



Appeal Decision

Inquiry opened on 26 October 2021

Site visit made on 9 November 2021

by Paul Dignan MSc PhD

an Inspector appointed by the Secretary of State

Decision date: 15 March 2022

Appeal Ref: APP/D5120/C/20/3255738

57 North Cray Road, SIDCUP, Kent, DA14 5EU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr A Stuart against an enforcement notice issued by the Council of the London Borough of Bexley.
 - The notice, numbered 15/00069/ENF, was issued on 3 June 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the development of: The Land from a use in part for a shared highway access, carpark and accessway related to and for a part geographically identified in Certificate 09/00091/LDCE (for the lawful use for screening of soil, manure and soil storage), and part undeveloped land of nil use, to an unlawful use comprising: a use for the deposit, crushing and processing of inert waste (waste code 17 09 04 as defined in Schedule 2.1 of the Environment Agency's variation of the permit attached as Appendix 1 to this Notice); a use for the deposit, processing and storage of soil within the hatched area on the Plan; and with ancillary development comprising the siting of 2 portacabins on the Land and the provision of enabling access to the areas used for the said unlawful waste use.
 - The requirements of the notice are: (i) Cease the use of the Land within: a. the red-outlined area shown on the Plan for the deposit, crushing and processing of inert waste; b. the hatched area shown on the Plan (outside of the area identified in Certificate 09/00091/LDCE) for the deposit, processing and storage of soil; c. the location marked "P" for the siting of 2 portacabins relating to the uses within (a) and (b); d. the location marked "C" on the Plan for access to the area in (a) and (b). (ii) In relation to (i), remove from the Land: a. Within the area identified in (i)(a), inert waste and plant and machinery associated with that unauthorised waste use; b. Within the area identified in (i)(b) all imported soil situated outside of the area identified in Certificate 09/00091/LDCE that is within the hatched area on the Plan; c. Within the area identified in (i)(c), the 2 portacabins shown in the approximate area marked "P" on the Plan. d. Within the area identified in (i)(d), the accessway and all its constituent materials. (iii) In relation to the areas identified in: a. (i)(a) and (b), restore the Land within the hatched area on the Plan to an undeveloped vegetation covered area devoid of inert and soil waste and equivalent to undeveloped appearance. b. (i)(c) restore the Land to an undeveloped appearance.
 - The periods for compliance with the requirements are: (i) – 2 months, (ii) – 2 months, (iii) – 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f), and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. It is directed that the enforcement notice be corrected by the deletion, in Section 2 (The Land to which the Notice relates) of the words "Parts of the Land are differentiated to show a green outlined area (representing the area certified more particularly in Certificate 09/00091/LDCE), a hatched area (denoting the extended area for the deposit and processing of waste (soil)), a blue outlined area (an accessway linking the southern part of the Land to the highway), and letters denoting particular unauthorised development of the Land. See the Plan and its key. "; by the deletion in Section 3, of the description in its entirety and its replacement with "Without planning permission the making of a material change of use of the Land to a mixed use for soil screening, for manure and soil storage, and for the processing of inert material."; by the substitution of the Plan annexed to this decision for the Plan attached to the enforcement notice; by the deletion in Section 5 of requirement (i) and its replacement by the words "(i) Cease the use of the Land for a mixed use for soil screening, for manure and soil storage, and for the processing of inert material"; of requirement (ii) and its replacement by "(ii) Remove from the land shown hatched black on the Plan all inert waste, all imported soil and all plant and machinery and restore it to an undeveloped vegetation covered area."; by the deletion of requirement (iii) in its entirety; and by the replacement of the times given for compliance with '6 months' as the single time for compliance with all steps.
2. I allow the appeal in part on ground (a) and I grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for "Use of the land the subject of LDC references 09/00091/LDCE and 20/01324/LDCE to a use for soil (Waste Code¹ 17 05 04) screening, for manure and soil storage, and for the processing of inert material (Waste Code 17 09 04)" subject to the conditions set out in the Schedule of Conditions attached to this decision.
3. The enforcement notice is upheld as corrected and varied, and planning permission in respect of that land identified by black hatching on the Plan attached to the Notice as amended is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Applications for costs

4. Applications for costs were made by the main parties against each other. These are the subject of separate decisions.

Background and preliminary matters

5. The appeal concerns a parcel of land to the east of North Cray Road, within the Metropolitan Green Belt. It was formerly associated with a commercial nursery/garden centre complex which now comprises a range of uses including a garden centre and through which access is gained to the appeal site. In May 2008, an enforcement notice (reference 07/00133/ENF) was served in relation to the unauthorised mixed use of the site for soil screening (B2), manure storage (B8); and a waste transfer station (sui generis). An appeal was made against the notice, but in the course of the appeal, in January 2009, an application was made for a certificate of lawfulness of existing use or development (LDC) for a use

¹ List of Wastes in Annex to the List of Wastes Regs 2005

described as “mixed use development for soil screening, manure and soil storage” within an area of land shown hatched on a “Site Plan” which includes part of the current appeal site. Subsequently, in September 2009, an LDC (reference 09/00091/LDCE) was issued for development described as: “Mixed use of soil screening and manure and soil storage”. The May 2008 enforcement notice was then withdrawn before the appeal was concluded.

