The Planning Inspectorate

Appeal Decision

Site visit made on 21 September 2020

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 November 2020

Appeal Ref: APP/Z4718/C/20/3249108
Land at Gypsy Pond Farm, Lindley Moor Road, Huddersfield, West Yorkshire HD3 3TE

- 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 Frank Spencer against an enforcement notice issued by Kirklees Metropolitan Borough Council.
- The enforcement notice was issued on 5 February 2020.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the site from agriculture to a mixed use comprising of the storage of stone, vehicles, caravans, trailers, plant machinery, tools, shipping and other containers; and the processing of stone. As well as operational development consisting of the erection of four no. buildings (shown in the approximate position hatched black on the plan attached) and a hut.
- The requirements of the notice are:
  1. Cease the importation of stone and other materials/items.
  2. Cease the use of the site for general storage and the processing of stone.
  3. Remove from the site all stone, vehicles, caravans, trailers, plant machinery, tools, shipping and other containers. Demolish the four no. buildings and hut and removal all of the resultant debris from the site.
  4. Restore the land to its previous condition as a green field by removing all hard surfaces and seeding the field with grass seed mixture.
- The period for compliance with the requirements is:
  1. 28 days.
  2. 250 days.
  3. 250 days.
  4. 250 days.
- The appeal is proceeding on the grounds set out in section 174(2)(d), (a), (f) and (g) 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 has lapsed.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with variations in the terms set out below in the Formal Decision.

Preliminary Matters

1. A fee is payable to the Local Planning Authority (the LPA) in respect of the appeal on ground (a) and the deemed application for planning permission. Section 177(5A) of the 1990 Act states that if the correct fees are unpaid within the stipulated period, then the ground (a) appeal and the deemed application will lapse.

2. The Planning Inspectorate wrote to the appellant via his agent on 24 March 2020 informing him that the relevant fee must be paid to the LPA by 7 April 2020 otherwise the appeal on ground (a) and deemed application would lapse. This letter was also sent to the LPA with the requirement that it must inform the Inspectorate if the fee has been received by that date.

3. The agent responded on 24 March 2020 to say the fee had been paid, then again on 31 March 2020 to say the fee had been paid but he was unable to provide evidence as the appellant's accountant was in lockdown.

4. The LPA responded to the Inspectorate on 8 April 2020 to say the fee had not been paid. The agent responded the same day to say the appellant had evidence of payment to the LPA but the delay in providing evidence of the payment was because his accountant remained in lockdown. The assurance that evidence would be supplied as soon as possible was given.

5. The Inspectorate wrote to the agent on 14 April 2020 informing him that, in the absence of evidence that the fee had been paid to the LPA, the appeal on ground (a) had lapsed. The agent wrote back to say the appellant's accountant had paid the fee and proof would be forwarded later in the week. It was said the error was with the LPA and a ground (a) appeal must be considered. The agent then wrote again to the Planning Inspectorate on 1 May to say the fee had been paid. Again, no evidence was supplied. Subsequently the LPA confirmed again on 20 May that the fee had not been received.

6. The Planning Inspectorate wrote on 20 May to say the ground (a) had lapsed and would remain so until proof the payment was made within the prescribed period was provided. At present no such evidence has been received by the Inspectorate. Therefore, in accordance with section 177(5A) of the 1990 Act, the appeal on ground (a) and the deemed application has lapsed. I cannot therefore consider the appeal on ground (a).

7. The appellant indicates that one of the buildings which is to be demolished comprises his home. If that were the case, then the use of part of the Land, including one of the buildings, for residential purposes would need to be included in the mixed use referred to in the allegation. However, very little evidence to support that position has been provided. Indeed, the Council disputes that the building has been used for residential purposes. The evidence does not therefore lead me to conclude that the Land was also in primary use for residential as part of the mixed use as enforcement against.

The appeal on ground (d)

8. In an appeal on ground (d), the onus is on the appellant to demonstrate, on the balance of probabilities, that, at the time the notice was issued, it was too late to take enforcement action in respect of the alleged breach of planning control.

9. Section 171B(1) of the 1990 Act sets out the relevant time period for taking enforcement action. In the case of a breach involving a material change of use it is ten years. In the case of a breach involving building operations, it is four years.

10. For the development to be immune from enforcement action, it is necessary for the appellant to demonstrate that the use of the land materially changed to a use as a mixed use comprising the storage of stone, vehicles, caravans,

trailers, plant machinery, tools, shipping and other containers; and the processing of stone materially changed on or before 5 February 2010 and the mixed use continued for ten years thereafter. For the building operations to be immune, it is necessary for the appellant to demonstrate that the four buildings and hut were substantially complete on or before 5 February 2016.

