



Appeal Decision

Site visit made on 22 November 2021

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 07 December 2021

Appeal Ref: APP/X2600/C/21/3279099

Land at Garage Lane, Setchey, Norfolk

- 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 Benjamin Lemmon (Skippy Industries Ltd) against an enforcement notice issued by Norfolk County Council.
- The enforcement notice was issued on 9 June 2021.
- The breach of planning control as alleged in the notice is:
 1. Without planning permission, the use of the Land for the import, export, deposit, storage, handling, processing and transfer of waste.
 2. Without planning permission, the use of the Land for operations ancillary to the waste facility the subject of planning permissions ref C/2/2013/2017 and C/2/2019/2009.
- The requirements of the notice are:
 - (i) Cease the importation of waste material onto the Land;
 - (ii) Cease the use of the Land for the depositing, storage, handling, processing and transfer of waste material;
 - (iii) Remove all waste material from the Land;
 - (iv) Cease the use of the land [sic] for operations ancillary to the operation of the waste facility, the subject of planning permission ref C/2/2013/2017 and C/2/2019/2009.
- The period for compliance with the requirements is 30 days for requirements (i) and (iv) and 56 days for requirements (ii) and (iii).
- The appeal is proceeding on the grounds set out in section 174(2)(f)&(g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld as corrected.

Application for Costs

1. An application for costs has been made by the Council against Mr Benjamin Lemmon (Skippy Industries Ltd). This application is the subject of a separate decision.

Procedural Matters

2. The appellant did not make an appeal on ground (b) originally but has raised issues pertinent to this ground in the statement of case. The appellant has since confirmed that those submissions should be treated as though made on ground (b). The Council suggested that only grounds (f) and (g) can be considered, as set out in the Appeal Form. However, I have a duty to consider hidden grounds of appeal in the interests of natural justice. As the Council has had opportunity

to comment on the ground (b) arguments, it will not be prejudiced by my consideration of this ground.

Matters relating to the enforcement notice

3. Both allegations refer to a change of use. However, only a 'material' change of use constitutes development requiring planning permission. Insertion of the word 'material' is uncontroversial. I am satisfied that such correction can be made without injustice to either party.
4. It is a well-established by case law that a notice must tell a recipient of it fairly what he has done wrong and what he must do to remedy it. An existing skip hire/waste transfer business is operated by the appellant with the benefit of planning permission on the adjacent land. The first allegation attacks the unauthorised use of land outside the permission boundaries for waste related purposes. This would be evident to a recipient of the notice familiar with the site from the description and with reference to the accompanying plan. The allegation is not framed in terms of an unauthorised extension of the existing (lawful) waste handling facility. Rather, it encompasses the whole area outlined on the enforcement notice plan. It is capable of capturing activities besides those of the appellant taking place at the time of issue.
5. The second allegation *is* directed at 'operations ancillary to' the adjacent authorised waste facility. The operations are not described. The word 'ancillary' has connotations in planning law often indicative of a lawful activity within the same planning unit. That is not the scenario here. There also appears to be some duplication with the first allegation.
6. Having queried the wording ahead of my site visit, the Council explained that the land is also being used by the appellant to maintain vehicles, the standing of skips, as a means of unauthorised access to the waste facility, the tipping of waste and storage of broken-down machinery. The purpose of this element of the notice is to require the appellant to keep all of these activities associated with the skip hire/waste transfer business within the site boundaries which benefit from planning permission. The Council wished to avoid being too prescriptive if it attempted to list all activities to the exclusion of others.
7. The appellant readily admits that part of the land is used for the storage of plant/machinery, inert soils separated from the adjacent waste facility, empty skips/containers together with stockpiled wood and skips containing recycled material. Apart from waste material being stored pending importation, I noted other forms of storage taking place within the appeal site during my visit. These included numerous skips (some stacked high), redundant plant, machinery, and discarded vehicles. Skip lorries were also parked within the appeal site.
8. Based upon how the second allegation is framed with reference to the two planning permissions and the concessions of the appellant, it is plain that the appeal site is being put to other uses besides those listed in the first allegation.
9. The appellant did not challenge the wording of the second allegation but I have a duty to ensure that the enforcement notice is in order. Whilst the appellant has evidently understood the nature of the Council's concern, I consider that the term 'operations ancillary to the waste facility' is vague and capable of misinterpretation.
10. Greater clarity would be achieved by reference instead to an 'unauthorised

access' (being a term used by both parties) to the adjacent waste facility along with the use of the land for associated purposes, including those specifically identified. In that way, the notice will be no wider than before and without the need to list each and every unauthorised item or activity taking place. A corresponding correction would be needed to the fourth requirement.