6. In the course of this appeal further LDCs were granted involving other parcels of land within or partly within the land the subject of the Notice. For convenience I have annexed a plan (Plan 1) submitted by the appellant indicating the location of various parcels for reference, which assists an understanding of their spatial relationships. I should emphasise that this plan has no other status and I treat it as schematic only. In particular, I do not treat it as accurately depicting the extent of the land the subject of the 2009 LDC, indicated as Parcel 1, coloured green on Plan 1. The red outline represents the appeal site.
7. On 24th August 2020, an LDC (reference 20/01325/LDCE) was granted for “a mixed storage use (Class B8) and the parking of vehicles (sui generis)” on a parcel of land which includes land on the westernmost part of the appeal site (Parcel 5, coloured light grey on Plan 1).
8. On 3 November 2020, an LDC was granted (reference 20/01324/LDCE) for “continued soil screening, manure and soil storage use of land in connection with the same adjoining use that was the subject of a certificate of lawfulness (09/00091/LDCE).” This land is at the northern end of the site. (Parcel 2, coloured magenta on Plan 1).
9. On 5th of November 2020, an LDC (application 19/01818/LDCE) was granted for “continued use of building for workshop (Class B2), and use of portacabin as ancillary office use (Class B1)”. The red-line plan accompanying that application (also Parcel 2, coloured magenta on Plan 1) includes the location of the 2 portacabin buildings cited in the notice, and the reason given was because the buildings had been used in connection with a use for soil screening that had been carried out on Parcel 2 for more than 10 years.
10. So far as this appeal is concerned, the effect of these LDCs is that the area within which soil screening and manure and soil storage can lawfully be carried out is the contiguous Parcels 1 and 2, the portacabins can lawfully be sited on that land ancillary to that use. Parcel 5 is in a separate and unconnected use. This has implications for the Notice in terms of the allegation, the requirements and the extent of the land subject to the Notice. I deal with these matters below.

The Planning Unit

11. Allegations concerning a material change of use of land must have regard to the appropriate planning unit. A planning unit represents an area of land or property within which a single primary or mixed use is identified and any other uses within that same unit are ancillary to that use. The planning unit was assessed at the time the notice was issued and considered to be the whole of the land within the red line on the attached Plan. However, the Parcel 5 LDC makes it clear that that land was a separate parcel of land within which the use the subject of the notice was not taking place, hence it should not have been included within the Land to which the notices relates.

12. I have also considered whether Parcel 4, coloured dark grey and including an access that directly serves the use on Parcel 5 and also enables one way traffic movement through the soil screening area, forms part of the relevant planning unit. The access was constructed, and indeed substantially completed as far as I can see, more than 4 years before the notice was issued, and hence would be immune from enforcement in its own right. However, the notice requires the cessation of the use of the access and its removal since it is considered to be development associated with and integral to the material change of use enforced against. However, while the access clearly facilitates the use enforced against, it also provides access to other lawful and separate uses on the wider area, including, from what I saw on my site visit, direct access to Parcel 5 and to other lawful uses to the north-west. In my view it is not so much an integral part of the use of the site for the mixed use enforced against that it could not be considered separately. As such I consider that it is appropriate that it be excluded from the planning unit.

The Notice

13. In view of my findings on the appropriate planning unit above, the Notice requires amendment by the replacement of the Notice plan, which I consider should comprise mainly indicative Parcels 1, 2, 3, and 6. The description of the Land in section 2 of the Notice requires amendment also. Consequential amendments to the requirements are also required in the light of the LDC relating to the portacabins, and to the accessway in view of my findings above.
14. Further, since the notice is aimed at development comprising the material change of use of the land to a single mixed use covering all of the planning unit, I consider it appropriate to correct the description to refer only to that use. The description of the development that appeared to constitute the breach of planning control appears to me to be more appropriately described as: "Without planning permission the making of a material change of use of the Land to a mixed use for soil screening, for manure and soil storage, and for the processing of inert material."
15. So far as the requirements are concerned, Requirement (i) should simply require the cessation of the mixed use, subsequent requirements require amendment as a consequence, and requirements affecting the portacabins and access are no longer necessary or appropriate.
16. I can make amendments to the notice so long as they cause no injustice to the parties. There was broad agreement that changes of this nature would not cause injustice, and I consider them to be necessary to get the notice in order. I am satisfied that these amendments can be made without injustice to the parties.

Ground (b)

17. This ground is that the alleged breach of planning control described in the notice has not occurred, as a matter of fact. The appeal on this ground concerns only the access, which no longer requires consideration, notwithstanding that it was not a ground (b) matter in any case.

Ground (c)

18. An appeal on this ground is that the matters alleged, if they have occurred, do not comprise a breach of planning control. The essence of the argument made

on this ground is that what is occurring on the land is no more than the use certified as lawful by the 2009 LDC. Before I address this argument, I will make clear that this ground cannot succeed because the use certified as lawful in 2009 is confined to a portion of the land only, that is the area shown on the plan attached to the LDC supplemented by Parcel 2. The use, as it is now, extends well beyond that, incorporating a substantial area of land to the east that was formerly undeveloped. I am not in any doubt that this considerable expansion of the area upon which the use is carried out, however it may be characterised, in an area designated as Green Belt in order to maintain openness and prevent urban sprawl, has resulted in a material change of use of land, which is development requiring planning permission.

