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## Appeal Decisions

Inquiry Held on 14 January 2020

Site visit made on 13 January 2020

**by Simon Hand MA**

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

**Decision date: 17 January 2020**

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### **Appeal A: APP/V4250/C/19/3226766**

#### **Land at Gorses Farm, Stanley Lane, Aspull, Wigan, WN2 1YQ**

- 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 Nick Marsden against an enforcement notice issued by Wigan Metropolitan Borough Council.
  - The enforcement notice was issued on 18 March 2019.
  - The breach of planning control as alleged in the notice is without planning permission the unauthorised use of the site as a haulage yard for onsite vehicle repairs.
  - The requirements of the notice are 1) cease using the site as a haulage yard; 2) cease using the site for vehicle repairs; 3) remove all heavy goods vehicles, vans and trailers from the site.
  - The period for compliance with the requirements is 3 months.
  - The appeal is proceeding on the grounds (d), (e) and (g) set out in section 174(2) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
  - An identical appeal reference 3226767 has been made by Mr Paeder McElchare
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### **Appeal B: APP/V4250/X/19/3225030**

#### **Land at Gorses Farm, Stanley Lane, Aspull, Wigan, WN2 1YQ**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by Mr Nick Marsden against the decision of Wigan Metropolitan Borough Council.
  - The application Ref A/18/85287/LUCE, dated 7 March 2018, was refused by notice dated 8 February 2019.
  - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
  - The use for which a certificate of lawful use or development is sought is sui generis haulage yard with on site repair of vehicles.
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## **Decisions**

### **Appeal A – 3226766 & 3226767**

1. It is directed that the enforcement notice be corrected by deleting the allegation and replacing it with "*without planning permission, the material change of use of the site to a sui generis use of highways maintenance, haulage and vehicle repairs*"; and varied by deleting the requirements and

replacing them with “1) *cease the use of the site as a sui generis use of highways maintenance, haulage and vehicle repairs; and 2) remove from the site all vehicles, plant and machinery associated with that use*”; and further by deleting “3 months” from the time for compliance and replacing it with “6 months”. Subject to these correction and variations the appeal is dismissed and the enforcement notice is upheld.

## **Appeal B - 3225030**

2. The appeal is dismissed.

### **Preliminary Matters**

3. Although an appeal was made on ground (e), having heard the appellant’s explanation I informed them I was not convinced there had been any injustice, even if the notice had not been served on everyone with an interest in the land. Briefly, of those not served, Chris McElchare attended the inquiry and gave evidence, and the other two McElchares were the father and uncle of the two brothers, neither of whom any longer had an official role in running either company, but still helped out essentially as employees. It was also suggested that the other employees had an interest in the outcome of the appeal and should have been notified.
4. In my view, with the exception of Chris McElchare, the Council had done all they needed to do with the service of the notice and Chris was not prejudiced as he was at the Inquiry. Consequently, the ground (e) appeal could not succeed and was not pursued further.

### **Background to the Appeals**

5. Mr Marsden’s family own and run Gorses Farm which lies down a track in the green belt. At some point in the late 2000s the McElchare brothers began to use a hardstanding at the farm and a small barn for their businesses. Exactly what they do, when they moved to the farm and where they were located were subjects covered at the inquiry. In 2018 they were advised, by the Council, to regularise the situation by applying for an LDC, which they did. The application subject to appeal B was made for the yard area. When this was refused the Council issued a notice requiring them to cease the alleged use and vacate the land. This is subject to Appeal A.
6. Paeder and Chris are brothers who each run companies that carry out very much the same sort of activities as each other. Both companies now operate from Gorses Farm, but originally were based at a different location, Dean Dam Farm at Newton Le Willows. They pay rent to the landowner, Nick Marsden.
7. Gorses Farm is aligned on a north-south axis and approached by a metalled track from the south. The first cluster of buildings one sees is a stables which operates as a livery, the original farmhouse, occupied by Mr Marsden’s father, and some buildings used as timber manufacturing company. Beyond that the track carries on in a straight line with a series of barns on the right hand side, one of which is known as Nick’s Garage, which was used by the McElchares, and a large barn on the left. These, apart from Nick’s Garage, are used for agricultural purposes and this is still, clearly, a working farm.
8. Beyond these barns on the right is a new house, where Nick Marsden lives and opposite is the yard in question. Beyond the house on the right is an area used

for parking and beyond that the track leads to a fishing lake, where there would seem to be more parking.

