



Appeal Decision

Inquiry Held on 20 April 2021

Site visit made on 7 May 2021

by Roy Curnow MA BSc(Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 18 June 2021

Appeal Ref: APP/L3245/C/19/3238844

Frodesley Lane Farm House, Frodesley, Shrewsbury SY5 7QG

- 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 Andrew Smallman against an enforcement notice issued by Shropshire Council ('the Notice').
 - The enforcement notice, numbered 16/04955/ENF, was issued on 10 September 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the change of use of the Land from a permitted agricultural use to a mixed use of agriculture and the storage of vehicles and vehicle body parts not associated with agriculture.
 - The requirements of the notice are: (a) Cease the use of the land for the storage of vehicles and vehicle body parts not reasonably associated with agriculture; (b) Remove from the land all vehicles and vehicle body parts not reasonably associated with agriculture; (c) Restore the land to a condition had the alleged breach of planning control not taken place.
 - The period for compliance with the requirements is five months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b) (d) (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is corrected and varied by: the deletion of the words "(c) Restore the land to a condition had the alleged breach of planning control not taken place" in Section 5 "What you are required to do" of the Notice; and the deletion of "5 months" and the substitution of "12 months" as the time for compliance.
2. Subject to the correction and variation, the appeal is dismissed and the enforcement notice is upheld.

Procedural Matters

3. Initially, a ground (e) appeal was also made. However, the Appellant confirmed that he was not pursuing this ground of appeal in his Inquiry Statement.

Reasons

The Appeal Site

4. The appeal site comprises land on the southeast side of Frodesley Lane. It lies to the south of Brooklands Farm and southeast of Frodesley Lane Farm ('the Farm'), where the Appellant lives. There is a range of outbuildings and an open

- yard at the Farm. Another dwelling lies adjacent to the Appellant's house with another dwelling, Brooklands Farm, close-by to the north of the site.
5. The site mainly comprises two fields; the smaller of which lies adjacent to Frodesley Lane, with the larger one beyond running to a small stream. The land includes smaller areas enclosed by post and wire fencing, which were being used for the keeping of chickens and storage of various building materials when I visited. These areas are in the ownership of the Appellant. A further relatively small area at the northeast corner of the site, is in the ownership of another party who did not appeal the Notice.
 6. There are two accesses to the site from Frodesley Lane. That at its northernmost point gives access to the smaller of the site's main areas and the other, a little to the southwest, leads to the area used for chickens and storage.
 7. Areas of hardstanding have been laid within the site at the two entrances. The evidence shows that these were formed to "make it easier to use the site for the parking of vehicles", along with drainage works and re-seeding "somewhere between 1997 and 1999". The northern one was largely grassed over when I visited, but was still in-situ and easily uncovered.
 8. It was established in the Inquiry¹ that the Council was not seeking the removal of these hardstandings under the terms on the Notice.

The Appellant's Businesses

9. When he bought the site, in 1994, the Appellant was working in general haulage. In 1991 he started his own haulage business, 'A R Smallman Contractors'. Tipper trucks associated with that business were kept on the site, but he said that they have not been kept there for over 10 years. In the Inquiry, he said that the haulage business ceased to operate "around 2009...maybe 2008".
10. Since then, the Appellant's business has been buying second-hand goods vehicles for subsequent sale to foreign buyers. He started this business more than 20 years ago. Bought vehicles are delivered direct to him by the seller and are stored, as necessary, prior to being exported. This exportation is primarily to countries with developing economies where they are particularly sought after, especially countries in the Caribbean.
11. This is one of three locations where the vehicles related to the business are stored. The business uses the farmyard adjacent to his dwelling, which has planning permission, personal to the Appellant, for the parking of up to 3 vehicles, as well as land close to a chicken farm at Condoover. There, he can keep up to around 40 vehicles. I visited each of these locations. The business had also used other land for storing vehicles, but that had been developed for housing.
12. The business also has land on the Condoover Industrial Estate, where it undertakes work to vehicles. This can involve repairs before sale, dismantling for spares, and/or cutting them up or partially dismantling them prior to sale. Vehicles for export are cut up, referred to as 'half-cuts' and 'front-cuts' at the Inquiry, before being loaded into a container or into a whole vehicle for onward

¹ Mr Whitley in Cross-Examination

shipping. A container can accommodate up to four cut vehicles. Excess vehicles and or parts are used for spares or sold on.

13. During my site visit, I went with both parties to the locations currently used by the business. Whilst at the industrial estate, I was able to see how cut-up vehicles were loaded for export.