19. Turning then to whether the use when the notice was issued is that certified as lawful in 2009. To a large extent this concerns what the term 'soil screening' can encompass. The appellant's operation involves taking in lorry loads of waste of which soil is a constituent, generally in his view the main constituent. The waste is deposited near the front of the site then moved to stockpiles. A visual inspection is conducted before the waste is accepted, in line with the requirements of the Environmental Permit (EP) for the site. Only wastes within permitted waste codes can be accepted². These are Waste Code (EWC) 17 05 04 (soil and stones other than those containing contaminated substances) and EWC 17 09 04 (mixed construction and demolition wastes other than those containing dangerous substances). The stockpiled waste is screened using a vibrating deck screener with mesh from which particularly large pieces are excluded by the use of 'grizzly bars' over the intake hopper. Soil of whatever grade mesh is used for the final screening is stockpiled for sale, while the coarser constituents, including the larger pieces shed from the 'grizzly bars' are stockpiled separately for further processing, namely crushing to form aggregate which is then sold as building material. At my site visit I was unable to see the rear of the site, but in the vicinity of the screening operations towards the front of the site (the western end) stockpiles of screened topsoil and stockpiles of stone and concrete awaiting further processing were roughly equal in size.
20. The Council's view is that 'soil screening' means the screening of waste comprising predominantly soil but with *de minimus* non-soil constituents. This interpretation is consistent with the site owners' Statutory Declarations provided in support of the 2009 LDC. These state that garden waste, including soil, concrete and timber, was tipped into the yard, then processed for resale as screened topsoil. The appellant, by contrast, argues that soil screening involves soil being separated from other materials, regardless of whether those other materials are small or significant in quantity, and that the processing of inert non-soil materials arising from screening operations, such as crushing to produce smaller hardcore of aggregate for onward sale, is all part of the 'soil screening' process.
21. In my view, and in the context of the full description of what was certified as lawful in 2009, the most logical interpretation is that 'soil screening' refers to the material which is to be screened, rather than the gaining of topsoil through the screening process, which could include the screening of wastes with a relatively low proportion of soil. While I would not restrict the content of non-soil constituents in the waste to be screened to a *de minimus* level, I consider

² There is evidence that incorrect wastes have been accepted.

that the input material to the process should be recognisable as soil to a reasonable observer. The EWCs 17 05 04 and 17 09 04 fall respectively in the 'soil' waste category³ and the 'other construction and demolition wastes' waste category, and this seems to me to distinguish between mainly soil waste and other wastes that likely contain much higher proportions of non-soil constituents such as stone and concrete. I consider, on the balance of probabilities, that the screening of EWC 17 05 04 material would be properly described as 'soil screening', whereas screening of EWC 17 09 04 would not.

22. The Environment Agency (EA) also noted materials on site in 2018⁴ that they considered did fall within the 2 permitted waste codes, including mixed aggregates containing concrete blocks, bricks, paving and breeze blocks in various sizes. It noted also that this waste type had increased significantly since the previous inspection⁵, noting that previously only small amounts of aggregates were being imported to the site within soil loads, rather than as a separate waste type.
23. Turning to the argument that the processing of inert materials arising from the screening operations should be considered as part of 'soil screening', I consider that this could not extend beyond the sorting by size inherent in the screening process. 'Soil screening' does not, in my view, encompass the processing of inert materials by, in essence, screening out soil to produce material suitable for crushing to produce saleable hardcore and aggregate. I consider that the extent to which the storage and subsequent processing of the inert material produced as a by-product of soil screening can be considered to be ancillary to soil screening to be largely a matter of scale, in the sense that small amounts, by proportion, of such material would be capable of being ancillary to the soil screening use. But I consider, as a matter of fact and degree, that the import, screening, storage and processing of inert materials on the scale now carried out is a primary use of the Land, and not ancillary to 'soil screening'. This has arisen not through intensification of an existing use, but through the introduction of new streams of waste to the site which have different characteristics. At present, the extent of non-soil material awaiting processing on the land is very substantial and well beyond what might be considered ancillary to the lawful use of some of the land for soil screening and soil and manure storage.
24. Separately, it is argued that the use of the crusher on the site for processing the inert materials arising from the screening process is development permitted by Part 4 Class B of Schedule 2 to the GDPO, such that it can be carried out for up to 28 days per year with the need for express planning permission. Class B permits the use of any land for any purpose for not more than 28 days in total in any calendar year and the provision on the land of any moveable structure for the purposes of the permitted use. Class B does not explicitly permit the provision of plant or machinery, but in any case the use of a crusher is part and parcel of, and not distinguishable or separate from, the use of the land for the processing of inert materials, part of the continuous mixed use of the land. Indeed this very argument is made in support of the appellant's appeal on ground (d).

³ List of Wastes in Annex to the List of Wastes Regs 2005

⁴ EPR Compliance Assessment Report - site visit date 3/07/2018

⁵ The preceding EPR Compliance Assessment Report site visit was on 24/02/2016

Ground (d)