11. I am satisfied that no injustice would be caused to either party by making those changes. I shall exercise my powers under section 176(1) of the Act to correct the notice accordingly.
12. Ordinarily, the allegation and requirements should match. For consistency, the first allegation should refer to 'waste material' to match the requirements. This does not alter the substance of the allegation and is a clear omission given the repeated inclusion of the word 'material' in the requirements. No injustice arises from the correction. The first allegation includes the use of the land for the import and export of waste. Whilst there is a standalone requirement to cease the importation of waste material, there is no mention of exportation. The Council says this is a deliberate omission so as not to prevent its aim of clearing the site of waste material. Compliance with the notice would not in my view be fettered by requiring the unauthorised activity of importing and exporting waste. Nevertheless, the other requirements prevent the importation and storage of waste material which would suffice to address the breach.

The arguments raised under ground (f)

13. The appellant is aggrieved that he has been served with a notice which includes land outside his or his company's control and for which he was not responsible.
14. Ground (f) is 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.
15. The appellant argues that it is excessive to require cessation of the use of the land for operations ancillary to the waste facility, the subject of the two planning permissions, as not all areas included within the notice are controlled or operated by the appellant. Whilst this requirement will be corrected in line with the corrected second allegation, the fact remains that the requirement will only bite insofar as it relates to unauthorised uses associated with the lawful waste facility. If the Council has made incorrect assumptions and there are other unauthorised uses falling outside the scope of the notice, then the notice cannot be relied upon for those matters and would need to be addressed separately.
16. In any event, ground (f) is concerned with the requirements of the notice and whether they are excessive. It does not encompass arguments over who was responsible for the breach of planning control or who should remedy it. Therefore, whether it is the owner rather than the appellant who has control over certain parts of the appeal site is outside the scope of ground (f). Similarly, arguments over the extent of the appeal site fall outside ground (f) and these shall be addressed as part of the hidden ground (b).
17. In terms of ground (f), the purpose of the notice must be to remedy the breach of planning control because it requires cessation of all the unauthorised uses and complete removal of the waste material.

18. Given that the notice does no more than seek to achieve the purpose of remedying the identified breach, it is not excessive. The appeal on ground (f) is bound to fail.
19. Whilst raised under ground (f), there are other arguments concerning the issue of the notice. The appellant is the tenant of part of the site. He has outlined eight areas within the appeal site. Only two of these areas are within the appellant's control, namely a section marked up and described as the unauthorised access to the adjacent waste facility and some land lying either side of it.
20. As the notice has been served on everyone with an interest in land across the wider site, the appellant points out that there are certain activities which 'cannot be ameliorated solely by the appellant.' The appellant therefore considers it unreasonable to require compliance with the requirements where he has no jurisdiction over the land or materials thereon. It is contended that the Council should have separated the allegation into two separate enforcement notices.
21. Under section 172(2) of the 1990 Act a copy of the enforcement notice must 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.
22. From the way that the site is laid out and operated, including a single entry point, it cannot readily be gleaned who occupies or controls which areas. There is evidence of waste related activity across much of the appeal site. Indeed, the unauthorised access partly extends over an existing track within the appeal site. The appellant may not rent or control the track but he is using it in connection with his waste/skip hire business.
23. The land enforced against does not need to reflect the planning unit. An enforcement notice can be directed at the whole or any part of the land to which it appears to the Council that the breach of planning control relates. The Council may have opted to issue separate notices for different occupiers but it did not have to do so. In the circumstances, it is somewhat difficult to see how sensibly the notice could have been split and been suitably effective given the way that the unauthorised use is spread across the site.
24. It is not excessive within the meaning of ground (f) to direct an enforcement notice at a site which is in multiple occupation and where not all areas are within an occupant's control.
25. Should the notice come into effect and compliance not secured with its terms, then it will be a matter for the Council at that stage whether and against whom any proceedings are brought. Section 179(4) limits criminal liability for carrying on or causing or permitting the continuance of an activity which the notice requires to cease to those who have control of or an interest in the land. Whilst I understand the appellant's concern over being held responsible for uses outside of his or his company's control, I see nothing in the issue of a single notice or how it is framed that affects the validity of the notice.

