

Appeal Decision

Site visit made on 6 April 2022

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 21 April 2022

Appeal ref: APP/U1050/C/20/3257919

Lady Lea Road, Horsley, Ilkeston, Derbyshire DE21 5BN

- The appeal is made by Mr Denley Allen under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by Derbyshire County Council.
- The notice was issued on 15 October 2021; ref. No. E/2020/00054.
- The breach of planning control was: Without planning permission, the importation and deposit of waste materials onto agricultural land.
- The requirements of the notice are:
 - a) Cease the importation and deposit of waste material on the Land.

Time for compliance: One day after this notice takes effect

- b) Remove all deposited waste material from within 5 metres of the edge of any hedgerow and from within 8 metres of the trunk of any tree. The removal of the material must be carried out such that no damage to any hedgerow or tree, or associated root systems occurs, and to allow the final re-graded landform to tie into adjacent natural ground level. No vehicles or heavy machinery should track over the rooting zone within 5m of a hedgerow or within 8 metres of any tree. Any waste material removed through this step must be re-distributed through the re-grading activity required by step c).

Time for compliance: 3 months after this notice takes effect

- c) Re-grade the deposited waste material to achieve a profile of even grade which ties in with the adjacent natural ground level. The extent of the re-grading of the waste material should be limited to within the depressions into which it has been placed except to the extent necessary to tie into adjacent natural ground levels. No placement or re-grading of the waste material shall extend into any other depressions existing on the land or any other undisturbed part of the land. Any placement of material through the re-grading must not be undertaken within 5 metres of the edge of any hedgerow or 8 metres of the trunk of any tree.

In the event there is any surplus waste material on completion of the re-grading it must be removed from the land and taken to a facility permitted to receive the material.

The re-grading of the waste material and the removal of any surplus waste material from the land must only be undertaken between the hours of 0700 and 1800 hours on Mondays to Fridays and 0800 and 1300 hours on Saturdays. No re-grading or removal of surplus waste material shall take place on any Sunday or Bank or Public Holiday.

For clarification the location of the deposited waste material and the depressions into which it has been deposited is shown for identification

purposes edged blue on Plan Ref - DCC/ENF/6.4057 attached to the notice.

Time for compliance: 12 months after this notice takes effect

- d) Remove from the final re-graded surface any stones, rocks, concrete, brick, tarmac or tile larger than 100 millimetres in any dimension and any wood, plastic or metal items.

Time for compliance: 12 months after this notice takes effect

- e) Following the surface treatment specified in step d) replace any soils that have previously been stripped from the area of the land where the waste material has been deposited. The soils must be replaced evenly across the area of re-graded waste material.

Time for compliance: 12 months after this notice takes effect .

- f) Following the completion of the replacement of soils as specified in e) cultivate the regraded areas to prepare a seed bed and sow with seed consisting of the following mix at a sowing rate of 14kg/acre:

28% ABERWOLF Int Perennial Rye Grass
36% ABERDART Int Perennial Rye Grass
22% ABEREAVON Late Perennial Rye Grass.
7% PRESTO Timothy .
7% ABERPASTURE White Clover Blend

Time for compliance: 24 months after this notice takes effect

- The appeal was made on grounds (a), (b), (c) and (f) as set out in the amended Act. As the fee for the application for planning permission deemed to have been made in respect of the ground (a) appeal was not paid, the application does not fall to be considered.

Summary of decision: The enforcement notice is upheld.

Appeal site

1. The 6.41ha enforcement notice agricultural land site fronts the north-western side of Lady Lea Road to the north-east of the village of Horsley and just to the south-west of the village of Kilburn. It is a separated part of the Appellant, Mr Denley Allen's, over 160ha holding.
2. Much of the notice land close to the road has been worked by the removal of topsoil and the raising and levelling of the land by the importation and placing of large quantities of what appeared to me to be builders' and civil engineers' waste materials.

Costs

3. At the end of his appeal statement, Mr Allen said: "The Appellant invites an order for costs in his favour on the statutory criteria.". But there was no formal application for an award of costs, where the County Council would have the opportunity to respond, or any reason given for the request. I take no action on Mr Allen's request.

The appeal on ground (b)

4. An appeal on ground (b) asserts that the matters stated in the enforcement notice allegation have not occurred. That may deal with the somewhat unusual

situation where what is alleged by the notice has not in fact happened. Alternatively, it might be pleaded where the notice recites the wrong breach, such as a material change of use rather than a breach of condition.