25. This ground is that it is too late to take enforcement action. The relevant period is 10 years, and the onus is on the appellant to demonstrate that the material change of use of the land to the use enforced against occurred at least 10 years ago and has been carried out continuously for the requisite period before the notice was issued. Although the Council issued (July 2018) and subsequently withdrew a notice framed in similar terms, it is not seeking to argue that the current notice is a "2nd bite"⁷ notice, hence the relevant date for the purposes of this ground is 3 June 2010.
26. Much of the evidence focussed on the use of a crusher and the presence of concrete and/or aggregates on the land, but it must be borne in mind that the question of lawfulness of an existing use, the mixed use in this case, is more extensive than the question whether the existing use has continued for ten years.
27. Crusher hire records commence in March 2007, and continue once or twice a year, and there is evidence that there has always been an element of concrete on the site, consistent with the origin of the soil for screening as being from building sites, mainly small-scale domestic works. In a Planning Contravention Notice response in June 2007, however, no mention was made of concrete crushing, only that concrete/paving etc was sifted out and sold as hardcore. Mr Stuart's explanation is that by 'hardcore' he meant crushed materials. Nonetheless, documents submitted for the appellant during the application for the 2009 LDC stressed that there was no processing of hardcore operation on the site. The description of the operation given then was of a monthly intake of about 400m³ on average of ground excavated material, producing about 350 m³ of topsoil. The waste from this process, presumably 50m³ per month or 600m³ per year, was stated to be transported elsewhere. Save for wood and plastic waste which Mr Stuart indicated would be taken away, these figures suggest that the inert materials being crushed at that time were very much a by-product of the soil screening operation, amounting to no more than about 12% of intake. As such I consider, as a matter of fact and degree, that the limited inert materials processing that had gone on up until the granting of the LDC in 2009 was ancillary to the soil screening and storage operation whose lawfulness was certified. Had inert materials processing been a primary use before the LDC application then the LDC would have been vulnerable to revocation⁸ because the Council would, in all likelihood, have been misled as to the actual use of the land.
28. Subsequent to the granting of the LDC the EA advised the appellant that a permit was required to operate a non-hazardous waste physical treatment facility.⁹ Mr McKemey advised on and prepared the application for a bespoke permit. He was familiar with waste codes and visited the site. He advised an application for Waste Codes 17 05 04 (Waste from construction – soil (not contaminated)) and 02 01 06 (Waste from agriculture). In the application the source material for processing is described as clean, natural topsoil excavated as part of topsoil strip and site clearance. The process is then described as "the screening of the incoming soil to remove any occasional timber pieces, lumps

⁷ Section s171B(4)(b) of the 1990 Act

⁸ Section 193(7) of the 1990 Act.

⁹ To comply with the Environmental Permitting (England and Wales) Regulations 2010

of clay, bits of concrete, bricks stones or other unsuitable items that may have been included in the load.” It was noted that mobile crushing plant visited annually and that crushed screenings were sold as road sub-base material. Save for the crushing of inert materials, that accords with what Mr Stuart claimed to have been doing and upon which the LDC was based. It is clear that Mr McKemey viewed the intake for screening to be predominantly topsoil, and was aware of the presence of inert materials screened out and their subsequent processing. Mr McKemey was confident that the permit issued in 2014 covered how the LDC site was operating. The permit plan showing the deposit and operating area was consistent with the LDC plan area, and Mr McKemey confirmed that that reflected what he saw on site at the time. Visits by Council officers in January and May 2010 found no breach of the 2009 LDC or of planning control. A similar observation was made by Rodney Kearns, a Council enforcement officer familiar with the site, who noted on a site visit in October 2011 that operations were contained within the LDC area. It seems clear then that at the time the EP application was being prepared, September 2013, the operative part of the appeal site was being used for the use set out within the LDC, and confined to the LDC land.

29. From the evidence available I consider that any processing of the by-product non-soil constituents of the waste soil treated, including crushing, was, at that time, ancillary to the soil screening operation.
30. The EP application was duly made on 25 November 2013 and issued on 18 March 2014. EA inspections of the site following issuing the EP commenced in June 2014. An aggregate stockpile was noted at that time, though it was relatively small. On the third visit, in June 2015 materials on site were described as comprising mostly soil with large pieces of concrete and some metals, but in September 2015 the EA officers noted large stockpiles of concrete material which (they considered) suggested that soils may be being imported from former industrial or commercial sites. Similar concerns were expressed following a site visit December 2015. However, in February 2016 the EA were satisfied that incoming loads were either from a residential development generating large quantities of sandy soil or from smaller jobs involving domestic properties.
31. An application to vary the EP to permit the import of EWC 17 09 04 (inert mixed construction and demolition wastes) was made in January 2017. The varied EP was issued on 22 February 2017. The appellant considered that this variation was necessary to cover materials that he had been processing all along.
32. Noise and dust complaints were made in 2018, leading to visits by the EA and the Council. On the first EA visit, 3 July 2018, there were several large stockpiles of mixed aggregates, including concrete blocks, bricks, paving and breeze blocks. The resulting Compliance Assessment Report (CAR) stated that this waste type had increased significantly since the previous inspection, noting that previously only small amounts of aggregates were being imported to the site within soil loads, rather than as a separate waste type. Some of the plant on the site belonged to Norris Haulage Ltd who the CAR stated were importing and treating aggregates on the site. The CAR advised that waste types present on the site were not within the waste codes permitted, specifically quoting EWC 17 01 01 (concrete), 17 01 02 (bricks), 17 01 03 (tiles and ceramics), 17 01 07 (mixtures of concrete, bricks, tiles and ceramics) and 19 12 12 (waste from

mechanical treatment – aggregates treated at another permitted site). It also noted that activities were extending beyond the site boundary, advising the introduction of a mechanism to ensure that activities remained within the site boundary in the future. The Council issued an enforcement notice on 5 July 2018 alleging, in brief, the processing of concrete in addition to soil on the 2009 LDC land and extension of the mixed use to the adjoining land.

