



Appeal Decisions

Inquiry Held on 18, 19 & 20 February 2020 and 1, 2 & 3 September 2021

Site visit made on 3 September 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 08 October 2021

Appeal A Ref: APP/A1720/C/18/3214579

Land east of New Road, Swanwick, SO31 7HE

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Borderland Fencing Ltd against an enforcement notice issued by Fareham Borough Council.
 - The enforcement notice was issued on 24 September 2018.
 - The breach of planning control as alleged in the notice is, without planning permission, material change of use of the Land from commercial nursery to mixed use comprising the manufacture of timber fencing and other timber products and the storage and distribution of raw materials and of finished products.
 - The requirements of the notice are to stop using any part of the uses detailed in paragraph 3 of the notice and remove from the Land any vehicles, equipment and all fencing and timber-based products brought onto the Land for the purpose of that use.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/A1720/X/19/3233135

Borderland Fencing, New Road, Swanwick, SO31 7HE

- 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 Borderland Fencing Ltd against the decision of Fareham Borough Council.
 - The application Ref P/18/1212/LU, dated 18 October 2018, was refused by notice dated 14 January 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 a mixed use comprising (i) for the repair and processing of timber and other fencing products, including the de-nailing and welding panels returned to the site, and the painting of products prior to delivery/collection; (ii) the storage and distribution of raw materials and of finished products; and (iii) as a storage area for materials and products used and supplied by the contracting business (for erection offsite).
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Summary Decisions: Appeal A is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision. Appeal B is dismissed.

Procedural Matters

1. The Inquiry was initially scheduled to sit for three days. In the event, the Inquiry sat for a total of six days in two separate sessions. Following the first session of three days, the Inquiry was scheduled to re-open on 8 September 2020. However, the Coronavirus pandemic precluded a return to face-to-face events at that time. Having opened as a face-to-face event, in the interests of fairness to all participants, the resumption of the Inquiry had to be delayed until such time as face-face-events were possible again. The earliest opportunity to do so was 1 September 2021.
2. Evidence at the Inquiry was given under oath by way of affirmation.

The Enforcement notice

3. The breach of planning control alleged in the notice is:
4. *Without planning permission, the material change of use of the Land from a commercial nursery to a mixed use comprising the manufacture of timber fencing and other timber products and the storage and distribution of raw materials and of finished products*

5. It was agreed at the Inquiry that the breach of planning control should be corrected to:

Without planning permission, the material change of use of the building from agricultural to a mixed use for the repair and processing of timber and other fencing products, including the -de-nailing and welding of panels returned to the site, and the painting of products prior to delivery/collection; for the storage and distribution of raw materials and of finished products, and as a storage area for materials and products used and supplied by the contracting business (for erection off site).

6. This description was proposed by the Council and agreed to by the appellant. I am therefore satisfied that the notice can be corrected in this respect without causing injustice. It is important to do so, given that this amended description now provides the basis for the appeal on ground (a) and the deemed planning application that arises under section 177(5) of the 1990 Act.
7. Correcting the notice in this respect addresses the appeal on ground (b) made by the appellant. The appeal on ground (b) succeeds to that extent, and I do not consider it further.
8. It occurs to me that correcting the notice in this respect also requires an attendant variation(s) to the requirements of the notice. However, because I intend to allow the appeal and grant planning permission on the amended description of the breach of planning control, there would be no merit in doing so.
9. The Council also sought a variation of the notice to require the demolition/break up of the concrete floor and ramp, together with the removal of the resultant materials from the land. Given that I intend to grant planning permission for the breach of planning control alleged in the notice, I am not in

a position to vary the notice in this respect. I have not reached any firm conclusion as to whether the notice could have properly required the removal of the concrete floor and ramp.

10. It would not, however, be appropriate to correct the notice to include the concrete floor and ramp in the description of the alleged breach of planning control. Those matters were not included in the breach of planning control originally alleged in the notice. The appellant has not had an opportunity to produce evidence on those matters, including whether planning permission ought to be granted for them. It follows that the Council has not had an opportunity to set out its position in response to any grounds of appeal on which the appellant might have relied. Consequently, both parties would be caused in injustice should I correct the breach of planning control to include the concrete floor and ramp.
11. Section 173(11) of the 1990 Act provides, in summary, that (a) where an enforcement notice could have required buildings or works to be removed but does not do so; and (b) all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of s73A in respect of development consisting of the construction of the buildings or works. In this case, the concrete floor and ramp do not form part of the breach of planning control as I intend to correct it. Accordingly, section 173(11) of the 1990 Act does not apply in this case and planning permission is not granted for the concrete floor and ramp by virtue of s73A of the 1990 Act. Furthermore, in the interest of clarity, although I intend to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act, my decision does not grant planning permission for the concrete floor and ramp.

The Certificate of Lawfulness

12. The reason for refusing the Certificate of Lawfulness, as set out in the First Schedule of the Council's Decision Notice, is not phrased as a reason at all. It simply lists the evidence on which the Council's decision was founded. I have therefore taken the description of the use for which a certificate of lawful use or development is sought from that stated on the application form.