Ground (b)

26. This ground of appeal is that the alleged breach of planning control has not occurred as a matter of fact. The onus of proof rests upon the appellant and the test of evidence is the balance of probabilities.

27. The appellant has chosen to identify eight areas within the appeal site although most are indistinguishable as distinct areas on the ground.
28. The parties disagree on the full extent of the unauthorised access. The fact remains that the appeal site has been used as unauthorised access to the waste facility. That is not in dispute. Moreover, in order to reach the undisputed access strip would necessitate vehicles utilising what the appellant describes as an 'historical farm access track'. I also observed wagons accessing the waste facility via the yard described by the appellant as a 'shared car parking area' to manoeuvre by sweeping around before entering the waste facility.
29. The appellant claims this car parking area ('Area 2') is used for 'shared/ ancillary parking' only. However, this is not borne out by the Council's photographic evidence showing skips and tyres. Nor does it correspond with my own observations, as above, and of a waste wagon and skip positioned within the area along with baled plastic waste left down the side of the building.
30. The appellant further contends that an area ('Area 5') has not been used for the deposit, storage handling, processing, or transfer of waste. Rather, the area contains spoil from the ditch which was created along the northern boundary of the appeal site to drain the agricultural field to the north. Whether this is discarded material captured by the notice is unclear on the information before me. Even if it is not 'waste', this would not be reason to exclude the area from the enforcement notice. The appellant says he has no control over this area (among others) although he accepts that it lies in between land where he is undertaking unauthorised uses ('Area 7'), as alleged.
31. After the site visit, it was suggested in final written submissions that this 'Area 5' remains agricultural. There is no physical demarcation separating it from the remainder. It appears as though part of the wider site with waste deposits on three sides. It is also legitimate for the Council to anticipate changes to defeat the operation of the notice by enforcing against the whole area.
32. The appellant insists that he only has ability to effect changes to the land within his control being his 'Area 7' and the section of access which he defines as 'Area 8'. Clearly, he could control how vehicles access his waste facility which includes other areas. Nevertheless, ground (b) is not a question of whether the appellant has acted in breach of planning control across the whole site but whether the alleged breach has occurred as a matter of fact.
33. The appellant refers to other areas not rented to him and to fly-tipping. No appeal has been brought by the owner or occupier of those areas. Not all of the alleged uses need to have taken place across the entirety of the appeal site to be included in the notice. The complexity of the situation on site over who is responsible for the waste and related activities which are spread across various areas, only reinforces that the appeal site should be considered as a whole without excluding any part.
34. By way of clarification, the Council confirms that it was not intended to include the ditch within the scope of the enforcement notice which runs parallel with the northern boundary. It contends that the plan is accurate in that respect. The boundary line for the appeal site is taken along the southern bank of the ditch. The appellant has superimposed the appeal site onto an aerial image showing the ditch within the red line. The thickness of the red line on the enforcement

plan would account for that discrepancy. In light of the Council's confirmation, there is no need to make an adjustment to the plan.

35. The appellant is adamant that the land he rents has not been used for the processing of waste as alleged in the notice at any time. The relevant date for the purposes of the ground (b) appeal is the time when the notice was issued.
36. During my site visit the Council was unable to point out where the processing of waste had taken place within the appeal site. An industrial soil screener was positioned within the authorised site. Although the bulky machine is moveable, there is no evidence that it has been located within the area enforced against in order to process waste.
37. The Council indicated that the term 'processing' covers the handling and moving of waste back and forth. However, the 'handling' and 'transfer' of waste are listed separately within the allegation. Whilst the Council may wish the notice to be all encompassing, it cannot be speculative and target a use that might, but has not yet, occurred in breach of planning control.
38. On the evidence before me, I find that on the balance of probabilities an unauthorised use for the 'processing' of waste has not, as a matter of fact, occurred within the appeal site. Accordingly, the notice shall be corrected to delete such reference.
39. To this limited extent the appeal succeeds on ground (b).