33. At a subsequent EA site visit on 18 July 2018 the appellant confirmed that waste concrete and aggregates were no longer being accepted and that they were working through the stockpiles to ensure it would be removed. On 31 July 2018 the Council issued a temporary stop notice requiring crushing activity to cease until 27 August 2018. When the EA visited the site on 16 August 2018 most non-permitted wastes had been removed. On a 17 December 2018 visit the EA observed a truck delivering a load of waste which it considered to fall under EWC 17 01 07 (mixtures of concrete, bricks, tile and ceramics), though the Waste Transfer Note described the load as EWC 17 09 04. The load appeared to be being delivered to Peter Norris Haulage Ltd who were operating on part of the site, though the appellant maintains that it was not a separate operation. A representative of Peter Norris Haulage Ltd indicated that they were importing EWC 17 09 04 for the production of aggregates. I understand that this particular load was then turned away by the appellant, though he also advised the EA that he had submitted a permit variation application to add EWC 17 01 01 (concrete), 17 01 02 (bricks) 17 01 03 (tile and ceramics) 17 01 07 (mixtures of concrete, bricks, tiles and ceramics) and 19 12 12 (waste from mechanical treatment) to the EP. On another visit on 26 February 2019 Peter Norris Haulage Ltd again appeared to be operating separately using a trommel and crusher. On the final site visit in evidence, 18 September 2020, no non-permitted waste was observed.
34. From this and other evidence it is clear that expansion of the operations on the 2009 LDC site onto the undeveloped land to the east occurred some time after 2013. In an aerial image (Google Earth) with an indicative date of 19 July 2013 operations appear clearly confined to the 2009 LDC area, whereas imagery dated 4 June 2015 shows waste piles being worked on the land well outside of the 2009 LDC area. Subsequent imagery suggests that the operating area has encroached further on the land to the east. Though I disagree with the Council that section 55(3)(b) of the 1990 Act operates to deem it a material change of use given that the waste is not being deposited for disposal purposes, I consider nonetheless that the increased capacity of the enlarged operational area with consequent likely increases in the potential for noise, dust and disturbance and traffic generation, along with the adverse impact on Green Belt openness, would themselves be sufficient impact upon which to base a firm conclusion of a material change of use having occurred some time after 2013.
35. The evidence also indicates that there have been significant changes since 2013 in the types of waste being processed on the site. Waste Transfer Notes up to 2011 indicate that only materials meeting EWC 17 05 04 were imported for processing, whereas considerable quantities of concrete are evident in 2018-19. However, even before the 2017 EP variation to allow EWC 17 09 04 to be processed, there is evidence of waste types other than EWC 17 05 04 or even 17 09 04, being imported and processed on the site, specifically those containing large proportions or comprising mainly of inert materials such as concrete or other building materials. As the appellant accepted, processing of

these harder materials is likely to be noisier, and it is also likely that more dust would be generated.

36. There is limited information on the amount of material being crushed, but in 7 days of crushing in 2019 some 2232 tonnes was crushed, which suggests far more such material on the site by comparison with the figures provided for the 2009 LDC application when only 600m³ per annum (equivalent to about 900 tonnes) of non-soil material was claimed. Crushing had also been carried out over 3 days in June 2018, but a build-up of 1800 tonnes was claimed during the short period of the Temporary Stop Notice in July-August 2018, which does not tally well with an operation based on soil screening. There is also evidence that materials were being imported for the purpose of aggregate production, as opposed to aggregate production being a necessary by-product of the soil screening operation. Overall, I am satisfied, on the balance of probabilities, and as a matter of fact and degree, that the changes in materials being processed on the site since 2013 has also resulted in a change in the character of the use of the land, such that there would have been a material change of use even if the operations had remained within the 2009 LDC boundaries. The appeal on this ground does not therefore succeed.

Ground (a) and the deemed planning application

37. An appeal on ground (a) is that planning permission should be granted in respect of any breach of planning control which may be constituted by the matters stated in the notice. It is accompanied by a deemed planning application. In this case the planning permission sought is to permit the stockpiling and processing of soil and inert waste, along with the storage of soil and manure, on the land benefiting from the 2009 and 3 November 2020 LDCs. The additional land to the east would be used for vehicular access to the stockpiles and for a scheme of landscaping, including woodland planting at the easternmost end (Parcel 6).
38. The main issues are:
- Whether the development is inappropriate development in the Green Belt;
 - Whether there is any harm to the living conditions of others.
39. If the development is inappropriate, I must consider whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations, and if so, would this amount to the very special circumstances required to justify the proposal.
40. If the development is not inappropriate development in the Green Belt, I must consider whether it accords with the development plan read as a whole, and if not whether there are material considerations sufficient to outweigh the conflict with the development plan.

Inappropriate development

41. Paragraph 150(e) of the National Planning Policy Framework (the NPPF) provides that material changes in the use of land are not inappropriate development in the Green Belt if they preserve its openness and do not conflict with the purposes of including land within it. Regarding openness, harm to openness can arise by the piling of waste for processing, and the stockpiling of soil and inert material following screening, along with the use of related plant

and equipment. The relevant LDCs place no restrictions on stockpile height or location, or on necessary plant and machinery, on the LDC land, so it is the impact of the use on the land beyond that, indicative Parcel 3, that requires consideration against Green Belt policy.

42. Restricting the use of Parcel 3 to vehicle use only, including vehicle access to the stockpiles, however that would be achieved, would still reduce openness on that land, and that operational use as part of the overall enterprise would constitute encroachment on the countryside, conflicting with one of the purposes of including land in Green Belts. While the visual impact of the loss of openness would be limited by hedgerow screening, there is a public footpath alongside from which the development related activity would be evident. As such the proposal is inappropriate development in the Green Belt. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