The Planning Unit

13. In order to determine whether a material change of land has occurred, it is first necessary to identify the relevant planning unit. The leading case for the determination of the planning unit is *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207. This case indicates that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically and/or functionally separate and distinct, and/or occupied for different and unrelated purposes. In *Burdle*, Bridge J suggested three broad categories of distinction:
 - a) A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;
 - b) A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another;

- c) The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.
14. In these respects, the area to be looked at is the whole of that used for a particular purpose. However, it is settled case law that an enforcement notice does not have to be directed at the whole of the planning unit or indeed to identify it. In this case, the enforcement notice is directed solely at that part of the land previously occupied by a glasshouse. Similarly, the LDC relates only to that area¹.
15. Applying the principles established in *Burdle* to the facts of this case, it is apparent that at the time the enforcement notice was issued and on the date on which the LDC was submitted the glasshouse formed part of a wider unit of occupation used by the appellant in connection with his business. There was no physical or functional separation of the uses taking place within the unit of occupation. The use of the land at that time therefore falls within the first of broad category identified in *Burdle*, namely where the unit of occupation has one primary use to which any other activities are incidental or ancillary². Accordingly, I consider that at the date on which the enforcement notice was issued and at the time of my site visit the planning unit encompassed all the land occupied by Borderland Fencing, and was as indicated by Mr Ward in his evidence.
16. Nevertheless, a planning unit can change over time. There is no dispute that the glasshouse originally formed part of the Columbo Nursery³ and as such was in agricultural use. At that time, the glasshouse was functionally separate from the uses undertaken by Borderland Fencing. The glasshouse was also physically separate from the Borderland Fencing land: there was no access from the Borderland Fencing site, and access was only possible from the Columbo Nursey land.
17. The glasshouse was therefore both physically and functionally separate from the Borderland Fencing site at that time. It formed part of a different planning unit. I therefore consider that the planning unit against which the material change of use should be assessed is that shown on the plan attached to the enforcement notice and on the plan accompanying the LDC⁴.

Appeal A: the appeal on ground (d), and Appeal B

18. The appeal on ground (d) is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters.
19. Section 191(4) of the 1990 Act indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My

¹ Albeit with a slight difference in the site area.

² That primary use being the use alleged in the enforcement notice as I intend to correct it and as described on the application form for the LDC.

³ Various spelt as 'Columbo' or 'Colombo' in the evidence. I have adopted the former spelling throughout.

⁴ Noting the slight differences between those plans.

decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a LDC was well founded.

20. In relation to both the appeal on ground (d) and the LDC, in order to succeed the appellant must show that the use had been continuous for a period of ten years beginning with the 'relevant date'. In this case, the relevant date is different for the enforcement notice and the LDC. In relation to the enforcement notice, the relevant date is ten years beginning with the date of the breach. In relation to the LDC, the relevant date is ten years prior to the date on which the application was made: in this case, 18 October 2008. However, the difference is such that the two can be considered together. In relation to both, the test is the balance of probability and the burden of proof is on the appellant.
21. Prior to any use by Borderland Fencing Ltd, the glasshouse in question formed part of the adjoining Columbo Nursery. In a report prepared by Bruton Knowles for Columbo Nursery in September 2012, this glasshouse is described as being "disused and in a somewhat dilapidated condition". Similarly, a planning statement in relation to Columbo Nursery produced by Robert Tutton Town Planning Consultants Ltd in July 2012 also describes the glasshouse as being "very dilapidated".
22. In December 2009, Borderland Fencing submitted a planning application for, in summary, the retention of various buildings and structures on its own site (Council Ref: P/09/1125/PP). The Design & Access Statement submitted as part of that application contains a detailed description of the Borderland Fencing site, but makes no mention of the glasshouse. The 'red line' area to which that application related did not include the glasshouse.
23. The photographic evidence tends to confirm that the glasshouse was in a dilapidated condition at that time. An aerial photograph taken in April 2007 shows numerous broken or missing panes of glass. It is not possible to discern from this photograph what use, if any, is taking place within the glasshouse. It is, however, evident from this photograph that a retaining wall, storage racking and stored items to the north of glasshouse (within the Borderland Fencing site) prevent any access to the glasshouse from there.
24. An aerial photograph taken in February 2012 is of poor quality and is not in sharp focus. Nevertheless, it is possible to make out two or possibly three white objects, together with a smaller blue object. These are consistent with the storage of boats, and large piece of furniture under a blue tarpaulin described by Mr George Metcalfe in his evidence.
25. Of more assistance is a photograph taken at ground level in July 2012. In this photograph, one of the boats shown in the above-mentioned aerial photograph is clearly shown, together with a trailer for a second boat owned by Mr Metcalfe. This photograph does not show all of the glasshouse, but all of the floor surface that is visible is covered in weeds and/or grass. There are isolated items of equipment lying on the ground, such as buckets and a step ladder, but there is nothing to indicate that these are being used by Borderland Fencing. There is no evidence of the storage of timber or timber related products in the area of the glasshouse that is visible in the photograph.