11. Case law has established that the appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the LPA has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to refuse the appeal, provided the appellant's evidence alone is sufficiently precise and unambiguous to show the existence of a lawful use through the passage of time on the balance of probabilities.

Material Change of Use

12. In terms of assessing the material change of use element of the breach, it is necessary to establish the relevant planning unit and its primary use over the relevant ten-year period.

13. The leading case law in determining the planning unit is *Burdle and Williams v SSE and New Forest DC [1972] 1 WLR 1207.* In *Burdle,* three possible scenarios were established. Firstly that, whenever it is possible to recognise a single main purpose of the occupier's use of the land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered as the planning unit. It may equally be appropriate to consider the planning unit to be the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another, as in the case of a composite use where the activities fluctuate in their intensity from time to time but not contain in distinct areas of the land. Finally, circumstances may occur where within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such case each area used for different main purposes ought to be considered a separate planning unit.

14. Determining which of the categories apply is a matter of fact and degree. *Burdle* makes clear that one may assume that the unit of occupation is the appropriate planning unit unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

15. Having regard to the *Burdle* tests, I am satisfied that the most appropriate area against which to assess the materiality of any change of use is the entire unit of occupation. There is no physical delineation between the storage and stone processing uses. Functionally, all the uses appear to operate as one business from the offices and facilities located centrally within the site. The evidence before me therefore indicates that the notice correctly identifies the planning unit as being the whole site occupied by the appellant.

16. There is no dispute between the parties that the use of the land at the date the notice was issued was a mixed use comprising of the storage of stone, vehicles, caravans, trailers, plant machinery, tools, shipping and other containers; and the processing of stone. There is no evidence which leads me to believe that is not the case.

17. The appellant has broken the Land down into four areas in his evidence – referred to as Area 1, Area 2, Area 3a and Area 3b. It is said that Area 1 was occupied by GMS as a stone yard in 2008 as shown by a 2009 aerial image from Google Earth. The 2009 image shows the majority of the Land as a single grassed field. A section in the bottom right hand corner depicts hardstanding with several containers, a large piece of machinery and several cylindrical shaped objects. It is difficult to ascertain solely from the image that Area 1 was being used as a stone yard at that time.

18. Moreover, the appellant indicates that Birse Civils Ltd occupied Area 1 from 2009 to 2013 and used the land for the storage, cutting and welding of metal poles. Very little detail regarding the operation of Area 1 in that time has been provided. Use of the land for such purposes may have amounted to an intervening material change of use and in the absence of evidence regarding the nature of that use I cannot conclude that was not the case. In such circumstances, the resumption of the use as a stone yard in 2013 would constitute a fresh breach.

19. In any event, the image is dated 30 May 2009. It therefore does not support the appellant's claim that use of the land as a stone yard commenced in 2008. Indeed, the difficulty in ascertaining what is actually shown on the aerial image means I cannot be clear whether it shows the GMS stone yard use or the Birse Civils metal use which is said to have commenced some time in 2009.

20. Area 2 is said to have been occupied by GMS in 2009 when Birse Civils moved onto Area 1. The land was cleared of topsoil and hard surfacing laid. The appellant draws my attention to an aerial image from 2011. The image shows the previous section of land has been extended through the provision of hardstanding. It appears to be occupied by storage containers, vehicles and various other objects. Piles of aggregates also appear to be present. However, the image is of insufficient clarity for me to ascertain whether what is present on Area 2 at that time was the stone yard use which the appellant said commenced in 2009. Indeed, the 2011 image shows Area 1 occupied almost solely by cars, laid out in a formalised parking arrangement. This conflicts with the appellant's evidence that Area 1 was used for the storage, cutting and welding of metal poles for street lighting. Indeed, there appears to be several long, narrow metallic objects on Area 2 which are reflective of street lighting columns.

21. The appellant's evidence is supported by a signed letter from Mr Graham Carter who is said to have been employed firstly by Birse Civils and subsequently the appellant. Whilst Mr Carter indicates that Birse Civils took over Area 1 in 2009, he does not say when the stone yard commenced in Area 2. In any event, the image is dated 28 September 2011. It therefore carries little weight in demonstrating that the use of Area 2 as a stone yard commenced in 2009 or indeed by the relevant date of 5 February 2010.

