
Appeal Decisions

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 30 June 2021

**Appeal Refs: APP/X1355/C/20/3258445 (Appeal A) &
APP/X1355/C/20/3258446 (Appeal B)
Waste Recycling Plant, Eldon Estate, Eldon DL14 8AE**

- 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 appeals are made by Falcons Two Limited (Appeal A) and Falcons One Limited (Appeal B) against an enforcement notice issued by Durham County Council.
 - The enforcement notice is dated 3 August 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission the material change of use of Land for the importation and processing of waste.
 - The requirements of the notice are: 1. Permanently cease the use of the Land for the importation and processing of waste. 2. Permanently remove all waste from the Land.
 - The period for compliance with the requirements is: Step 1 – within one day of the date this notice takes effect. Step 2 – within 6 weeks from the date on which this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(e) and (g) of the Town and Country Planning Act 1990 as amended.
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Decisions

1. It is directed that the enforcement notice be amended by the deletion of the text 'within 6 weeks' from the period for compliance, and its substitution by the text 'within four months'.
2. Subject to this amendment, appeals A and B are dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The appeals were originally made on grounds (a), (c), (e), (f) and (g). However, after the appeals were lodged, the site was subject to a serious fire. Due to restrictions brought about by the ongoing coronavirus pandemic, it was difficult for the appellants to assess the full extent of the fire damage. Nonetheless, it became apparent that the extent of the damage was such that the future use of the site needed to be reassessed. That being the case, the appellants withdrew grounds (a), (c) and (f), and the appeals are proceeding on grounds (e) and (g) alone.
4. As ground (e) is a legal ground and ground (g) relates only to mitigation, on review of the case, I considered that it was not necessary to make an inspection of the site. I have therefore considered the remaining grounds of appeal on the written evidence alone.

The appeals on ground (e)

5. Ground (e) is that the notice was not properly served on everyone with an interest in the land.
6. The appellants make reference to Section 172 of the Town and Country Planning Act 1990, which provides that:
 - (2) A copy of the enforcement notice shall be served:
 - (a) on the owner and on the occupier of the land to which it relates; and
 - (b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.
7. They state that as the company Falcons Two Limited have an interest in the site as operators, they would be materially affected by the enforcement notice, and most affected by the requirement of the notice to remove its property from the site. However, they state that Falcons Two Limited were not served with the enforcement notice.
8. The Council have provided a list of those served, and they confirm that Falcons Two Limited was not amongst those served with a copy of the notice. Nevertheless, they state that Mr Jonathan Waldron, a company director of both companies, was handed a copy of the notice, and that a copy was also posted at the entrance to the appeal site.
9. Moreover, even if the notice was not correctly served, section 176(5) of the Act provides that failure to serve may be disregarded if an appellant has not been substantially prejudiced. In this case, Falcons Two Limited have been able to submit an appeal against the enforcement notice and to make written representations in support of their case through these appeal proceedings. It cannot, therefore, be said that they have suffered any prejudice as a result of any failure to comply with the rules concerning service.
10. They do not indicate how they have been prejudiced, and there is no suggestion that any other person or entity may have been prejudiced. I conclude, therefore, that in the circumstances of this case, any failure in terms of service of the enforcement notice may be disregarded.
11. The appeals on ground (e) fail.

The appeals on ground (g)

12. Ground (g) is that the time given to comply with the notice is too short. The notice requires permanent cessation of the importation and processing of waste within one day and the removal of all waste from the site within six weeks of the notice taking effect.
13. The appellants state that it is not possible to remove all the waste within six weeks. They argue that, even if it was possible to get contracts in place with haulage companies and waste disposal sites to take the waste, unprocessed, in six weeks, which they consider highly unlikely, the cost of doing so would be unviable.
14. I have taken into account the statutory declaration (SD), dated 28 March 2021, of Gareth Russell Cherry, who is a company director of Falcons One and

Falcons Two. He states that Falcons Two's income came solely from the operation of the appeal site, and that they have had no income since July 2020. As a result, the company has no funds to carry out the notice requirements. There was also no insurance in place at the time of the fire.

15. In order to address this problem, the appellants have decided to try and sell the site to raise the funds. On the date of the declaration, Mr Cherry states that two purchasers were interested and that negotiations were ongoing. There has been no further information as to whether the site has been sold. Whilst a facility has been lined up to receive the waste material, Mr Cherry estimates that the cost of the work will be £150,000 to £200,000, which the company is currently unable to afford.
16. The Council contend that the fire significantly reduced the total volume of waste on site. They estimate that the volume of waste on site prior to the fire was approximately 5,000 tonnes, which could be cleared from the site in six weeks with a modest 5-10 HGV loads per day. This approach appears to assume that the work could start almost immediately on the issue of this appeal decision, with little account of any time needed to arrange for the work to be done.
17. The appellants suggest that five months would provide a reasonable time for the sale of the site to be agreed, against which they could secure a loan to cover the costs of the requirements. Mr Cherry also explains that, if the waste has been able to dry out over summer months, this will reduce the cost of removal as its weight will be less.
18. I note the Council's arguments to the effect that the appellants have had time since the service of the notice to carry out the requirements. Nevertheless, where an enforcement notice is appealed, the appellants are entitled to assume success on any ground. If they pleaded any legal ground as well as (g), as is the case here, they may anticipate the notice being quashed. That being the case, I am unable to accept the Council's argument against the extension of the period for compliance on the basis that the appellants have had time to commence the requirements during the appeal proceedings.
19. It is clear that the fire has had a significant impact on the appellants' circumstances. The evidence given in Mr Cherry's statutory declaration is to be given significant weight. Whilst they are sceptical about the prospect of the sale of the site, the Council do not dispute the information given regarding the appellants' financial situation.
20. I have also taken into consideration the continuing disruption and uncertainty caused by the pandemic restrictions. In light of these circumstances, I find that six weeks is an unnecessarily tight time frame for the works to be contracted and then carried out, particularly as there appears to be little harm from the appeal site that requires urgent remedial action. However, due to the timing of the appeal process, the appeal decision will now be issued during the summer season, which the appellants have stated will have reduced the weight of the waste, making the requirements somewhat less onerous.
21. Taking all these factors into account, I consider that a period of four months would be reasonable for compliance. To that limited extent, the appeals on ground (g) succeed, and I have directed that the enforcement notice be amended accordingly.

Conclusion

22. For the reasons above, both the appeals are dismissed, and the enforcement notice is upheld, as varied.

Elaine Gray

INSPECTOR