Living conditions of neighbours

43. As noted above, noise complaints were made to the EA in 2018. The appellant believes that these were due to his temporary use of a hydraulic 'pecker' attachment to break down concrete pieces. He had realised the 'pecker' was too noisy and had stopped using it. However, there had apparently been complaints of noise dating back to 2004, and they have continued in the absence of the 'pecker'. The use on site of a trommel has also been recognised by the appellant as being particularly noisy and machine operation in elevated positions such as on the top of stockpiles was also occurring and may have led to complaints.
44. In response to the enforcement notice the appellant commissioned a noise survey and report. Noise measurements were taken on the site when a crusher and screener were present and operating, one at a time, along with a wheeled loader and tracked 360° loader working to them. During operations bunds made from stockpiles of waste, soil and aggregate were in position on the southern and northern perimeters and across the site to the east. Machine operation was in the space between bunds, so that they were effective in screening noise transmission towards noise sensitive properties to the north, south and east. Screening was included in the calculation of Rating Levels¹⁰ for assessing the impact on nearby residential properties.
45. Briefly, the screener and crusher noise generation was similar, 81 and 83 dB L_{Aeq} at 10m, albeit there are acknowledged differences in character. To the south, which was unaffected by screening by bunds, the Rating Level for each machine at the nearest residential property did not exceed the representative background level, indicating a low impact. In part this was due to traffic noise on the intervening A223 elevating the representative background level. The nearest 2 residential properties to the north were not in fact assessed because they belong to the appellant's brothers who are part owners of the appeal site and work there. That may not always be the case, so strictly speaking these properties should have been assessed. Rating Levels at properties to the north-east and to the south were assessed as being at or just below the representative background level, again indicating a low impact. As such it was concluded that, provided that operations were confined to daytime, the noise levels arising from use of the concrete crusher would fall somewhere between

¹⁰ Calculated in accordance with BS4142

what the Planning Practice Guidance (PPG) describes as *Significant observed adverse effect level* (SOAEL) and *Lowest observed adverse effect level* (LOAEL). These are, respectively the level of noise exposure above which significant adverse effects on health and quality of life occur, and the level of noise exposure above which adverse effects on health and quality of life can be detected.

46. In short, the machines may be audible, depending on conditions, but should not be unduly harmful. PPG advice in these circumstances, where it is acknowledged that noise may be starting to have an adverse effect, is that consideration needs to be given to mitigating and minimising those effects. Hence importance is placed on retaining bunds around the processing areas. Mr Jarman's view is that without the bunds the noise experienced at the residential properties assessed would still be within LOAEL parameters, though I consider that it would certainly be at the upper end where the acoustic character of the area and the quality of life of nearby occupants would, at the very least, be beginning to be adversely affected.
47. Overall, what Mr Jarman's evidence indicates is that the operation of the screening and crushing machines present on the site during monitoring can be undertaken without disruptive impacts on neighbours due to noise, provided that appropriate measures are in place. That is not to say that that has always been the case, and it is unsurprising that there have been complaints given practices in the past including the use of plant and machinery on top of stockpiles, and the use of trommels, which can have a different noise character and which the appellant accepted would be noisy once the softer materials had been screened out. Mr Jarman also acknowledged that the use of a screener or crusher in elevated positions without screening would likely have a significant adverse impact.
48. Prevention of noise pollution from the site is a requirement of a condition of the EP, and the production of a Noise and Vibration Management Plan (NVMP) was required by the EA when it responded to noise complaints in 2018. The Plan included the use of bunds and the siting of operational plant within defined working areas below the stockpile bunds to control noise impacts, and these measures appear to have been implemented. There is also an Environmental Management System document. Despite the site management actions since 2018 there have been further complaints of noise, which the EA has acted upon promptly. However, even allowing for the presence on site of considerable quantities of inert material, there is no evidence of noise generating activities on the site presently that would be inconsistent with the 2009 LDC.
49. So far as the potential for noise generation is concerned there are differences between what is permitted by the 2009 LDC and what is sought. The appeal proposal covers a larger area than the land covered by the relevant LDC, and while stockpiles would not be sited on the previously undeveloped land to the east, there would be noise from machinery accessing the stockpiles from that side. Such activity has not been assessed in terms of the potential for noise and disturbance, but nor has it been raised as a significant issue. The processing of more inert materials would also be likely, which would be likely to see more frequent use of crushing plant, though operating in line with the NVMP and the mitigation measures proposed by Mr Jarman should avoid harm to residential amenity over and above that that would occur due to 2009 LDC compliant operations, as regulated by the EP. In any case EP condition 3.4.1

regulates noise and vibration from the site, and the NPPF expects planning decisions to assume that regimes aimed at the control of processes and emissions will operate effectively.

50. Noise impacts have not been estimated for the residential properties associated with the business, but it is likely that these would be subject to noise levels that would have a significant adverse impact, given their close proximity. No doubt the failure in this respect is due to an assumption that the occupiers would tolerate the impacts, and hence should not be counted as sensitive receptors. While it should not be assumed that future occupiers will feel the same, I consider that the EP noise and vibration condition could be invoked if circumstances change and I have no reason to believe that this would not be effective.
51. Policy ENV39 of the London Borough of Bexley Unitary Development Plan (UDP) requires new development to avoid prejudice to the environment of the occupiers of adjacent properties, consistent with paragraph 130 of the NPPF. On the evidence before me I consider that, properly regulated, the use could be carried out without detriment to the living conditions of neighbours over and above that already possible by virtue of the LDC permitted use, as regulated by the EP. Accordingly, it does not conflict with Policy ENV39.