22. The area identified as Area 3a is said to have been occupied by the appellant in 2013 when the topsoil was removed and the land hard surfaced. An aerial image dated 5 June 2016 is provided in support. It is apparent from the 2011 image that the area identified as 3a was partially hard surfaced and used for storage containers as of 28 September 2011. Although those containers had been cleared by the 2006 image, the extent of hardstanding appears to have

changed very little. In any case, none of the evidence demonstrates that the alleged use had took place in respect of Area 3a on or before 5 February 2010.

23. Area 3b is depicted as the rectangular strip of land which forms the northernmost part of the site. The appellant states that the use of that part of the Land only commenced in the last 2 years. This is supported by the fact it is shown as a grassed field in the 2016 aerial image, with hardstanding and some activity present on the 2018 image. As such, none of the evidence demonstrates that the alleged use had took place in respect of Area 3b on or before 5 February 2010.

24. Taking the evidence as a whole, even were I to have found the appellant's evidence sufficiently precise and unambiguous regarding the use of Areas 1 and 2, there are two fatal flaws to this case. Firstly, the appellant's evidence only claims to support the use of those parts as a stone yard. There is no reference at all to the mixed use comprising the storage of stone, vehicles, caravans, trailers, plant machinery, tools, shipping and other containers; and the processing of stone having commenced on those parts of the Land on or before 5 February 2010.

25. Secondly, it is clear, and the appellant's own evidence supports this, that the Land comprised two separate planning units as recently as 2018, since the northern part of the Land remained physically and functionally separate in agricultural use. Case law has established that any existing lawful use is capable of being extinguished by the creation of a new planning unit in respect of the land in question. It follows therefore that the commencement of the use of Area 3b in 2018 resulted in a new mixed use and the material change of use of the land from agriculture to that mixed use. The earliest evidence of the mixed use alleged in the notice being carried out is the 2018 aerial image which shows the full extent of the land being occupied. On that basis, ten years continuous use of the alleged breach cannot be demonstrated.

26. The appellant argues that the hardstanding in Areas 1, 2 and 3a is considered to be lawful as it was substantially complete more than four years prior to the issue of the notice. However, the alleged breach does not include the provision of hardstanding. Rather, the notice requires the hardstanding to be removed on the basis that it has facilitated the alleged material change of use. Thus, the question of whether that requirement is necessary is a matter dealt with under the appeal on ground (f) and I will return to it accordingly.

Building Operations

27. The notice alleges the construction of four buildings and a hut. There appears to be a discrepancy between what the appellant considers the four buildings to be and what the LPA considers. The plan attached to the notice identifies four buildings outlined in black and hatched in black lines. From left to right they are a large rectangular shaped building close to the western site boundary running from north to south (building 1). Adjacent to the east is a rectangular building running east to west with a small projection to the front (building 2). Adjacent to that building to the east are two smaller rectangular buildings sitting back to back (building 3 to the north, building 4 to the south). I have identified the buildings as 1-4 for the purposes of clarity within this decision.

28. In contrast, the appellants statement appears to suggest that building 1 is two buildings, whilst building 4 is one building. However, this doesn't accord with

the photographs the appellant has submitted or my observations on the site visit.

29. I saw from my site visit that the four buildings comprised as follows. Building 1 was a single, open fronted building, constructed of steel frame. It was largely as is shown on the appellant's photographic submission. Building 2 was a large timber construction with a tiled roof. Building 3 was a smaller timber constructed building whilst building 4 was a flat roof cabin. This accords with the aerial imagery provided by the appellant and the Ordnance Survey mapping the appellant has used to identify the four areas of the site. The evidence before me therefore suggests that the identification of the four buildings on the plan attached to the notice is correct, as opposed to that used by the appellant in evidence. I have therefore proceeded on that basis.

30. The appellant indicates that three of the four buildings were constructed in Area 3a when it was first occupied by the appellant in 2013. An aerial image from 2016 has been provided in support. Firstly, the image shows the narrow rectangular building I have referred to as building 4 in the same location as existed at the date of my visit. The appellant indicates that this was substantially complete in 2015. The 2018 aerial image also shows the same building in the same location.

31. However, there is no evidence that the building was substantially complete on ore before 5 February 2016. The earliest record of its existence being the aerial image dated 5 June 2016. The appellant states only that the aerial imagery shows that the building is well established at that point, but I fail to see how that can be established solely from the aerial photography. There is no way of establishing from the image that the building had been there for four months or more by that point.