9. Because of the uncertainty surrounding most of the matters discussed at the Inquiry it will not be clear which are the appropriate grounds for appeal A until the facts have been established, I shall do this first, then consider the enforcement appeal and finally the LDC appeal.

### **The Facts at Issue**

10. When the LDC was applied for, the material change of use was described as a sui generis haulage yard with on-site repairs and was restricted to the red line area which is called the yard. This yard is a clearly defined area of hardstanding with bunds around three sides which contains a large shed – relatively newly constructed – used for vehicle repairs and next to that a two story portacabin used for storage and offices. However, the brothers do not just operate a haulage company but also carry out road maintenance and have a number of vehicles whose use is solely for that purpose. When the brothers first moved to the yard, according to their evidence, they moved their road maintenance vehicles and plant first. It would seem that Chris was at that time solely involved in road maintenance, but Paeder had tipper trucks as well, but these remained at Dean Dam Farm for the moment.
11. The crucial difference is that if the vehicles are used for transporting other people's goods, that is for haulage purposes, they require an operating licence. The road maintenance vehicles and plant do not require an operating licence. The tippers can be used for carrying aggregate to the areas where the maintenance is being undertaken, and some have an attached device that allows that aggregate to be sprayed onto the road. In which case they too do not need an operator's licence. However, if they are used simply as bulk transporters and are hired by others to carry aggregates from one place to another, they do require an operator's licence. Road maintenance is mainly a summer job, whereas the more general haulage work is all year round, so the tippers could be used for road maintenance in the summer and haulage in the winter.
12. According to Paeder, he applied for an operator's licence to run the tippers from Gorses Farm in 2010 because that was when he relocated them from Dean Dam Farm, consolidating his business in the one location. Chris got his own tippers in 2013 to supplement the road maintenance business, all being run from Gorses Farm.
13. There was some discussion about the what proportion of the businesses was road maintenance and what was haulage. The percentages given changed during the course of the inquiry, but it is clear for Chris that it was originally all road maintenance and has swung more towards haulage in recent years. For Paeder, it was always more about haulage, but road maintenance is still carried out. In my view if the tipper trucks are carrying aggregates for the road maintenance then they are not involved in haulage, but even if that is incorrect, there has clearly been a substantial road maintenance operation run from the yard, and it is still on-going.
14. The evidence for vehicle repairs is that originally the yard was simply an open space and all repairs took place in Nick's Garage. In 2014 the repair facility was built and most repair work moved up to the yard. This involves

- maintaining the brothers' own vehicles and plant, the farm machinery, and the vehicles of anyone else who asks.
15. Consequently, it would seem to me the brothers' businesses, when considered together, have always been a mixture of road maintenance, haulage and vehicle repair. The latter has mostly been ancillary to the other two elements, but also involves other repair work. In my view it is most accurate to describe it as a sui generis use comprising three elements, road maintenance, haulage and vehicle repairs. It was agreed at the inquiry that I could change the allegation or the LDC description without prejudice to encompass the actual uses taking place.
  16. The second issue is the identification of the correct planning unit. The appellants contended that the unit was the farm as a whole which is in mixed use as agriculture and haulage (or whatever the sui generis is). This was altered at the inquiry to just the northern part of the farm. It was suggested the southern part, with the original farm house, the livery and timber manufacturing use was one (or possibly more) planning units, and the northern section involving the agricultural element itself, Nick Marsden's house and the brothers' businesses was a separate planning unit. The suggestion was that the brothers made free use of the hardstandings in front of the various barns to park their vehicles, while Nick used the yard to park his agricultural machinery. Cars belonging to employees of the businesses parked on the right of the track, where the new house now stands and now park further up next to that house. The repair works were carried out in Nick's Garage, which is in the farm itself, and both the business and the farm vehicles were repaired there. Since that use has moved to the yard Nick's Garage is now mostly used for farm storage but also for small scale repairs of both farm and business equipment and vehicles. The appellant argues the uses are thus intertwined into a genuine mixed use in a single planning unit.
  17. I am not convinced by this argument. Firstly there seems to be no specific reason why the farm should be split into north and south areas. The original contention was that the farm complex as a whole had become a mixed use. This would be difficult to show because there were already potentially separate planning units with the livery and the timber manufacture. It seems the division into north and south was for convenience rather than any planning logic. I have no information as to what is going on in the southern part beyond the livery and the timber manufacture. There may well be agricultural uses that link the south to the north, but no evidence was presented on this issue.
  18. The yard itself has clearly grown in size over the years. An aerial photograph from 2005 shows the yard area as simply some gravel in the corner of a field. By the time the McElchares arrived in 2007 this would seem to have been an established hardstanding that covered about two-thirds of the current yard area. They immediately created bunds around the yard for security and to stop water running off the field and this is clearly shown in the 2011 aerial photograph. Some time later the yard expanded across the field to its current size and the bunds were reshaped and still stand around three sides now. None of this is in dispute.
  19. There was some attempt to suggest the corner of the field that is now subsumed under the yard was actually used for occasional overflow parking, but I find this hard to believe. Nick Marsden explained it was difficult to grow