Ground (b)

14. This ground of appeal is that the matters alleged in the Notice have not occurred. In this legal ground, it is for the Appellant to make his case on the balance of probability.
15. The Appellant's case, here, relates to that part of the alleged breach of planning control concerning 'vehicle body parts'. In his Appeal Form, he seems to have interpreted this as meaning these parts are literally being stored on the land. In that document, he said this has not occurred, but he referred there to lorry cabs on the back of some of the vehicles. In his Proof of Evidence (PoE) he asserts that the allegation is incorrect, as the site is kept tidy and parts are not strewn across it. He does, however, acknowledge that cabs of trucks and front cut trucks are stored on flat-bed trucks on the land.
16. During his Examination in Chief, the Appellant answered 'Yes, on flat beds' to the question of whether he kept vehicle parts on the site. During Cross-Examination he agreed that what was on the flat bed of a red truck, in the photographs that formed Appendix 14 to his PoE, were vehicle parts. He further agreed that were the Notice not to refer to lorry parts, and the lorries were to be removed, the parts might be stored on the land.
17. I do not see an inconsistency between the Statement of Common Ground (SoCG) and the Notice. It is a question of determining whether vehicle parts stored on lorry backs equates to their storage on the land. Although the parts have been stored on other vehicles, those vehicles have been on the land. Therefore, it is entirely reasonable to conclude that vehicle parts have been stored on the land.
18. For the above reasoning, I find that there has been storage of vehicle parts on the land and my conclusion here is that the appeal on ground (b) fails.

Ground (d)

19. This ground of appeal is that, at the time 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. The onus is on the appellant to prove his case, on the balance of probability.
20. The relevant time period in respect of the alleged breach, set out in section 171B of the Act, is ten years. Therefore, it is for the appellant to show that the use of the land had occurred for ten years prior to the Notice being issued and, if this was the case and it became lawful, that this status was not thereafter lost. As the Notice was issued on 10 September 2019, it is necessary for the Appellant to demonstrate that the land had been used in the manner alleged in the Notice for the period from 10 September 2009 to the issuing of the Notice, ('the relevant period').

21. It was common ground at the Inquiry that the mixed-use alleged in the Notice is that of agriculture and the storage of vehicles and vehicle body parts. For the mixed use to occur, the component uses would need to be carried on continuously throughout the relevant period. The Council stated that its case did not require a specific number of lorries to have been stored on the land at any one time. It was further agreed that there was no need for a particular proportion of each use to be carried out at any given time, as long as the uses were both carried on and that neither became so dominant as to become the primary use.
22. The judgement in *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226 sets out that the use of land can only become lawful if it continues throughout the relevant immunity period, such that the LPA could have taken enforcement action at any time. This judgement was applied in *Swale BC v FSS & Lee* [2005] EWCA Civ 1568. It required decision-makers to ask whether there was any time during the relevant period when the LPA could not have taken enforcement action against the use of land because it was not actually being so used. This involves a judgement as to whether periods of non-use were *de minimis*. Where there has been a significant break, which is a matter of fact and degree, the result will be that the 'clock is restarted'.
23. Broadly speaking, the Appellant's case is two-fold: that he has used the land in the alleged manner throughout, and beyond, the relevant period; and that this use has been continuous. That he has run his business for a period in excess of the relevant period is not doubted by the Council. In essence, its case is that he has not used the appeal site for the uses described in the Notice continuously throughout the relevant period.
24. Mr Smallman says that the use of the land for vehicle storage commenced in 1994, and certainly ran from 2009 onwards. He stated that an Enforcement Officer from the then local planning authority, Shrewsbury and Atcham Council, investigated this use of the land in 1996. The officer, he says, advised him to apply for the use of the farmyard. Whilst this might have been the case, no documentary evidence of this advice was put forward.
25. In cross-examination Mr Smallman stated that, due to an illness, his memory "was not the best". He said that there had been lorries on the land since 2009, and that the land had been used on a year-round basis from 2015-2017 onwards, though "maybe before then". He stated that, on average, there had been 6-12 vehicles on-site prior to 2015-2016. From 2016, he said that the numbers increased with typically 10-20 vehicles, and at times more than 40 vehicles on the land. Following their purchase, vehicles might be kept for up to a year depending on the state of the market. He said, however, that the land was not used on a 365 days per year basis; explaining that in December and January, the site could be empty. This, he said, was primarily dependent on the weather, but also on how busy the business was.
26. Evidence of the running of the business from 2009 to 2019 was provided, in the form of bills of lading and invoices², and associated charts³ relating to purchases, turnover and profit and loss. The documents in the former give Mr Smallman's name and set out the address of the business as Frodesley Lane Farm. However, there is nothing within them or the charts that provides

