. There may well be different planning units obtaining here for different purposes in light of the permissions and registered freehold ownerships, but there is no good reason other than to treat the appeal site as an appropriate area of land over which to consider the materiality of the alleged change of use.

50. Within the appeal site, when I inspected it, was a truck laden with a pile of used timber planks irregularly placed in a heap, including some concrete. There were new bricks and paviors on pallets and against the fence on one side of the site were scattered items of waste material, including plastic, plastic sheeting, hardboard, timber and window frames.

51. However in the middle of the site, as well as the materials scattered along the boundary, was a large pile of clearly discarded waste material, including large twisted iron or steel frames, broken axles, broken bricks and paviors, broken concrete and the like, some of which had a burnt or distinctly charred appearance. The site was hard surfaced including the area underneath the waste materials, in a variety of surfaces, mainly compacted hardcore.

52. It is undisputed that in 2018 the Council received complaints about the deposit and burning of waste on the appeal site. Many photographs were submitted, including some taken on the day the enforcement notice was issued. Not all, (if any) of those claimed to relate to land outside the appeal site, were in fact outside the appeal site. It is clear from the plan attached to the notice that the appeal site includes the access track and strip of land alongside it, wherein images also showed the deposit of waste, and which was present when I

visited. The gates to which the appellant refers were erected between the track and the rest of the site but that does not, as the Council points out, negate the existence of any breach of planning control.

53. I find there is clear evidence of waste materials deposited on site the use of which is likely to have been used as such when the notice was issued. The appellant states that it is not significant enough to warrant characterisation of the use of the land for the purposes alleged but I disagree. The pile of waste deposited in the middle of the site was similar in appearance to what I subsequently saw and it bore clear marks of having been burned. Clearly fresh waste deposits have been made since the 2018 photographs were taken. I have been given no good reason to suppose that the materials were not surplus to requirements and would not otherwise need to be disposed of. The pile of waste is large and prominent in the site, and images taken a few months before the notice was issued show additional waste deposited on the site.

54. I note the images taken after the notice was issued and the statement that fly tipping was taking place but these factors do not go to the issue of whether the alleged use was in fact occurring when the notice was issued. The SoC (paragraph 75) appears to accept that fly tipping/burning of waste continued.

Appellant's affidavit

55. There is a two-page typed statement headed "Affidavit" purporting to be made by the appellant but it is undated, unsworn and unsigned. The appellant's FC appended what purports to be a signed copy of the affidavit but is the second page only of the document provided with the SoC. It is signed "A Peters" above the typed wording "Sworn by the said Anthony Peters" and countersigned with an illegible signature with no transcription alongside a handwritten note of the date "09/03/21" and an address: 8, Park Terrace in Southwell at the end of which is the word "Director". This is above the typed words "Before me….Solicitor/Commissioner of Oaths" and it seems to me that the document deliberately seeks to show that it was made before a practising solicitor or person authorised to take oaths. The public record of solicitors kept by the Law Society has no record of individuals or firms of solicitors at this address.

56. Be that as it may, in an affidavit (more commonly used in court proceedings) the "jurat" at the bottom will state when, where, and before whom it was sworn. It is impossible to tell what solicitors' firm or authorised notary etc was used if any, or if an individual, their name. If intended to be a statutory declaration (more commonly used in planning appeals) neither document meets the requirements of the Statutory Declarations Act 1835, nor is it endorsed with a statement of truth which would indicate that the maker of the statement or deponent regards it as a serious statement to make on oath. The wording matters because it is intended to bring home the seriousness of what is said. There has been no due diligence in submitting the documents to say the least and in light of this particular factor, I give no credence to them.

Relevance of planning history

57. The planning history of this site is detailed in the Council's SoC and FC. There is already an enforcement notice dated 2 July 2010 in effect in relation to the appeal site. It is also undisputed that, as related in the position statement of the Council, there is a valid injunction covering land within the current appeal

site, requiring it to be cleaned and returned to its former agricultural/open countryside state.

58. In his FC the appellant expressly declines to comment on various matters in the Council's SoC, including on the injunction, but states that the lack of a response to any particular point cannot be taken as agreement with it. If the matter is put to proof in this way, (which of course is most unhelpful and unusual and no extra time was requested to deal with points raised) then I take the view overall, including my review of the full evidential matrix available to me, that the absence of any dispute as to these matters leads me to believe that on the balance of probability, they are true.