26. Aerial photographs taken a year or so later, in either July or August 2013, tell a similar story. The boats and the blue tarpaulin are clearly visible. The ground surface is of uniform appearance throughout the glasshouse, with no evidence of storage of timber products by Borderland Fencing. The same is the case in an aerial photograph taken in September 2014.
27. The latter contrasts markedly with an aerial photograph taken in April 2015. In that photograph, there are still boats stored in the eastern and central bays of the glasshouse. But the difference is that there is a clearly visible line of stored timber products extending practically the full depth of the glasshouse. This photograph pre-dates the construction of the concrete floor and ramp, and it is not immediately apparent how that material was moved into that position.
28. This photograph is chronologically the first to show any evidence of timber products being stored in the glasshouse. The use is plainly visible, and I am satisfied that this use would have been equally apparent in earlier photographs had it been occurring at those times, certainly on that scale or anything like it. In that context, I do not find it credible that the storage of timber products was somehow not visible in earlier photographs because it was of a darker colour that blended into the surface colour.
29. The evidence given by Mr Metcalfe is entirely consistent with these aerial photographs. Mr Metcalfe confirms that he was a regular visitor to the glasshouse between 2007 and 2016. He kept his boats in the glasshouse, and would typically access the glasshouse 2 or 3 times per month during that period. Although Mr Metcalfe only had access to the eastern part of the glasshouse, he describes being able to see the whole of the glasshouse from that position as well as through the glass in the south elevation. In that respect, Mr Metcalfe was well placed to observe the use of the glasshouse during that period. In my view, it is inconceivable that he would not have noticed timber products being stored in the glasshouse had that occurred.
30. It is therefore instructive that Mr Metcalfe's clear recollection is that he saw, for the first time, the storage of fencing panels by Borderland Fencing in the western bay of the glasshouse in 2015. He described this as covering some two-thirds of the bay and being stacked at waist to shoulder height. That is entirely consistent with the photographic evidence, both in terms of chronology and the specific part of the glasshouse used by Borderland Fencing shown in photographs. It is also Mr Metcalfe's evidence that the glasshouse was subsequently emptied of timber stock later in 2015. In May of the following year, Mr Metcalfe was asked to move his boats and trailer from the glasshouse by which time, according to Mr Metcalfe, the glasshouse was empty.
31. To some extent, Mr Metcalfe's evidence appears to be corroborated by Mr Adam Hay. In his evidence, Mr Hay recounts a conversation with Mr Skinner Snr in 2015 in which the latter indicated that "Borderland Fencing have ideas about using the glasshouse but I am not sure about it". This is hearsay evidence which, by its very nature, cannot be challenged. Consequently, I attach only minimal weight to this evidence.
32. The appellant counters this evidence by indicating that Borderland Fencing started to use the glasshouse in or around 2000, soon after the previous agricultural tenant vacated the site. According to Mr Mike Jarvis, the glasshouse was used both to store items linked to the production of fencing and other products, as well as for undertaking various processes, such as

painting and de-nailing. In this context, Mr Jarvis divided the glasshouse into four zones. It was claimed that Zone 1 was used constantly for storage, with Zone 2 being frequently for storage, painting and repair (every other week). Zone 3, in the centre of the glasshouse, was regularly used for painting and repair (every 2 – 3 weeks) and occasionally used for storage (every 5 – 6 weeks). Zone 4, on the eastern side of the glasshouse, was occasionally used for painting and repair (every 2-3 months).

33. In his evidence, Mr Jonathan Skinner confirms that Borderland Fencing began to store timber products in the glasshouse in or around 2000. This was an informal arrangement with his parents, with no particular rent being assigned to that space. For his part, Mr Skinner would monitor the use of the glasshouse on his return visits, typically twice a year. On those visits, Mr Skinner noted that there was continual storage, albeit the amount and range of products and position of the storage varied from year to year.
34. In a Statutory Declaration dated 18 October 2018, Mr Booth indicates that between 1987 and 2009 he started worked for Borderland Fencing as a site fencer. He recalls loading and unloading fencing materials in the glasshouse during that period. He also recalls that Beach Huts, which had been manufactured in the workshop on the Borderland Fencing site, were laid out on bearers in the glasshouse where they were primed and painted.
35. There are, in addition, Statutory Declarations and correspondence from former employees and customers of Borderland Fencing. In summary, these documents record seeing hoarding panels, gates, railings and shed panels stacked inside the glasshouse at various times between 1999 and 2013. Others recall visiting the glasshouse to discuss the colour and specification of Beach Huts being constructed by Borderland Fencing, or to take an inventory of those items. On those occasions, the samples were being stored in the glasshouse.
36. The appellant has provided copies of invoices which purport to relate to products stored in the glasshouse. The difficulty with this evidence is that it not possible to positively associate the products stated on those invoices with the glasshouse: they could equally relate to products stored in the remainder of the Borderland Fencing site. For those reasons, I attach only limited weight to this evidence.
37. Furthermore, if the invoices did relate to products stored/painted in the glasshouse, this would have translated into a significant level of activity in the glasshouse. It is reasonable to conclude that those products would appear in the photographic evidence and/or would have been noticed by Mr Metcalfe during his regular visits to the glasshouse. But this was not the case and in that respect, if anything, this evidence tends to support the Council case.
38. Having regard to the appellant's evidence, it is more likely than not that the glasshouse was used on occasions by Borderland Fencing in connection with its business between acquiring it in or around 2000 and late 2015, after which it was used continuously. However, I have great difficulty reconciling the use prior to late 2015 with the photographic evidence and the evidence of Mr Metcalfe. The most likely explanation, it seems to me, is that the glasshouse was used by Borderland Fencing on only an ad hoc or occasional basis until the construction of the concrete floor and ramp in or around 2016 facilitated a permanent use of that space.

39. This would explain the absence of any photographic evidence of use of the glasshouse by Borderland Fencing prior to 2015, and why Mr Metcalfe did not himself observe such activity until he saw storage taking place in 2015. It would also explain why the use of the glasshouse was not identified by an experienced enforcement officer when the Borderland Fencing site was subject to an enforcement investigation in 2009: either the use was not taking place at all or was only taking place intermittently, so as not be apparent to the enforcement officer at the time of the investigation.
40. The corollary is that, more likely than not, the use of the glasshouse by Borderland Fencing was not continuous throughout either of the relevant periods. On the balance of probability, it is likely that there were periods of time between 2000 and late 2015 when the use was not taking place, such that the Council was not in a position to take enforcement action.
41. Furthermore, it is more likely than not that any use of the glasshouse by Borderland Fencing, such as it was, was limited to a portion of it rather than the whole. The Council's planning witness, Mr Stephen Jupp, calculated this to be in the region of 12% of the total floorspace, a figure that was not challenged. This would be consistent with the photographic evidence.
42. Given that I found the use of the glasshouse by Borderland Fencing not to have occurred continuously over the relevant period(s), there is no need for me to consider whether there has been a change in the character or an intensification of that use.
43. Having regard to all the above and on the balance of probability, I conclude that at the date on which the notice was issued the Council was in a position to have taken enforcement action in respect of the breach of planning control constituted by those matters stated in the notice. Accordingly, the appeal on ground (d) fails.
44. I also conclude that the Council's refusal to grant a certificate of lawful use or development was well-founded and that Appeal B should not succeed.