² Appendix 10 – Appellant's SoC

³ Appendix 11 – Appellant's SoC

- evidence of the actual use of the land for the storage of vehicles or vehicle body parts.
27. I find similarly with regards to letters⁴ from Ryder and Leicester Commercial Centre. They state that they have supplied the Appellant with vehicles “for over 20 years” and “since 2004”, respectively. Again, they do not provide evidence of the actual use of the appeal site.
28. Alan Potter, who has lived adjacent to Frodesley Lane Farm since 1986, appeared at the Inquiry. In his PoE he stated that there had been lorries and trucks on the land as far back as he could remember. However, in cross-examination he was unable to provide any particularly detailed information regarding numbers of vehicles and when they were kept there. He did agree, however, that there were periods when there were none of these vehicles on site and that this could have been for a month or more.
29. Graham Davies appeared at the Inquiry in support of the Appellant, as well as providing a Written Statement (WS). He is an Acton Burnell parish councillor, who has lived close to the site for more than 60 years. He said that he had travelled past the site regularly and that lorries and trucks had been kept on the land for many years and certainly since Mr Smallman started living in Frodesley Lane.
30. In his oral evidence, Mr Davies admitted that he was unable to comment on the consistency of the numbers of vehicles on the land. He was also unable to say how many months the use of the land occurred in 2009 and 2016, and said that he did not take much notice of the business.
31. Further WSs were made by David Higgins, who has lived in Frodesley for nearly 30 years and Peter Meredith, who has lived near the site for more than 30 years. Both stated that they knew the site and passed it regularly. Mr Higgins stated that vehicles have been stored on the land for at least 20 years, whilst Mr Meredith states that the use has occurred for more than 20 years.
32. The weight that I can afford the evidence in the WSs of those people that did not attend the Inquiry is limited, as it could not be fully tested. Furthermore, these submissions did not provide substantive evidence of when the use occurred or the length of time that vehicles were on the land. I find their content to be vague and lacking in precision.
33. Malcolm Leavesley made a statutory declaration. He said that during his employment with Mr Smallman from 1995, and which was on-going at the time of the Inquiry, he had amongst other things parked vehicles associated with the export business on the land “for over 20 years and certainly since 2009”. He did not, however, attend the Inquiry; the reason given being his concern with the time this would take. Although his evidence carries greater weight than that in the WSs, again there was no opportunity to fully test his evidence. As it does not provide substantive evidence of when and where on the site the use occurred, its duration and the number of vehicles, I give it limited weight.
34. James Jones made written representations and appeared at the Inquiry. He spoke in support of the Council’s position on behalf of his ageing parents who live in Brooklands Farm, close to the site. He was born there and said that he regularly visited his parents on a weekly-fortnightly basis.

⁴ Appendix 7 – Appellant’s SoC

35. In his initial online comments⁵ on the appeal he stated that the Appellant had “parked a small number of lorries on the site (perhaps up to half a dozen)”. In cross-examination on this point, he said that this was an error; he had not appreciated how the site was defined and pointed to three areas of land off the site where this had happened. His view was that the storage of lorries anywhere, save for where the Appellant had planning permission, was inappropriate. He went on to say that his comment that “vehicles are not intended to languish for 10 or 20 years in the middle of a farmer’s field” was made to clarify matters.
36. He was clear that the use of the land changed markedly, to that use which is the subject of the Notice, after the dismissal of the appeal⁶ (‘the appeal’) relating to a planning application⁷ (the application) for residential development on the land. He did not recollect vehicles on the land prior to this. He said that the Google Earth images showing the land without vehicles reflected the land’s appearance before that point.
37. Mr Jones’s evidence was clearly given. His explanations of the possible ambiguities between what he said at the Inquiry and his initial comments were plausible in my view. Notwithstanding that he clearly disliked the use of the land and the effects that he felt this had on the well-being of his parents, I found his evidence to be fairly compelling. However, on the balance of probabilities, I find that this did not point to there being no vehicles stored on the land prior to the appeal decision. His evidence did show clearly though that there was a significant change in the nature of this use after the appeal decision was issued.
38. For the Council, Mr Whitley’s direct knowledge of the site dates from 10 November 2015. On that date he accompanied the Inspector and the Appellant’s then agent at the site visit related to the appeal. At that time, he says his recollection is that there were no lorries on the land.
39. Subsequently, he took over the enforcement case, which forms the basis of this appeal, from an Officer who left the Council’s employment. He visited the site on 3 December 2018 and saw a significant number of vehicles on the land. At that time, he says that he recollected Mr Smallman telling him that he had had no option other than to bring lorries over from a site at Condover, due to the actions of the Council. He said he could find no evidence of this in the Council’s records, but did not make much of the link between the two sites at the Inquiry. My finding on this is that the only link between the sites was that they are used by the same business – albeit for differing purposes. On a further visit to the appeal site in July 2019, rather than seeing a cessation of the use, as he had requested in a letter to the Appellant following his December 2018 visit, there were still a considerable number of lorries. This led to the issuing of the Notice.
40. Save for questioning regarding the link between the appeal site and that at Condover Industrial Estate, this evidence was not challenged, so I take it to be the case.