59. The 2010 notice was appealed but upheld on 29 March 2011, extending the compliance period to six months which means that it has been in force as from 29 September 2011. The land affected covers a large part of the current appeal site. It prohibits the use of land for residential purposes, and the removal from that area of a mobile home and other items, including domestic paraphernalia, all surface and foul drainage systems in place, and "*removal of the hard surfaced material*."

60. In August 2019 permission was granted on adjacent land to the north for a timber stable block, manege and concrete yard area. Later, in October of that year permission was granted on land within the southern part of the appeal site itself, for the erection of a "building for use in association with the keeping of horses" and the maintenance of adjacent land, the subject of the August 2019 permission. This was referred to as the barn reinstatement.

61. The approved plan for the August 2019 permission, dated January 2019 for the stable block etc, noted that the general area of the appeal site (which is outside the scope of that permission) was "existing hard surfaced area". It also noted that the area (later granted permission for the barn reinstatement), was "*existing building to be converted to dwelling under separate planning application*."

62. However no such permission for a dwelling has been drawn to my attention. When I inspected the site the area covered by the reinstatement barn was cordoned off by recently planted trees and large gates were erected in front of the boundary thus created with tall brick supports atop of which were large stone ornamental decorative elements. There were very many vehicles on the appeal site, including vans and a roller, a mobile home, and a touring caravan on the appeal site. I also saw a large communal type, septic tank that appeared to be waiting to be installed and several other construction materials and equipment. No doubt some items were there in connection with the buildings and structures granted consent on adjacent land, but whether or not development was proceeding in accordance with its terms is a matter for the Council to investigate, that is not the subject of the notice before me.

63. The upshot is that s180 of the 1990 Act will have operated to render that part of the 2010 enforcement notice of no effect insofar as it is inconsistent with the 2019 permissions.

Conclusion on ground (b)

64. The appellant states that the date of issue of the notice is "critical" and so it is but the photographs taken on that date are considered with other evidence

which taken overall make it more probable than not in my view that the alleged use was ongoing when the notice was issued.

65. Therefore I conclude on the balance of probability, and as a matter of fact and degree, that the matters alleged in the notice have occurred as a matter of fact. The appeal on ground (b) therefore fails.

Ground (d) - that, at the time the enforcement notice was issued, it was too late to take enforcement action

66. The appeal on this ground is considered in respect of the hardstanding, ie that, 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.

67. The normal time limit in respect of hard surfacing which is operational development, is set out in s171B as "*after the end of the period of 4 years beginning with the date on which operations are substantially completed*". The enforcement notice was issued in March 2019, so it would be necessary to show that it had subsisted for four years prior to that date but, if it amounted to development that was part and parcel of the change of use it would not be immune from enforcement unless completed more than ten years ago.

68. The exception would apply where – and this is often unclear in its application - in its nature and scale and as a matter of fact and degree, the hardstanding could not properly be described as "ancillary" to the material change of use, eg because its completion would have been obvious and permanent, such that it cannot properly be described as works associated with the change of use.

69. The onus is on the appellant to prove his case on the balance of probability, using evidence that is precise and unambiguous. Also, s191(2) sets out what is lawful development which for present purposes includes consideration also of whether development constitutes a contravention of any of the requirements of any enforcement notice then in force.

70. There is an overlap between the area of the 2010 notice and the current appeal site, but the hard surfacing required to be removed under the current notice is by definition only that associated with the use for waste related purposes.

71. Nevertheless I would note that the aerial imagery obtained from Google Earth does not to my mind prove that some hardstanding is lawful and immune from enforcement action. The images date respectively from September 2011, April 2015, April 2016 and April 2018. Only that dated September 2011 was taken outside the 4-year period prior to the issue of the notice, yet it differs markedly in my view from the rest, in that it is difficult to ascertain with any degree of confidence whether what is depicted is the formation of a hard surface as opposed to mere compacted soil.

72. The plan attached to the currently appealed notice has a base map that shows development consistent with what is shown on the September 2011 image. There were pre-existing tracks and possibly some hard surfacing around the barn, but this would seem to have been part of the development successfully attacked by the previous enforcement notice. The April 2015 image shows that the area of hard surfacing had significantly increased and from then on the hard surfaced area increases even further so that it covers more or less the whole site prior to March 2019 when the recent notice was issued.