32. Secondly, the 2016 image shows that building operations of some description are present in the same location as the building attacked by the notice which I have referred to as building 1. However, the roof covering and arrangement shown on the 2016 image are noticeably different to that shown on the 2018 aerial image. I cannot reasonably ascertain therefore from the evidence before me that the building shown on the 2016 image is the same as the one from the 2018 image or indeed at the date the notice was issued. In any event, even if I were to conclude it is the same building, as with building 4 the earliest record of its existence is the aerial image dated 5 June 2016. There is very little evidence which shows it was substantially complete on or before 5 February 2016.

33. The earliest evidence provided of the presence of buildings 2 and 3 is shown on the image dated 19 April 2018. The buildings are in the same location and contain the same roof shape and materials as they did at the time of my site visit and on the photographic submissions of the appellant. The earliest evidence provided of the substantial completion of the buildings is the aerial image from April 2018. Indeed, they are clearly not present on the land at the time of the June 2016 image and thus cannot have been substantially complete on or before 5 February 2016.

34. Likewise, the hut which the notice attacks is present on the 2018 imagery but not any earlier imagery. On that basis I cannot establish that it was substantially complete 4 years or more prior to the date the notice was issued.

Conclusions on the appeal on ground (d)

35. For the reasons given above, I find the evidence presented in support of the appeal on ground (d) in respect of the material change of use and building operations set out in the alleged breach of planning control to be ambiguous and insufficiently precise. It has not therefore been demonstrated on the balance of probabilities that the use of the land materially changed to a use as a mixed use comprising the storage of stone, vehicles, caravans, trailers, plant machinery, tools, shipping and other containers; and the processing of stone on or before 5 February 2010 and continued for ten years thereafter; and, that the four buildings and hut were substantially complete on or before 5 February 2016.

36. The appeal on ground (d) therefore fails.

The appeal on ground (f)

37. An appeal on ground (f) is made on the basis that the requirements of the notice exceed what is necessary. Section 173(4) of the 1990 Act sets out the purposes which an enforcement notice may seek to achieve. They are either (a) remedying of the breach of planning control or (b) remedying any injury to amenity which has been caused by the breach.

38. The notice does not state which of the two purposes it seeks to achieve. Nevertheless, the requirements are to cease the importation of stone and other materials/items, cease the use of the site for general storage and the processing of stone, remove all stone, vehicles, caravans, trailers, plant machinery, tools, shipping and other containers, demolish the four buildings and hut and restore the land to its previous condition as a green field by removing all hard surfaces and seeding the field with grass seed mixture.

39. On that basis, it seems to me that the purpose of the notice is to remedy the breach of planning control by restoring the land to its condition before the breach took place. The purpose of the notice therefore falls under section 173(4)(a) of the 1990 Act.

40. The appellant argues that the requirement to restore the whole of the Land to grass is excessive, since much of the land was covered in hardstanding more than four years ago and is therefore lawful by virtue of section 171B(1) of the 1990 Act.

41. Section 173(5) of the 1990 Act gives power to require the removal of buildings or works for the purposes of remedying the breach. Case law has established firstly in *Murfitt v SSE [1990] JPL 598* and latterly in *Somak Travel v SSE [1987]* that a notice directed at a material change of use may require the removal of works integral to and solely for the purposes of facilitating the unauthorised use, even if such works on their own might be immune from enforcement, so that the land is restored to its condition before the change of use took place.

42. In *Bowring v SSCLG & Waltham Forest BC [2013] EWHC 1115 (Admin)* the Court supported the view in *Somak* that such works must have been integral to, or part and parcel of, the making of the material change of use. It will not be sufficient if the works had been undertaken for a different and lawful use and could be used for that other lawful use if the unauthorised use ceased.

43. In this case, it is the evidence of the appellant that the hardstanding in areas 1, 2 and 3a was provided to facilitate the use of those areas as a stone yard at various points in time. The hardstanding in area 3b was done to facilitate the mixed use alleged in the notice. I have no reason to suggest that is not the case.

44. Referring back to my considerations on the appeal on ground (d), the evidence leads me to conclude, on the balance of probabilities, that those stone yard uses were not lawful at the date the notice was issued as they hadn't subsisted continuously for ten or more years prior to that date. Therefore, having regard to *Bowring* the hardstanding across the site as a whole cannot be said to have been undertaken for a different AND lawful use. In essence, the evidence before me leads me to conclude that the hardstanding of the land in its entirety, whilst in part may have occurred more than four years before the date the notice was issued, was not an obvious and permanent building operation, but was done to facilitate the unauthorised use of the Land as alleged in the notice. On that basis having regard to the relevant authorities, I find the requirement to remove the hardstanding does not go beyond what is necessary to remedy the breach by returning the land to its condition before the breach took place.