5. The main point of contention here is not that there has been no importation and deposit of materials onto agricultural land, but that Mr Allen claims those materials were not wastes as alleged. Misstatements of fact in the allegation can be the subject of an appeal on ground (b), but they do not necessarily defeat the enforcement notice, as there is the power to correct any "misdescription" in s.176(1)(a) of the Act. In this case, the difference between the parties is not simply a need to correct a poorly worded description of the alleged breach of planning control. It goes to the heart of the question of the lawfulness or otherwise of the operational development that has taken place on Mr Allen's land. It is a matter for the ground (c) appeal. The appeal on ground (b) fails.

The appeal on ground (c)

6. The appeal on ground (c) asserts that the matters stated in the enforcement notice allegation (if they occurred) do not constitute a breach of planning control. As above, by the evidence of large quantities of imported materials deposited on the land, and my determination of the ground (b) appeal, the matters stated in the enforcement notice did occur.
7. It was Mr Allen's case that the materials imported onto the appeal land were not wastes. They were said to be recycled soils, part of engineering operations necessary to the purposes of agriculture within the unit. The work did not require planning permission.
8. The definition of waste set out in Art. 1(a) of the Waste Framework Directive - Directive 2006/12/EC is: ...any substance or object in the categories set out in Annex 1 which the holder discards or intends or is required to discard.
9. In the Court of Appeal decision in the case of *OSS Group Ltd, Regina (on the Application of) v Environment Agency and others*: CA 28 Jun 2007, it was held that once lubricating oil had been processed into fuel oil suitable for burning, it ceased to be waste so as to require it to be handled and stored as waste. Carnwath LJ discussed the meaning of the term 'discards or intends ... to discard'. The use of the subjective test, while useful when examining the product in the hands of the 'producer' of waste, may not be apt to define the status of the material in the hands of a subsequent holder of the material for recycling or re-processing. Carnwath LJ expressed the 'general concept' of the discard of waste as getting rid of something which is unsuitable, unwanted or surplus to requirements. He summarised European case law: "*Understandably, the court has held that a material does not cease to be waste merely because it has come into the hands of someone who intends to put it to a new use. But that should not be because it still meets the Art.1(a) definition in his hands; but rather because, in accordance with the aims of the Directive, material which was originally waste needs to continue to be so treated until acceptable recovery or disposal has been achieved.*".
10. In the present instance, a Council site inspection on 9 October 2019 showed that a large amount of material had been imported onto the land. The officers concluded that those materials were soil based but contained non-soil items

such as brick, stone, concrete, tarmacadam, wood and plastic. They said it did not have the appearance of material that had been through a treatment process. It was consistent with construction and demolition waste. The Council's view that deposited materials were wastes was corroborated by an email from a member of Environment Agency East Midlands Area Enforcement Team commenting on the suspected breach of planning control which included the view: *"I am not yet in possession of our lab results, however, a simple visual inspection of the material is, in our view, sufficient at this stage to categorise the material as waste. It contains substantial sized pieces of brick and other materials consistent with construction and demolition (C&D) waste."*

11. The Appellant, Mr Denley Allen, said that in 2019 he agreed to take material from the Trust Utilities/Nutbrook Aggregates site at Ilkeston. He was told the company worked for utility undertakings which produced large amounts of soils then taken to their premises at Ilkeston. He understood the materials were treated by screening out stones, aggregates and other materials to produce good quality soils. It required no further screening or work. Mr Allen said that Nutbrook Aggregates, because of their overstock at their site, were prepared to pay for haulage and to pay him to allow its use in the field at Lady Lee Road. It was an economic accident that Nutbrook had the material available for his use.
12. This evidence was supported by Robert Fox, company director with Aggrecom Limited, successors to Trust/Nutbrook Aggregates. He said that land used to store processed soils was needed for other purposes. That led to the offer to Mr Allen. Later, it seems further fill materials were supplied from a Peveril Homes site nearby. It was criticised that there was plastic and other contamination of the soils brought in. Mr Fox said that was certainly untrue in respect of the material coming from Trust/Nutbrook Aggregates. He also found it difficult to accept that that is true in respect of the material coming from the Smalley Housing development for Peveril homes Ltd. He accepted that occasionally there could be mistakes which were usually picked up by picking such material at the time of spreading so that it was not, in the end, deposited. That was not a process on any scale but simply removing, effectively litter, which had mistakenly been left in.