- crops there as it was always boggy, which makes it an unlikely area for parking, especially as there is plenty of space in the wider farm area. It has clearly been ploughed and planted in the 2011 photograph. The yard has thus grown significantly in size during the 10 year period.
20. The appellants have described the use of the yard as mixed, with agricultural vehicles and the business plant, machinery and lorries all mixed together. On my site visit I noticed a couple of agricultural machines parked in one corner. Mr Marsden accepted that his use of the yard for parking has declined in recent years and is now "not a lot". I remain unconvinced that Mr Marsden would have regularly used the yard, that was predominantly filled with road maintenance equipment, tipper trucks and other HGVs, presumably coming in and out on a regular basis, for his own agricultural equipment, when he has plenty of space elsewhere on the farm. The only independent evidence is two aerial photographs which show no obvious agricultural equipment, but plenty of lorries, tippers, vans and cars as one would expect of a yard used for haulage and maintenance purposes. I've no doubt that from time to time there was a need to use the yard for parking of farm machinery, but whether that amounted to a mixed use is another matter.
  21. The appellants are also keen to claim the regular use of the northern part of the farm for parking of the McElchares' vehicles. The aerial photographs show several lorries parked on the opposite side of the road from the yard, roughly in the area now used for car parking. When Nick's Garage was used for repairs their vehicles might well have parked down in the farmyard proper, and the access has always (until recently, when a new road has been constructed) been through the farm. But this is not the same as creating a mixed use. Various planning applications have been made over the years. In 2010 an application for an agricultural worker's dwelling, on more or less the same site as Mr Marsden's house stands now, was made and refused. There is a detailed description of the activities being undertaken on the farm at that time by the agricultural assessor for the Council. There is no mention of a mixed use taking place and no mention of any activity other than farming. The Council also allowed a temporary caravan for a farm worker, on the land close to the yard, in 2013 and 3 years later allowed the existing dwelling to be built opposite the yard. There is no suggestion on any of these applications of a mixed use being undertaken on the land.
  22. It also was never explained why the McElchares would find it convenient to park their lorries and other equipment in the farm, in front of the cow sheds, when they had their own yard and plenty of land opposite to park on and there was no evidence as to exactly where they did park. They seemed to suggest it was anywhere in the farm, but that would weaken the case for a distinct separation of north and south.
  23. I also heard considerable evidence from supporters of the appellants as to what they thought had been going on. This mostly confirmed the analysis above. Mr Robinson did suggest that tippers operated from Gorse Farm from 2007 onwards, but not as haulage vehicles requiring an operator's licence. However, this contradicts the brothers' own evidence as to when they moved tippers to the site. It is likely, as other's suggested, that tippers came to Gorses Farm for maintenance purposes, but that would not have taken place in the yard until 2014 and the occasional parking of a tipper truck on the farm, or in the yard, does not affect my conclusions below.