Appeal A: the appeal on ground (a) and the deemed planning application

45. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The Council has stated two substantive reasons for issuing the enforcement notice, from which the following main issues raised are:
- whether the development is essential to the operation of the existing business, and
 - the effect of the use of glasshouse on the living conditions of the occupiers of surrounding residential properties, specifically in relation to noise disturbance and vibration.

A third main issue formed no part of the reasons for issuing the enforcement notice and arose out of third party representations. This is:

- the effect of the use of glasshouse on the safety and convenience of other highway users.

Is the development essential to the operation of the existing business

46. Policy DSP9 of the Fareham Local Plan: Development Sites and Policies (Local Plan) provides that proposals for the expansion or intensification of existing employment sites outside of defined urban settlement boundaries will only be permitted where, amongst other things, the development is essential to the *operation of the existing business* (emphasis added). There is no dispute that the appeal site is outside of any defined urban settlement and that Policy DSP9 applies in this case.
47. The Oxford English Dictionary defines “essential” as being something “absolutely necessary”. Mr Jarvis accepted that the glasshouse could be cleared of stock and space found elsewhere on site. Indeed, Mr Jarvis went further and indicated that his business would continue to expand regardless. As a matter of ordinary language, in the light of the appellant’s own evidence the use of the glasshouse cannot be considered as being “absolutely necessary” to the operation of existing business. Consequently, the use of the glasshouse cannot be regarded as being essential, either for the operation of existing business or for the expansion of that business.
48. The appellant puts forward an alternative interpretation of the term “essential” by seeking to align it with paragraph 4.14 of the supporting text to Policy DSP9, which seeks to promote a healthy and diverse rural economy. On my reading, Policy DSP9 is itself seeking to achieve a balance between promoting a healthy rural economy and protecting the countryside. Read in that way, the term “essential” in Policy DSP9 bears its natural meaning.
49. I conclude that the breach of planning control conflicts with Policy DSP9 of the Local Plan in this respect.

Living conditions

50. In terms of noise disturbance, there are two potential sources: vehicle movements along New Road, and forklift trucks operating within the Borderland Fencing site. The noise consultant commissioned by the Council, Mr Rhys Scrivener, set out his findings in relation to both. These findings were arrived at on the basis of modelling noise impacts rather than actual noise measurements. The soundness of this methodology was not seriously challenged. I see no reason no reason to take a different view.
51. The simplified assessment undertaken by Mr Scrivener assumed the worst-case scenario for daily movements by the 3.5 tonne vehicles owned by Borderland Fencing and the estimated number of HGV deliveries to and from the site. Using these figures, and assuming that the existing yard operated at 100% capacity, Mr Scrivener estimates there would be a total of 62 movements by 3.5 tonnes vehicles and 3 HGV vehicles in the scenario whereby the appeal is dismissed (the 2020– scenario). This would increase to of 108 movements by 3.5 tonnes vehicles and 5 HGV vehicles in the scenario whereby the appeal is allowed (the 2020+ scenario).
52. For present purposes, I will focus on the 2020+ scenario because that scenario equates to the maximum potential number of movements possible with the glasshouse being used by Borderland Fencing in conjunction with the existing the existing yard operating at full capacity. In other words, the worst-case scenario resulting the breach of planning control that has occurred.

53. Mr Scrivener has modelled two scenarios based on the 2020+ figures: (i) assuming minimum evenly distributed operations throughout a nine-hour day, and (iii) assuming typically distributed operations with a peak in activity during the morning. The latter is the worst-case scenario and, in any event, appears to me to be the more representative of the pattern of operations at Borderland Fencing. I will therefore focus on that scenario.
54. Using the figures set out in the 2020+ scenario and assuming typically distributed operations, Mr Scrivener models that there would be a 14dB increase in noise levels at the noise sensitive properties facing onto New Road. There would be a 11dB increase in noise levels in the rear gardens of those properties. An increase of 10dB or more, which equates to more than a doubling of loudness, is described as being a 'major impact' in a document jointly published by the World Health Organisation in 2009⁵.
55. This leads Mr Scrivener to conclude the noise impact arising from additional vehicular movements generated by the use of glasshouse by Borderland Fencing would be contrary to Policies DSP2 and DSP9 of the Local Plan. These policies require, respectively, that development proposals should not have a significant adverse impact on neighbouring development or unacceptably impact the amenity of residents. That conclusion is consistent with the experiences of the occupiers of the residential properties in New Road, some of whom complain of an increase in noise disturbance since the glasshouse has been used by Borderland Fencing, sometimes at unsocial hours.
56. In relation to forklift trucks operating within the Borderland Fencing site, Mr Scrivener calculates that there would be increases in noise levels of 14dB and 10dB respectively at the two residential properties to the south of the appeal site in the 2020+ scenario. This brings the impact in that regard into the 'major impact' category and is again consistent with the experiences of local residents, with noise generated by forklift trucks being a recurring theme in the representations from the occupiers of properties in New Road (albeit not all those properties would experience the increase in noise levels identified by Mr Scrivener).
57. I acknowledge that there is no history of noise complaints to the Council outside of the planning process, and that the Council's own Environmental Health Officers do not perceive there to be a noise problem associated with the use of the glasshouse. However, I have the benefit of technical noise evidence produced by Mr Scrivener that was not available to the Council previously. I have based my conclusions on that technical evidence.
58. The enforcement notice specifically alleges harmful impacts from vibration caused by the number of lorry and HGV vehicles using New Road. In that respect, Mr Scrivener undertook some initial measurements and concluded that with the current water-logged ground conditions it is unlikely that vibration resulting from vehicle movements would be harmful.
59. I recognise that it is not possible to attribute all the noise generating vehicular movements and forklift truck operations to the material stored in the glasshouse. Some of the material transported to and from the site originate from other part of the site. Nevertheless, the use of the glasshouse is now an integral part of the Borderland Fencing operation and a significant proportion of