Ground (g)

40. The ground of appeal is that the time given to comply with the requirements of the notice falls short of what should reasonably be allowed.
41. The appellant considers that 56 days is too short to remove all waste material from the land as per the third requirement. In his Appeal Form, the appellant originally accepted all the other timescales for compliance.
42. A period of 3 months was initially sought to allow sufficient time to source suitable and sustainable outlets for the waste material. This was subsequently revised to seek a period up until 30 March 2022 to comply with both the third and fourth requirements. This date is anticipated to tie in with the conclusion of the appellant's appeal against a permit revocation notice issued by the Environment Agency.
43. Following submission of the appeal, the Council wrote to the appellant on 26 July 2021 with an offer to extend the third compliance period to 120 days with reference to the effective date of the notice being 19 July 2021. As it is, the effect of the appeal was to stop the clock. The notice only takes effect on the date of this appeal decision which is when the compliance period starts. Nonetheless, I gather that the appellant did not respond to the Council's offer and so the compliance period was not extended under the Council's powers within section 173A(1) of the Act. It is only in his final comments that the appellant has agreed to 120 days.
44. In its statement of case, the Council says that it 'has no particular objection to the increase in time for compliance to 3 months' but points out that the waste only needs to be moved 25 metres to the south of its current position to go back within the permitted area. As such, the Council submits that there would be no

problem achieving compliance with the original timescale if the appellant was minded to comply. This stance is reinforced in the Council's final comments.

45. Given the line of argument pursued under the grounds of appeal, there was no question of the unauthorised waste material being allowed to remain. The appellant will have known that the waste material must be removed from the land once the notice takes effect. Therefore, the appellant has had several months warning already to make the necessary enquiries and arrangements.
46. The appellant had instructed his agent to prepare a planning application to regularise activities on site for the area to the north of the waste facility and the access. Plans were produced but prior to completion of the application, the appellant suffered personal circumstances and the impacts of the global coronavirus pandemic. The latter contributed to delays and difficulties on site, including staffing levels and a severe lack of destination sites able to accept waste from his site. Whilst I am sympathetic to those circumstances, they do not fully account for what is clearly a long-standing enforcement situation.
47. There is no pending planning application or any certainty that permission would be forthcoming. Moreover, the Environment Agency proceedings are separate. Even if that appeal succeeds, it has no bearing on the enforcement notice.
48. If the permit revocation appeal fails and the appellant must clear the whole area of waste, including the appeal site, he says that this will be done within 1 month of the date of dismissal. That being so, it is inexplicable why the unauthorised use cannot reasonably cease and the waste material cleared from a lesser area (i.e., the appeal site only) within 30 and 56 days respectively.
49. None of the arguments advanced explain with any detail why a longer compliance period is needed.
50. I consider it imperative that the breach of planning control is remedied without unnecessary delay in order to address the harm arising from it, as identified in the reasons for issuing the notice. Those effects on the landscape in visual terms and upon the amenity of others using the wider site are so serious that it heightens the need for compliance with the notice in a timely manner. In line with the advice at paragraph 59 of the National Planning Policy Framework, effective enforcement is important to maintain public confidence in the planning system.
51. Whilst noting that the Council had initially raised no particular objection to an extension of time, I am not satisfied that the notice periods of 56 and 30 days, respectively, fall short of what should reasonably be allowed in all the circumstances of the case.
52. The appeal on ground (g) fails.

Formal Decision

53. It is directed that the enforcement notice be corrected by:

- deleting paragraphs 3.1 and 3.2 and substituting:

"Without planning permission, the material change of use of the Land:

- (a) for the import, export, deposit, storage, handling, and transfer of waste material; and*

(b) *as an unauthorised access to the waste facility the subject of planning permission refs. C/2/2013/2017 and C/2/2019/2009, and for purposes associated therewith, including (but not limited to) the storage of skips, containers, plant/machinery, inert soils, recycled material and maintenance of vehicles."*

- deleting the word "processing" from paragraph 5.(ii).
- deleting the text in paragraph 5.(iv) and substituting:

"Cease the use of the Land as an unauthorised access to the waste facility the subject of planning permission refs. C/2/2013/2017 and C/2/2019/2009, and for purposes associated therewith, including (but not limited to) the storage of skips, containers, plant/machinery, inert soils, recycled material and maintenance of vehicles."

54. Subject to these corrections, the appeal is dismissed and the enforcement notice is upheld.

KR Seward

INSPECTOR