24. It seems to me that on the balance of probabilities the most likely scenario is that the primary use of the yard was for the McElchares' businesses, including from 2014 the vehicle repairs which would include agricultural vehicles. There was no doubt also some occasional parking of agricultural vehicles unrelated to repairs, but the primary use of the land was for the McElchares' business. Nick's Garage would seem to have been used for vehicle repairs mostly by the McElchares. Mr Marsden said that they did most of his maintenance for him. This use reduced when the repairs moved into the yard. There would undoubtedly have been some parking of the McElchares' vehicles in the farmyard from time to time, not least while they were waiting to be repaired in Nick's Garage but this did not amount to a mixed use. There was clearly more extensive use made of the land to the east of the yard for parking (that is the north-east of the farm complex) and this is shown also in the aerial photographs, and it is still used today.
25. The yard, as it stands today is clearly separated from the main farm complex by bunds and the central access track and its use is limited primarily to the McElchares' businesses. This fulfils two of the criteria listed in Burdle<sup>1</sup> to help identify separate planning units. Whether the planning unit extends across the track to encompass the land which seems to have been used mostly for parking for the business I cannot say, but the yard either is, or is part of, a planning unit whose primary use is a sui generis one of highway maintenance, haulage and vehicle repairs. It is possible another planning unit within the farm was created when Nick's Garage began to be used for vehicle repairs, but that is not before me.
26. As was pointed out at the Inquiry, neither the LDC application nor the enforcement notice is required to identify the entire planning unit, so the identity of the exact boundaries is not important. What is important is that the LDC application and subsequent enforcement notice identified a parcel of land on which, at the date the application was made and subsequently the notice was issued there was an identifiable sui generis use going on, which encompassed the entirety of the site.

### **The Appeal on Ground (d)**

27. Although there has been activity by the McElchares on part of the site since 2007 this has not been continuous for 10 years. Firstly, the yard itself has grown significantly in that time so that the site identified in 2018 was in a mixed use in 2007 and up to 2011 and beyond. That was the sui generis business use in the smaller yard, which formed one planning unit and agriculture on the field which was part of the larger surrounding agricultural planning unit. There was thus a significant change when the business use expanded across the site that formed a new chapter in the planning history and started the clock again.
28. Secondly, the sui generis use in the yard itself has changed over time, from highway maintenance, to maintenance and haulage to maintenance, haulage and vehicle repairs. Even though vehicles used for haulage may have from time to time been at the yard that does not mean a haulage use was operated from there. There is a significant difference between these uses, particularly in terms of traffic movements, character and intensity, which amounts to at least

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<sup>1</sup> Burdle & Williams v SSE & New Forest RDC [1971] 22 P&CR 610

one and possibly 2 material changes of use within the 10 year period. Therefore for both those reasons the appeal on ground (d) fails.

### **Other Matters on Appeal A**

29. Although there was no ground (f) appeal, the appellant argued that the requirements were excessive, because they prevented any use of the land for storage and parking of vehicles from any of the lawful uses on the farm. I agree that this is correct, but it is hardly fatal to the notice. It is clear the third requirement, to remove the vehicles, relates to the breach as alleged, and to vary this requirement to make this clear would not be an injustice to any of the parties.
30. Of greater significance is the issue that the requirements refer only to the haulage and vehicle repair use and so if the allegation is corrected to include the vehicle maintenance the requirements will likewise have to be extended. This also will not be an injustice as it was a matter discussed at the inquiry and dealt with in closings by the appellant's representative who argued the complete closure of the businesses on the site would require more than 3 months allowed. I shall deal with this below.

### **The Appeal on Ground (g)**

31. I agree with the appellant that upholding the notice will force the closure of the businesses on this site. They will need time to find elsewhere to relocate, to obtain the necessary operator's licences and possibly obtain planning permission. A period of 6 months would be a more reasonable period.

### **Appeal B – The LDC**

32. It follows from the above analysis that the LDC appeal cannot succeed as the use, even as amended, has not been carried on at the site for 10 years or more and the LDC appeal is dismissed.

### **Conclusions**

33. I shall correct the allegation in the notice to "*the material change of use of the site to a sui generis use of highways maintenance, haulage and vehicle repairs*". I shall vary the requirements to say "*1) cease the use of the site as a sui generis use of highways maintenance, haulage and vehicle repairs; and 2) remove from the site all vehicles, plant and machinery associated with that use*". I shall uphold the appeal on ground (g) and vary the time for compliance from 3 to 6 months. Subject to these corrections and variations I shall dismiss the appeal and uphold the notice. I shall dismiss the appeal for the certificate of lawfulness.

*Simon Hand*

Inspector

## **APPEARANCES**

### **FOR THE APPELLANT:**

Sarah Clover of Counsel  
She called  
Nick Marsden  
Chris McElchare  
Paeder McElchare  
Chris Weetman

### **FOR THE LOCAL PLANNING AUTHORITY:**

Freddie Humphreys of counsel  
He called  
Mike Jones

### **INTERESTED PERSONS:**

Anthony McMahon  
James Flynn  
Michael Ellerby  
Graham Robinson