⁵ *Night Noise Guidelines for Europe*, jointly published by the European Union and the World Health Organisation.

the timber products are stored there. It is therefore reasonable to include all of the vehicular movements generated by Borderland Fencing in considering this issue. On that basis, I conclude that the breach of planning control that has occurred has had a significant adverse impact on and unacceptably harms the living conditions of the occupiers of surrounding residential properties, specifically in relation to noise disturbance. I therefore conclude that the development is contrary to Policies DSP2 and DSP9 of the Local Plan.

Safety and convenience of other highway users

60. Although I have taken account of all third-party representations received, the essence of the concerns raised by local residents are set out in the Witness Statement of Mrs Jane Metcalfe. Mrs Metcalfe also gave evidence under oath at the Inquiry, and was cross-examined on her evidence. In addition, Mr Mike Jones gave evidence at the Inquiry on behalf of 14 other local residents on this and other matters. I have given this evidence the appropriate weight.
61. The concerns of the local residents are predicated on the assumption that the use of the glasshouse by Borderland Fencing has resulted in an increase in the number of vehicle movements on New Road, particularly activity by HGVs. In that context, I have adopted the same approach as above: that the use of the glasshouse is now an integral part of the Borderland Fencing operation and that it is reasonable to have regard to all of the vehicular movements generated by Borderland Fencing.
62. The concerns of local residents may be summarised as follows:
 - the width of New Road
 - visibility in New Road, and
 - visibility at the junction of New Road with Swanwick Lane.

It is convenient to consider these matters in turn. In doing so, I have had regard to the Highway Statement produced by Paul Basham Associates (PBA) on behalf the appellants, and to the evidence of Mr Mark Smith of PBA, who spoke to that statement at the Inquiry.

63. The width of New Road is 4.8m for the majority of its length, but with a section of 3.6m in width outside the residential property known as Oakenshaw and a section of 4.6m outside a property known as New House. The minimum width for a car and a large vehicle to pass is identified in Manual for Streets as being 4.8m such that, for much of its length and aside from those to pinch points, there is sufficient space for those types of vehicle to pass each other. The minimum width identified in Manual for Streets for two large vehicles to pass each other is 5.5m. Nowhere on New Road does the width of the carriageway accord with that minimum.
64. It is evident from the guidance in manual for Streets that there is not sufficient space for two HGVs to pass each other on New Road. The Highway Statement produced by PBA does not directly address this matter, suggesting that only one vehicle is able to be present on site at any one time for turning and operational reasons. It is also suggested by PBA that deliveries to the site are managed to ensure that this is the case, such that the chances of two HGVs meeting on New Road is highly unlikely.

65. The well-documented evidence of local residents, including photographic evidence, clearly indicates that the Highway Statement produced by PBA is incorrect in that assumption. That photographic evidence conclusively shows that HGVs associated with Borderland Fencing are on occasions obliged to pass each other on New Road, where there is insufficient space to do so. This results in the road being blocked, and those vehicles straying off the carriageway and onto the verges. This is clearly an inconvenience to other road users, and I return to that below. However, because the vehicles concerned are obliged to pass each other at very low speed, there is ample opportunity to avoid conflict and there is no evidence before me that this presents a hazard to highway or pedestrian safety.
66. In that respect, I am aware that there is a Public Right of Way (a footpath) along New Road, and this provides access to the popular Swanwick Lakes Nature Reserve. I am also mindful that that children from Fair Ways School walk along New Road and on occasions play in the road. Whilst I am mindful that there is a potential risk to those pedestrians from conflict with vehicles accessing the Borderland Fencing site, and that it might not be a pleasant walking environment when HGVs are passing, there is no evidence of any actual conflict or hazard to pedestrians using the public footpath or to the children from Fair Ways School.
67. I noted on my site visit that New Road is not entirely straight, with a slight kink in the alignment between the Borderland Fencing site and Swanwick Lane. There is also a slight undulation in the road just to the south of the Borderland Fencing site. Both of those features reduce visibility of approaching vehicles to some extent but do not, in my judgement, prevent it entirely. More importantly, there is again there is no evidence before me that these characteristics of the road have given rise to any hazard to highway or pedestrian safety.
68. In relation to visibility at the junction of New Road with Swanwick Lane, the PBA Highways Statements includes a visibility splay that shows that visibility is achievable in excess of the required distance in the primary direction (to the west of the access) of 2.4m by 84m. Visibility in the secondary direction is restricted by intervening land, but visibility is achieved to 43m to the centreline with an 'x'-distance of 1.8m. It was also pointed out that the visibility from a HGV, in which the driver is sat relatively high up and close to the front of the vehicle, is generally better than that from a private car.
69. In her evidence, Mrs Metcalfe criticises the visibility splay shown in the Highway Statement produced by PBA, pointing out that the guidance in Manual for Streets indicates that the 'x' distance should be taken from the give-way line. The Manual for Streets indicates that the 'x' distance should normally be 2.4m in most built-up situations. The visibility distance in the PBA Highway Statement is measured from the centre line of the carriageway, rather than being set back from the give way line.
70. As Mr Smith pointed out, the Manual for Streets is guidance intended primarily for the design of new development. It was therefore not intended to be applied in this type of situation, which relates to vehicular movements from an existing business using an existing vehicular onto an existing main road. In this type of situation, accident statistics are in my view a more reliable source from which to assess whether the use of an existing vehicular access is safe or not.