45. Likewise, it is clear from the aerial imagery provided by the appellant that prior to the unauthorised use taking place, the land was laid to grass. The requirement to return it to grass does not therefore go beyond what is necessary to restore the land to its condition before the material change of use took place

46. The appellant also indicates that that the requirement to cease the importation of stone and other materials/items is excessive since the operation can lawfully continue on parts of the site. However, referring to my findings in the appeal on ground (d) that is not the case in respect of the importation of stone.

47. Nonetheless, the phrase 'other materials/items' is somewhat generalised and would potentially prevent the appellant from bringing any materials onto the Land which could be done so lawfully either because it did not constitute development, because it was carried out in conjunction with the lawful use of the land or because it is development permitted under the GPDO[1]. Thus, in accordance with the 'Mansi principle'[2], I find it necessary to vary the requirement to state "materials/items which facilitate the unauthorised use of the land". I am satisfied such a variation would not result in injustice to the appellant or the Local Planning Authority.

48. Similarly, the requirement to cease the use of the site for general storage would potentially restrict any lawful use rights of the land for storage, either in connection with the lawful use of the land or permitted under the GPDO. It is necessary therefore to vary the requirement to specifically refer to the storage uses which form the unauthorised use which the notice attacks. I can vary the notice without causing injustice to the appellant or the LPA.

49. As a result of the above, the appeal on ground (f) succeeds to a limited extent.

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[1] The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)
[2] *Mansi v Elstree RDC* [1964] 16 P&CR 153

The appeal on ground (g)

50. An appeal on ground (g) is made on the basis that the time period specified for compliance with the notice falls sort of what should reasonably be allowed. The appellant indicates that the compliance timescales refer to days rather than months and thus are not clear. He also says there is confusion over when the notice takes effect. However, the notice is clear that it takes effect on 18 March 2020 unless an appeal is made against it beforehand. Likewise, the use of the number of days for compliance seems to me to meet the requirements of section 173(9) of the 1990 Act which states that a notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased. There is no requirement in the Act for this to be specifically expressed in months.

51. The appellant indicates that one of the buildings which is to be demolished comprises his home and thus a period of 12 months would be needed to find alternative residence. As set out in the preliminary matters above there is very little evidence before me to allow me to conclude, on the balance of probabilities, that is the case.

52. However, even if that were not the case, 250 days is somewhere in the region of 8 months. In my view I see no reason why the appellant would not be able to source alternative accommodation within such a timescale. Likewise, I also consider 250 days a reasonable timescale for all the buildings to be demolished, everything associated with the use to be removed from the site and for the land to be restored to grass. It also seems to me to be a generous timescale to allow the use to continue and would afford the appellant sufficient time to source alternative premises.

53. If the building were to be in residential use, then the demolition of the building would amount to interference and would engage the right for respect for private and family life, home and correspondence set out in Article 8 of the Human Rights Act 1998. This is a qualified right, whereby interference may be justified if in the public interest, applying the principle of proportionality.

54. The harm identified by the Council in their reasons for issuing the notice is of such weight that upholding the notice would be a proportionate and necessary response that would not violate that person's rights under Article 8 of the HRA. The protection of the public interest cannot be achieved by means that are less interfering of their rights. I acknowledge that the consequence of dismissing the appeal would be that any person presently residing in the building would lose their home. However, the notice allows for a 250 days compliance period which would allow the residents to find an alternative home. Moreover, there is no indication that those persons would necessarily be made homeless beyond that date.

55. Extending the compliance period to 2 years as suggested by the appellant would be akin to granting a temporary planning permission for the unauthorised use and building operations. In my view, extending the period further would unnecessarily prolong the planning harm that arises from the breach. In the absence of compelling evidence to the contrary, I find the time periods specified for compliance with the notice to be reasonable.

56. The appeal on ground (g) therefore fails.

Formal Decision

57. It is directed that the enforcement notice is varied by:

    - inserting the words "which facilitate the unauthorised use of the land" after the word "items" in section 5a of the notice; and,
    - deleting the words "for general storage" and substitute with the words "as a mixed use comprising of the storage of stone, vehicles, caravans, trailers, plant machinery, tools, shipping and other containers" in section 5b of the notice.

58. Subject to the variations, the appeal is dismissed and the enforcement notice is upheld.

J Whitfield

INSPECTOR