⁵ Pages 495-497 Core Bundle

⁶ Planning Inspectorate reference – APP/L3245/W/15/3033317

⁷ Council reference – 14/005583/FUL

41. Mr Whitley was of the opinion that the Council could not have enforced against the use when he visited for the appeal, as it was not occurring. He said the same would have been the case at the time of the Google Earth images he submitted dated 31 December 2010 and 14 April 2015.
42. In cross-examination, though agreeing that certain gaps in the use of the land would not break its consistency, Mr Whitley argued that there was no pattern in the usage of the land for the storage of lorries. He pointed to Mr Smallman's evidence regarding the influence of weather and business matters on the use of the land at different times of the year – especially December-January with respect to the former. In support of his position, he pointed to the Google Earth and other images. Even though in other years Mr Smallman had not used the land due to poor weather, his photographs from December 2018 shows the land being used for lorry storage. Conversely, in the Google Earth image from April 2015 there were no vehicles on the land, even though Mr Smallman had put no case forward that weather affected the use of the land in the Spring.
43. Although the Google Earth images have to be treated with a degree of caution, that the Appellant could only suggest that the lack of vehicles on the land in the various images was just bad luck was unconvincing.
44. Whilst not determinative of itself, I find the Council's argument regarding the lack of reference to vehicles being parked on the land, in the planning application and the subsequent appeal, quite compelling. I, too, would have expected an applicant/appellant to highlight the parking of lorries on the land to further a proposal for a less harmful development. Mr Smallman, when asked about the absence of this argument agreed that he would have expected it to be made but was not able to explain why it was not. From this evidence, I find that on the balance of probability there were no lorries stored on the land when the agent visited it to make the application and appeal. That the Inspector made no reference in his description of the site to vehicles on the land points, on the balance of probability, to there being none on the land when he visited.
45. As they predate the relevant period, that the three Google 'Streetview' images of the site in Mr Whitley's Proof of Evidence show no vehicles on the land carried little weight. I find similarly with regards to the Google Earth aerial photograph of the site from July 2008. Notwithstanding that they are, quite literally, snapshots in time, the Google Earth images that are dated 31 December 2010 and 14 April 2015 are dated within the relevant period. Neither shows any lorries or parts on the site. These contrast greatly with the Google Earth image dated 1 July 2018, in what appears to be a large number of lorries are seen on the site.
46. Mr Whitley's direct evidence was convincing. His clear recollection of visits to the land, including the appeal site visit, gives credence to the argument regarding the lack of reference to the lorries on the land by the Appellant's then agent and the Inspector.

Conclusion on Ground (d)

47. No one person was able to provide a comprehensive account of the continuous use of the land for the storage of lorries and vehicle parts throughout the relevant period. From the evidence put before me, I find that there has been, on the balance of probability, lorry storage on the site over the relevant period.

The evidence from Mr Smallman, Mr Davies and Mr Potter point to this being the case. Although Mr Jones explained the inconsistencies between his initial comments and those he made at the Inquiry, I find it likely that some of the vehicles that he saw were on the land during the relevant period.

48. I have no doubt that the nature of the storage changed to a considerable degree following the receipt of the appeal decision. However, I do not take the complaint the Council received, following the appeal decision, to show that this was when the use started. On the balance of probability, it had occurred to a degree before that time, but it has not been demonstrated that this was continuous. Following the appeal decision, the numbers of lorries stored on the land increased dramatically, as did the time that they were there. However, whilst the land might have been used continuously for the mixed use after the appeal decision, this is insufficient for the ground (d) to succeed.
49. Breaks in the use were greater than *de minimis* and, being the result of inclement weather and the nature of the market for lorry sales, these gaps were not planned or regular. The consequence was that there were times when the absence of vehicles would have meant that the Council could not take enforcement action.
50. Save for Mr Jones's submission, the Council was unable to provide first-hand evidence regarding the use of the land until the time of the planning application and subsequent appeal. Overall, however, its evidence shed considerable doubt on the assertion that the land was continuously used for storage purposes throughout the relevant period.
51. It is for the Appellant to demonstrate that, on the balance of probability, the mixed-use of the land that is alleged in the Notice was continuous for the relevant period. He has not done this. Therefore, for the reasoning given above, the Ground (d) appeal is dismissed.