71. The Personal Injury Data provided by Hampshire Constabulary indicates that there have been two slight accidents at this junction in the previous 5 years. Both accidents resulted from driver error, rather than any deficiency in the visibility achievable at this junction. Neither accident involved a vehicle associated with Borderland Fencing. On the basis of that data and the absence of any recoded incidents on New Road itself, I am not persuaded that movements by vehicles associated with Borderland Fencing has given rise to any issues with highway safety.
72. But the same cannot be said in relation to the convenience of other highway users. The occupiers of properties in New Road have recounted numerous examples when their use of the highway has been seriously inconvenienced by vehicles associated with Borderland Fencing, particularly HGVs. For example, there are accounts of a HGV becoming wedged under a tree, such that the road was completely blocked. In another example, five HGVs arrived within 50 minutes, resulting in head-on conflict and blocking the road. There are instances of HGVs damaging the grass verges and fences, requiring the occupiers of the respective properties to repair or replace them.
73. The occupiers recount several occasions on which vehicles queuing to get into Borderland Fencing have blocked the drives of residential properties in New Road, preventing or delaying the occupiers from leaving their properties, or making access to/egress from their properties more difficult. By way of example, one photograph taken at 07:55 on 22 March 2021 shows seven 3.5 tonne trucks queuing to get into the Borderland Fencing site and impeding access to/egress from the residential property opposite. Other residents recount being delayed by having to wait for large vehicles attempting to negotiate the turn into New Road from Swanwick Lane.
74. Individually and cumulatively, these instances amount to a serious inconvenience to the occupiers of properties in New Road and other users of the highway, including Swanwick Lane. To that extent, the breach of planning control is contrary to Policy CS5 of the Fareham Local Development Framework: Core Strategy which, amongst other things, indicates that development will be permitted where it does not affect the operation of the local road network.

Other considerations

75. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that the breach of planning control that has occurred fails to accord with the development plan. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.
76. It is a central tenet of the appellant's case that the business operated by Borderland Fencing would not change if the appeal were to be dismissed and the use of the glasshouse denied to them. In his evidence, Mr Jarvis explained that the number of vehicle movements is dictated by two factors: the level of contracts being serviced, the frequency of which deliveries are made to Borderland Fencing. These are direct relationships. The more contracts being

serviced, the more vehicles going to more sites. The smaller the area available for storage, the more frequent the deliveries of stock need to be.

77. I can understand that logic: to a point. Logically, the point must eventually be reached whereby the space available to store stock runs out and no more contracts can be serviced. But I accept the evidence of Mr Jarvis that that point has not yet been reached. It was the clear evidence of Mr Jarvis that the glasshouse could be cleared of stock and space found elsewhere on site to store material sufficient to service existing contracts. As indicated above, Mr Jarvis went further and indicated that his business would continue to expand just using the space in the existing yard.
78. But as Mr Jarvis explained, both scenarios come with consequences. The height to which the material is stacked in the existing yard would need to be increase and/or more of the existing yard would be taken up by that storage. This would mean that vehicles would have less space in which to manoeuvre in the yard. Large vehicles would not be able to turn within the site and would be forced to reverse out onto New Road. A smaller area available for storage would mean that stock would need to be replenished more often and that more frequent deliveries would therefore be necessary.
79. To my mind, the overall outcome of denying Borderland Fencing use of the glasshouse would be a worsening of the environment for local residents. More frequent deliveries would mean more vehicular movements. That would in turn require an increased and more frequent use of forklift trucks. Both would result would in an attendant increase in noise disturbance. It follows that denying Borderland Fencing use of the glasshouse would not bring a reduction in the number of vehicles using New Road. Rather, it would increase it. The corollary is that all of the issues that local residents have identified in terms of the existing use of New Road would be exacerbated if the enforcement notice was upheld and the glasshouse was not available to Borderland Fencing.
80. On the other hand, granting planning permission for use of the glasshouse offers the opportunity of controlling certain aspects of the use of the wider Borderland Fencing operation. The site from which Borderland Fencing operates was found to be lawful through a LDC granted in May 2018 (Council Ref: P/18/0197/LU). As such, the use found to be lawful is unfettered by conditions or restrictions. The appellant accepts that it is open to me to impose suitably worded conditions on land that is not subject to the enforcement notice but which is within his ownership or control⁶. Granting planning permission would enable me to impose conditions to restrict hours of operation, the use of power tools and safeguarding space within the existing yard for the turning of HGVs. In my view, that would be a significant benefit to local residents.

Conditions

81. A condition restricting the hours of operations of the Borderland Fencing site is necessary to safeguard the living conditions of the occupiers of surrounding residential properties. In order to make the development acceptable in planning terms, that condition needs to be applied across the whole of the Borderland Fencing site, rather than just the glasshouse area.

⁶ Referred to a 'blue land'.