Planning balance

52. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. Substantial weight must be given to any harm to the Green Belt, which in this case is the definitional harm due to inappropriateness in the Green Belt, loss of openness and encroachment on the countryside. The very special circumstances necessary to permit inappropriate development will not exist unless the harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
53. The other considerations put forward by the appellant are that the visual impact would be almost or completely undetectable, the positive benefits of the opportunity for landscaping and works of restoration of the non-LDC land, along with biodiversity benefits, and that the business may become unviable if it is unable to process the by-products of soil screening within the site.
54. On the first point, while the visual impact of enlargement of the area of use to include the previously undeveloped land to the east would be limited by virtue of screening by hedgerows, the use itself, involving the operation of earth-moving machinery, would be evident to people using the public right of way along the southern boundary, so that even with hedgerow enhancement the loss of openness would be perceptible. I consider the limited visual impact to be a neutral consideration at most. The opportunity for landscaping and restoration, mainly at the far eastern end, can be considered as a positive benefit to which some weight can be accorded. The assertion that the business may become unviable if by-products of soil screening cannot be processed is not actually supported by any evidence, but in any case I have made clear my view that the processing of by-product from soil screening, as opposed to the products of screening of other waste types, would be ancillary to that use and is not prevented by the requirements of the enforcement notice. It has not been asserted that the deposit and processing of inert waste as a primary use

of the land is essential for viability. This is not a matter to which I accord weight in favour of the development.

55. It is also suggested that the opportunity to subject the use to conditions such as limiting the hours of work, the siting and type of machinery, the height of stockpiles and limiting permitted development rights should be accorded weight. The use is in any case subject to the EP conditions, and as Mr Jarman pointed out, his conclusion that operations on the site would not give rise to harmful amenity impacts is predicated on mitigation measures, including daytime working. In essence, once representative background noise levels fall, such as outside of normal working hours, operations would be more likely to cause harm. If that arose, permit conditions would be breached. Similarly, Mr Jarman's conclusions do not extend to the use of potentially noisier machinery such as a 'pecker' or a trommel, and the appropriate siting of machinery is also central to his conclusions. Regarding stockpile heights, these are in any case physically self-limiting, and, given the strong screening along the boundaries of the LDC parcels, it is difficult to see what visual, or other, benefit would accrue from limiting maximum height to the 9m proposed. While I accord some weight to the possibility of regulating the use through conditions, this is limited by the existence of controls already in place through the EP.
56. It has also been argued by the Council that the intentional nature of the unauthorised development should weigh against the proposal, in accordance with the December 2015 Ministerial Statement concerned in particular with the protection of the Green Belt. I note the appellant's claim at the Inquiry that there was in fact no development beyond the LDC land, though in other documents he had insisted that the use had exceeded the LDC land for more than 10 years, which undermines his evidence. Nonetheless, I have considered whether the incursion into the undeveloped land is caught by the Ministerial Statement, but it seems to me that there is reliable evidence that it had already occurred, to a large extent at least, before the relevant date.
57. Overall, while there are considerations that weigh in favour of the development, I consider that these fall well short of clearly outweighing the substantial harm that must be accorded to the inappropriate nature of the development by virtue of its harmful effect on openness and conflict with the purposes of including land in the Green Belt. The very special circumstances necessary to justify the development do not therefore exist. The development conflicts therefore with Policy G2 of The London Plan 2021 and the NPPF, and with the development plan read as a whole. Planning permission should therefore be refused on the deemed planning application.
58. However, there is an obvious alternative which I am bound to consider. This is to grant planning permission for the mixed use, but confined to the land that has the benefit of the relevant LDCs, and with more precise definition of the incoming inert waste, namely EWC 17 09 04. This is within the terms of the deemed planning application, and it would not be inappropriate development in the Green Belt because it would not involve harm to openness or conflict with the purposes of including land in the Green Belt. Since this use can be carried out without additional harm to local amenity in terms of noise, and there are no other significant planning objections, I am satisfied that there is no conflict with the development plan.

Conditions

59. I have mentioned some of the conditions proposed by the appellant. The Council has formally suggested 2 conditions, one limiting the noise at residential properties, and one limiting working hours. Although there are noise controls in place through the EP, I consider it necessary to impose the Council's noise condition, with a saving for properties occupied by those employed on the appeal site, as it is more objective and will provide reassurance to occupiers of nearby properties. In doing so I recognise that the primary responsibility for pollution control lies with the EA, but there are circumstances in which the local planning authority can take enforcement action to secure compliance with such conditions. I shall also impose the additional noise control measures proposed by the appellant, restricting on the hours of operation and siting of the noisier machines to be used, and restricting the use of certain machines, in the interests of local amenity. The condition will require that screeners or crushers only be operated at natural ground level. Since this is not established, I shall also require a full ground survey to establish natural ground levels across the site, as suggested by the Council in response.
60. Regarding general working hours, the appellant proposes working from 7am to 6pm Mondays to Saturdays, while the Council proposes 8am to 6pm Monday to Friday, and 8am to 1pm on Saturdays. I consider that a 7am start is not unreasonable on weekdays, but Saturday mornings and afternoons are, for many people, a time for unwinding, relaxing and enjoying their properties and gardens. The level of audible noise that can be tolerated in these circumstances is likely to be far less than during normal working hours, and the representative background noise is likely to be lower. I consider it appropriate, reasonable and necessary therefore to restrict general operating hours to 7am to 6pm Mondays to Fridays and 8am to 1pm on Saturdays, with work on Sundays and Public or Bank Holidays precluded altogether.
61. Since the area of operations would not extend beyond the LDC land, I consider the wider landscaping scheme proposed by the appellants to be unjustified, but a scheme of soft landscaping is necessary in the interests of local character, to ensure, among other things, that the hedgerow alongside the public right of way does not continue to deteriorate. So far as the proposal to use marked poles for stockpile height management, I see no necessity or even any particular benefit given the noise control measures, which will remain the responsibility of the operator. The appellant has suggested a condition controlling additional external lighting on buildings, but no justification for additional external lighting has been submitted. The fact that a site may have particular lawful use does not include permission to carry out operational development incidental to that use. The appellant has also proposed the removal of some permitted development rights, apparently as a benefit, but such rights should only be restricted where there is clear justification to do, in the absence of which I consider it would not be reasonable or necessary. The dust management measures condition proposed is not necessary since it is a matter controlled adequately by the EP.