73. Be that as it may it is not evident that the hardstanding overall was laid to facilitate the unauthorised use for waste related purposes. The Council for example appears to try to connect the transfer of waste with the building up of a bund and laying of hardcore to form hard surfaces on the site, from the deposited waste. However the evidence presented by the Council does not support this conclusion.

74. That said, from inspection, there does appear to be an area where the material arising from waste deposits, including construction materials and stone has formed the surface of the land underneath and around the waste. Thus this part of the hard surface of the land in my opinion has been integral to the change of character and consequent change of use of the appeal site. However by definition this is commensurate with the date of the change of use that has taken place and cannot be the subject of a successful appeal on this ground.

75. The appeal on ground (d) fails.

Ground (f) – that the steps required to comply with the notice are excessive

76. An appeal on ground (f) is that the requirements of the notice exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any harm to amenity resulting from the breach. From the requirements of the notice I take its purpose to be to remedy the breach of planning control.

Entrance gates etc to appeal site

77. The requirement to remove the gateposts and gates at the entrance to the site, is not supported by evidence that they were erected to facilitate the unauthorised use of the site. They may have been erected in part to prevent fly tipping but that does not associate them with the unauthorised use in the way envisaged by established principles of law. I will therefore delete this part of the requirements.

78. For the avoidance of doubt the deleted requirement relates to the gate, adjoining short sections of fencing and adjoining brick posts at the entrance to the site, not the large gates now erected within the site to which I have referred to above. The latter do not form part of the allegation and it is for the Council to decide how to proceed in that matter.

79. I should however record that the two photographs submitted by the Council show firstly, the gates "under construction" in August 2018, and different gates in April 2019 (but the same gate posts appear in both images). The metal gates in the 2018 image do not seem to me under construction as such but they clearly differ from the more permanent element of the timber gates in the 2019 image. The large brick built gate-posts appear complete and the same height as in 2018 but they form part of the entrance gate as shown in 2019. In the latter image a person, said to be approximately 1.9m tall (which is undisputed) stands fractionally below the apex of the gates, demonstrating they are below 2m high. However the brick gate posts are significantly higher, approaching 3m.

80. As the gates are not adjacent to a highway, they may extend to 2m in height under permitted development legislation. There are no permitted development rights to erect a gate any part of which is more than 2m high. However, as

noted, the notice which is before me improperly requires its removal and there is no allegation of operational development in its own right.

81. The appeal on this ground succeeds to that extent only.

Hardstanding

82. The hard surfacing introduced without planning permission since September 2011 may have been reinstated in breach of the earlier notice that is still in force. It is not for me to replicate requirements of an earlier notice just because it may not have been complied with (although it clearly has not in respect of the removal of hardstanding on land as specified in that notice).

83. As noted some material from the waste deposits has integrated with and formed part of the surface of some of the land and has been integral to the material change of use that has taken place as alleged. It would not be excessive to require its removal.

84. Requirement 3 is to restore the levels of the land to adjacent land levels with topsoil and pasture seed. The information supplied is however inadequate from which I can make any judgements about the re-profiling of the land, or whether such facilitated the unauthorised use. I agree that this requirement is excessive and should be amended to require restoration of the land to its former condition prior to the breach of planning control, as the appellant suggests.

85. I would note that the outcome of this appeal in no way absolves the owner of the land or person(s) with control over it from complying with the earlier notice requiring, amongst other things, the removal of hard surfaced material and levelling, topsoiling and seeding with pasture grass, over such of the land within the appeal site as is covered by that notice, and subject to the provisions of s180 of the 1990 Act insofar as inconsistent with planning permissions 19/0850 and 19/0325.

86. The appeal on ground (f) is allowed to the extent described above.

Formal Decision

87. It is directed that the enforcement notice be varied so as to:

- In Requirement 2 delete “the gateposts and gates (approximate position marked with an x on the attached plan)”
- Delete Requirement 3) and substitute therefor “Restore the land to its former condition prior to the breach of planning control.”

88. Subject to this variation the appeal is allowed in part only and the enforcement notice is upheld.

Grahame Kean

INSPECTOR