82. A condition restricting the use of power tools and machinery in the glasshouse area would be necessary for the same reasons. The condition suggested by the Council originally included forklift trucks, but forklift trucks are an integral part of the Borderland Fencing operation. It would therefore be unreasonable to preclude the use of forklift trucks in the glasshouse. The appellant also relies on the use of power tools for certain operations required as part of his core business and it would be unreasonable to preclude the use of power tools completely. The appellant has subsequently provided a plan which depicts a defined enclosed space within the glasshouse in which power tools would exclusively be used. The Council is content with that plan. I shall therefore impose a condition limiting the use of power tools to that defined area.
83. A condition limiting the storage of timber to a height of 1.8 metres across the whole of the Borderland Fencing site would be necessary and reasonable. Similarly, a condition requiring that access to the glasshouse from the north would be necessary in the interests of safeguarding the living conditions of the occupiers of surrounding residential properties. For the same reason, a condition requiring openings on the south side to be permanently closed, other than in the event of an emergency, is necessary.
84. A condition limiting the use of glasshouse is both necessary and reasonable. The use to which the deemed planning application relates is defined by the breach of planning control as I intend to correct it. I shall therefore impose a condition limiting the use of the glasshouse to that approved on the application deemed to have been made. Because that use differs in some respects from the use found to be lawful in the LDC granted in May 2018 (Council Ref: P/18/0197/LU), it would be unreasonable for that condition to apply across the whole site.
85. The appellant has submitted a plan depicting a turning area for HGVs that is to be kept clear of storage. The Council is content with that plan. A condition requiring that area to be reserved for the turning of vehicles and kept clear of storage is necessary to safeguard the living conditions of the occupiers of surrounding residential properties.

Conclusions on the appeal on ground (a) and the deemed planning application

86. I am sure that Councillor Woodward echoed the views of many local residents when he implied that Borderland Fencing has simply outgrown its current site. However, my conclusions must be based on an objective analysis of all the evidence that is before me. Looked at objectively, I conclude that the use of the glasshouse by Borderland Fencing as part of its wider business operations is contrary to the development plan and has resulted in some unacceptable impacts on the living conditions of the occupiers of residential properties in New Road. In particular, New Road is patently unsuitable to accommodate the volume and type of vehicular movements generated by the Borderland Fencing operation.
87. But equally, looked at objectively, it is apparent to me that those harmful impacts would arise at least to the same extent, and potentially more so, if the storage space provided by the glasshouse was denied to Borderland Fencing. Furthermore, there are significant benefits to be gained by imposing planning conditions on some aspects of the Borderland Fencing operation that are presently unrestricted. Granting planning permission subject to conditions would achieve an appropriate balance between allowing an established rural

business to function and grow, and protecting the living conditions of the occupiers of neighbouring residential properties as far as possible given the background of the lawfulness of the existing Borderland Fencing operation.

88. In my judgment, those are material considerations of sufficient weight to indicate that in this case determination should be made otherwise than in accordance with the development plan. Accordingly, I conclude that planning permission ought to be granted.

Conclusion

89. For the reasons given above, I conclude that Appeal A should succeed on ground (a). I shall grant planning permission for the breach of planning control described in the notice, as I intend to correct it. It follows that the appeals on grounds (f) and (g) do not fall to be considered.
90. I conclude that Appeal B should be dismissed. Accordingly, I will exercise the powers transferred to me in section 195(2) of the 1990 Act as amended.

Formal Decisions

Appeal A Ref: APP/A1720/C/18/3214579

91. It is directed that the enforcement notice is corrected by:

- deleting the breach of planning control in paragraph 3 of the notice in its entirety, and substituting there the following:

Without planning permission, the material change of use of the building from agricultural to a mixed use for the repair and processing of timber and other fencing products, including the -de-nailing and welding of panels returned to the site, and the painting of products prior to delivery/collection; for the storage and distribution of raw materials and of finished products, and as a storage area for materials and products used and supplied by the contracting business (for erection off site).

92. Subject to that correction, the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the material change of use of the building from agricultural to a mixed use for the repair and processing of timber and other fencing products, including the -de-nailing and welding of panels returned to the site, and the painting of products prior to delivery/collection; for the storage and distribution of raw materials and of finished products, and as a storage area for materials and products used and supplied by the contracting business (for erection off site) at Land east of New Road, Swanwick, SO31 7HE as shown on the plan attached to the notice and subject to the following conditions:

1. The use of the land to which this permission relates (shown edged in red on the plan attached to the notice) shall be limited to the repair and processing of timber and other fencing products, including the -de-nailing and welding of panels returned to the site, and the painting of products prior to delivery/collection; for the storage and distribution of raw materials and of finished products, and as a storage area for materials and products used

and supplied by the contracting business (for erection off site), and for no other purposes.

2. On the land to which this permission relates (shown edged in red on the plan attached to the notice), the use of power tools, machinery and equipment shall be restricted to within the area shown hatched in black on Drawing ref 18-1249-PL01 rev B (attached to this Decision). Other than forklift trucks, no powered tools, machinery or equipment shall be used outside of the area shown hatched on the above drawing at any time.
3. Across the whole of the Borderland Fencing site at land east of New Road, Swanwick, SO31 7HE, no work or operations shall take place outside the hours of 08:00 to 17:00 Monday to Friday and 08:00 to 13:00 on Saturdays. No work or operations shall take place on Saturday afternoons after 13:00, or at any times on Sundays or recognised Public Holidays.
4. Across the whole of the Borderland Fencing site at land east of New Road, Swanwick, SO31 7HE, no materials shall be stored or stacked to a height exceeding 1.8 metres.
5. Access to the land to which this permission relates (shown edged in red on the plan attached to the notice) shall be solely from the north. No further openings shall be created in the south elevation of the former glasshouse and, other than in the event of an emergency, the existing opening in the south elevation shall be permanently closed.
6. The area of the Borderland Fencing site shown hatched on PBA Drawing No. 097.0004.003 Rev A (attached to this Decision) shall be kept clear at all times to provide a turning area for vehicles. No material or equipment shall be stored in that area at any time.