Ground (f)

52. An appeal under ground (f) is that that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
53. The Appellant argued that Requirement (c) of the Notice, to "Restore the land to a condition had the alleged breach of planning control not taken place" was superfluous, as its terms were already addressed by Requirements (a) and (b). In response, Mr Whitley said that its inclusion clarified matters, by emphasising Requirements (a) and (b). He did, however, concede that the harm identified from the Notice solely arose from the vehicle-related storage and it was not directed at the hardstandings.
54. I find that Requirements (a) and (b) require no clarification nor emphasis. They unambiguously explain what needs to be done and compliance with them would address the harm that the Council identifies as arising from the development. Therefore, I find that Requirement (c) is unnecessary, as it merely repeats Requirements (a) and (b).

55. Some arguments on the ground (f) were made in the Appellant's original SoC, but were not repeated elsewhere. It is incumbent upon me to address these, nonetheless.
56. He argued that, if his argument relating to the storage of vehicle parts under ground (b) were to be accepted, requirements 5(a) and (b) of the Notice should be corrected by deletion of references to vehicle parts. As I dismissed the ground (b) appeal, so this line of argument fails, too.
57. Arguments were made that it is not necessary to remove all vehicles from the land. Limiting numbers of vehicles by way of condition is not possible where, as here, there is no deemed planning application and the purpose of the Notice is to remedy the breach of planning control. This is also relevant to the proposal to provide screening at the site.
58. Whilst it was claimed in the Appellant's SoC that the term "reasonably associated with agriculture" in Requirements 5(a) and (b) was unclear, Mr Smallman said in cross-examination that he understood what it meant with regards to vehicles.
59. My conclusion on this ground is that, in the light of the evidence put forward, there is no need for Requirement (c) and I shall vary the Notice by removing it. To this limited extent the appeal under ground (f) succeeds.

Ground (g)

60. The Notice gives five months for compliance with the terms of the Notice. The Appellant claims that this is insufficient, citing problems with the export market arising from Brexit. Whilst he has the chicken farm site, it is not large enough for additional storage. Furthermore, that site is not suited to storing vehicles for export, due to problems with vandalism. He goes on to say that the Covid-19 pandemic has increased the uncertainties. Initially, in the light of these factors, he sought a period for compliance of 18 months to 2 years.
61. In response, the Council was of the opinion that 5 months was an appropriate period for compliance. However, it acknowledged the business uncertainties referred to and that an extension to 12 months may be appropriate.
62. I concur with the Council's position that the 5-month period was appropriate at the time that the Notice was issued. Indeed, I note that this was not contested by the Appellant; his case centres on the changes in circumstances since that time.
63. Although the Appellant agreed that he could physically remove the vehicles from the land in a matter of weeks, that is only part of the matter. He would need to arrange for somewhere for them to be taken to or cease buying new vehicles. I understand how the latter would be likely to have an adverse effect on his business. It was suggested that he should have been planning for re-locating the vehicles and parts during the period since the Notice was served on him. However, he would quite reasonably have anticipated success in the appeal that would not have meant having to re-locate them.
64. Allowing the use of land to continue for the length of time requested by the Appellant would call into question the expediency for the LPA to issue the Notice in the first place. Therefore, I do not agree this would be reasonable. No substantive evidence was brought forward to show that the 12-month

period agreed by the Council would not suffice, and I find that in the circumstances this would be an appropriate period for compliance.

65. For the above reasons, I agree that 12-months to comply with the terms of the Notice would be reasonable, and I vary the terms of the Notice. To this extent, the Ground (g) succeeds.

Conclusion

66. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and variation.

Roy Curnow

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Peter Dixon	Counsel, of Exchange Chambers. Instructed by Tracey Lovejoy of Lanyon Bowdler Solicitors
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He Called:

(In Order of Appearance)	
Mr Andrew Smallman	The Appellant
Mr Alan Potter	Witness

FOR SHROPSHIRE COUNCIL (SC):

Mr Piers Riley-Smith	Counsel, of Kings Chambers Instructed by Kim Brown, Solicitor of SC
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He Called:

Mr James Jones	Witness
Mr Frank Whitley	Planning Enforcement Officer

THIRD PARTY

Mr Graham Davies