Overall conclusion

62. The development as proposed is inappropriate development in the Green Belt and the very special circumstance in which it may be granted planning permission do not exist. However, for the reasons given above the appeal

succeeds in part and I shall grant planning permission on the deemed planning application for the making of a material change of use of the land the subject of LDC references 09/00091/LDCE and 20/01324/LDCE to a use for soil (EWC 17 05 04) screening, for manure and soil storage, and for the processing of inert material (EWC 17 09 04) subject to conditions. The appeal on this ground therefore succeeds in part. The notice will be upheld, but the operation of section 180(1)(a) of the 1990 Act means that the notice will cease to have effect so far as it is inconsistent with this permission.

Ground (f)

63. This ground is that the requirements of the notice exceed what is necessary to remedy the breach of planning control, which is the purpose of the notice. Some of the matters raised concern the accessway and the portacabins. For reasons outlined earlier, I have varied the requirements and the extent of the land subject to the notice, such that they do not now affect the portacabins or the accessway. There are no specific requirements affecting the types of machinery on the LDC land.
64. Nothing else of substance is raised on this ground, and I am satisfied that the requirements, as amended, do no more than seek to remedy the breach of planning control by returning the land to its condition before the breach took place.

Ground (g)

65. A period of 12 months is sought for compliance with the notice. In part this was to allow time for the portacabins to be dismantled and transported from the site, and for the accessway to be dismantled and the land restored, but these are no longer requirements. Inclement weather has been raised as an issue, in the sense that the narrow window allowed for the relocation of the stockpiles on the land outside of the LDC land may require operating in poor weather conditions, with the potential for detrimental ground impacts, and hazardous working conditions. I consider that extending the time for compliance for all of the requirements to 6 months to enable works to be carried out in appropriate conditions is pragmatic and reasonable in the circumstances, and the appeal on this ground succeeds to that extent.

Paul Dignan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Stuart Jessop and Mark Davies
of Counsel

They called	
Adam Stuart	Appellant
Les Searle	Waste collector
Stuart Hendrick	Waste collector
Neil Jarman	Noise
Malcolm McKemey	Environment
Paul Nicholls	Planning

FOR THE LOCAL PLANNING AUTHORITY:

Christiaan Zwart
of Counsel

He called	
Fiona Bradley	Enforcement Consultant
David Bloom	Senior Planning Enforcement Officer

INTERESTED PARTIES:

Kevin Courtney	North Cray Residents Association
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DOCUMENTS

- 1 Opening submissions - Appellant
- 2 Legal note on ground (d) - Appellant
- 3 Opening submissions - LPA
- 4 Crusher invoices – July 2020
- 5 LDC application form dated 22 January 2009
- 6 Extract from Environmental Permitting Core Guidance A1.19-22
- 7 Additional documents provided by Mr McKemey; Waste Codes, Waste Classification Technical Guidance and site plan documents
- 8 Suggested conditions - appellant
- 9 Suggested conditions - LPA
- 10 Council's closing submissions
- 11 Appellant's closing submissions
- 12 Council's costs application and responses
- 13 Appellant's costs application and responses

SCHEDULE OF CONDITIONS - Appeal Ref: APP/D5120/C/20/3255738

1. No noise generated by the development hereby approved otherwise than that below the level of -5dBa lower than the relevant background noise level (when calculated in accordance with BS4142 or its successor) at a residential façade other than at a residential property occupied by a person employed on the development hereby approved, shall occur outside of the application site.
2. Machinery shall be operated, processes shall be carried out and deliveries shall be taken at or despatched from the site only between 0700 and 1800 on Monday to Friday, 0800 to 1300 on Saturdays, and not at any time on Sundays or on Bank or Public Holidays.
3. The following noise control measures in connection with the use of screening and crushing plant (excluding loading plant) shall be adhered to at all times:
 - a) Plant shall be operated at natural ground level only;
 - b) No more than one screener or crusher shall operate at any time;
 - c) Screening and crushing plant shall not be operated outside of 0730 to 1600 Mondays to Fridays and 0830 to 1300 on Saturdays.
 - d) No pecker or trommel shall be used on the site.
4. Within 3 months of the date of this decision the following information shall have been submitted to the local planning authority: a full site survey showing: the datum used to calibrate the site levels; levels along all site boundaries; natural ground levels across the site at regular intervals.
5. Within 3 months of the date of this decision details of all proposed soft landscaping, including new hedge planting, shall have been submitted to the local planning authority for approval in writing. Development shall be carried out in accordance with the approved details, which shall include a timescale for their implementation.
6. Any trees or other plants planted in accordance with condition 5 above which, within a period of 5 years, die, are removed or become seriously damaged or diseased, shall be replaced in the next planting season with others of similar size and species, unless the local planning authority gives written approval to any variation.

PLAN 1: Illustrative Plan showing Parcels (by colours and numbers) referred to in the decision. The red line shows the appeal site before correction. As noted in the decision, the plan is not considered to accurately show Parcel boundaries or extent.





The Planning Inspectorate

ENFORCEMENT NOTICE PLAN

This is the replacement plan referred to in my decision dated: 15 March 2022

by Paul Dignan MSc PhD

Appeal Ref. APP/D5120/C/20/3255738

Land at: 57 North Cray Road, SIDCUP, Kent, DA14 5EU

Scale: not to scale