Appeal B Ref: APP/A1720/X/19/3233135

93. The appeal is dismissed.

Paul Freer

INSPECTOR

APPEARANCES

For the Appellant

Mr Scott Stemp	Of Counsel
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He called:

Mr Mike Jarvis	Appellant
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Mr Jonathan Skinner	
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Mr Christopher Ward BA (Hons) LLM MRTPI	BJC Planning
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Mr Mark Smith CIHT	PBA
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For the Local Planning Authority

Mr David Lintott	Of Counsel
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He called:

Mr George Metcalfe	
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Mr Stephen Jupp BA (Hons) LLM MRTPI	Planning consultant
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Mr Rhys Scrivener MSc MIDA	KR Associates
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Interested Persons

Councillor Woodward	Parish Councillor
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Mr Adam Hay	Local resident
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Mr Mike Jones	Local Resident
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Mrs Jane Metcalfe	Local Resident
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DOCUMENTS SUBMITTED AT THE INQUIRY

- 1/ Additional information submitted by Mr Scrivener
- 2/ Opening statement on behalf of the Appellant.
- 3/ Witness Statement of Mr Adam Hay
- 4/ Witness Statement of Mrs Jane Metcalfe
- 5/ Witness Statement of Mr Mike Jones
- 6/ Closing submissions on behalf of the Local Planning Authority
- 7/ Closing submissions on behalf of the Appellant



Plan

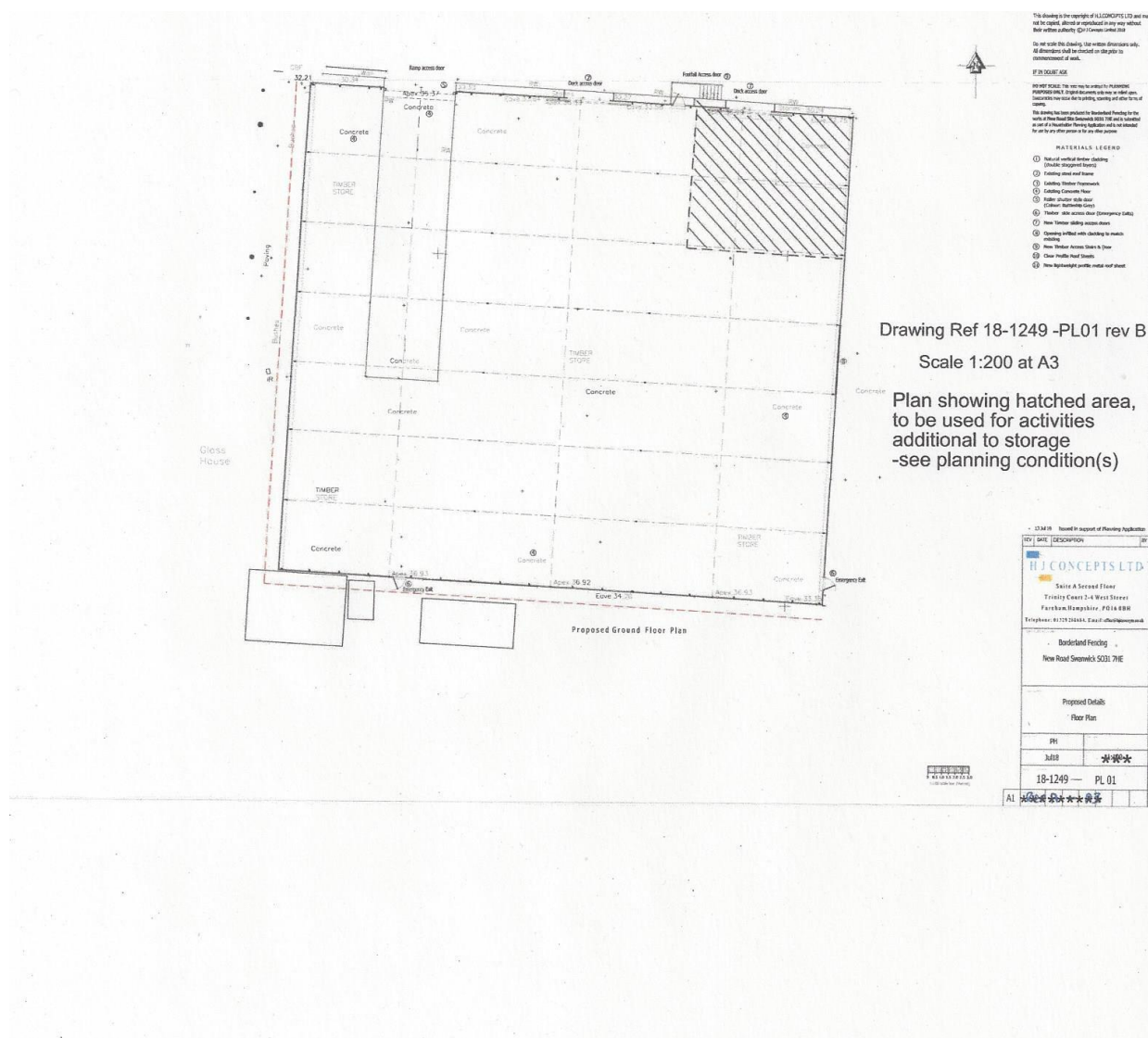
This is the plan referred to in my decision dated: 08 October 2021

By Paul Freer BA (Hons) LLM PhD MRTPI

Land at: Land east of New Road, Swanwick, SO31 7HE

Reference: APP/A1720/C/18/3214579

Scale: Not to scale





Plan

This is the plan referred to in my decision dated: 08 October 2021

By Paul Freer BA (Hons) LLM PhD MRTPI

Land at: Land east of New Road, Swanwick, SO31 7HE

Reference: APP/A1720/C/18/3214579

Scale: Not to scale