Inspector's conclusions on the ground (c) appeal

13. I look at each applicable part of the 1990 Act and the concessions in the Town and Country (General Permitted Development) (England) Order 2015, (the Order).
14. S.55(3)(b) of the Act states that the deposit of refuse or waste materials on land involves a material change in its use, if — (i) the superficial area of the deposit is extended, or (ii) the height of the deposit is extended and exceeds the level of the land adjoining the site.
15. If the materials deposited on the notice land were wastes and the purpose of their deposition was for the disposal of wastes rather than for the improvement of agricultural land, there would clearly have been a material change of use of the land that required planning permission. There were depressions in the land resulting from earlier mineral workings on the land that Mr Allen wanted to fill to restore it to a beneficial agricultural use. If, however, Mr Allen's importation of soils was primarily to take advantage of the Nutbrook offer of his being paid to accept excess stock of stored soils, I would consider that activity to have

been the placing of discarded wastes on the land. That is especially so where the original levels of land have been increased, clearly shown where materials deposited around trees are some way up the trunks.

16. In relation to the Nutbrook sourced materials imported on to the appeal site, according to Mr Fox for the Appellant, much of that material came from construction or utility excavations. Where some of the extracted soil may be suitable for reuse at a site other than where it was produced, that soil is likely to be waste. It is waste unless it can meet the requirements in the CL:AIRE code of practice., (para. 3 p2, Cl:aire guidance bulletin). Certain excavated materials may be suitable for their intended use in a proposed development without any treatment at all. If they are used in that way those materials are unlikely to be waste. If treatment is needed in order to make the material ready for use the material will be waste but may cease to be waste once treated so as to be suitable for use. That is what Mr Allen said of his imported soils. But in the case of the stockpiles of soils here, the owners wanted them to be removed to free up some of their land. They paid Mr Allen to take those soils, which may not have passed the Cl:aire test at Factor 3 - Certainty of use. On page 3 of the bulletin a demonstration that the material will actually be used is sought and the use is not just a probability. For example, if materials are stockpiled with no pre-defined destination and use, they will still be waste. In such circumstances the material would have a low or negative economic value as it's likely to be a burden on the producer or holder who will have an incentive to get rid of it.
17. The Peveril Homes sourced soils were unlikely to have been suitable for use without any treatment. There was scant evidence of any screening or processing of those soils or of tests to ensure they were suitable for infill without screening or cleaning.
18. The Council officers who visited the site on 9 October 2019 concluded that materials imported onto the land were wastes, (para. 10 above). Their photographs showed some of the imported soils contained unscreened and sizeable pieces of concrete, bricks and broken bricks and bent steel reinforcement rods. I agree that those imported materials certainly had the appearance of being wastes. Similarly, earlier Council photographs taken in January 2014 show tipped soils containing large concrete blocks and plastic wastes, the outer edge of the tipping apparently on land not previously stripped of topsoil. Although it may be that some of the imported soils had been sufficiently processed or assessed as to suitability to be considered end of waste materials, when mixed with materials that are clearly wastes, the whole mixture will be waste, (Environment Agency – general guide on deciding if a material is waste or not). What I saw confirmed the Council's assessment. It is hard to accept that deposited materials that contained large blocks of concrete, road tarmac, plastics and timber had received any significant screening before deposition.
19. In my view, the enforcement notice's allegation that waste materials were imported and deposited on Mr Allen's land at Lady Lea Road was correct. That was a breach of planning control.
20. Article 3, Schedule 2, Part 6, Class A of the Order, relating to agricultural development on units of over 5 hectares, permits any excavation or engineering operations reasonably necessary for the purposes of agriculture within that unit. Development is not permitted by Class A, at A.1(h), where any part of the

development would be within 25 metres of a metalled part of a trunk road or classified road. Condition A.2(1)(c) to Class A, (subject to exceptions not applicable here), requires that waste materials are not brought on to the land from elsewhere for deposit. Condition A.3(2)(c) permits development permitted by Class A, including the deposit of waste material, on condition that the developer must, before beginning the development, apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to, amongst others, the siting of the excavation or deposit. Part of the appeal land nearest to Lady Lea Road, a classified road, is within 25m of the metalled, (surfaced), part of Lady Lea Road. No application for a determination on the question of prior approval was made to the local planning authority.

21. Where a development fails to comply with concessions in the Order in any particular, the whole of the development is unlawful, (*Garland v MHLG* [1968] 20 P&CR 92). In an appeal on legal grounds, as here, the burden of proof to show there has not been a breach of planning control lies with the appellant, (*Nelsovil v MHLG* [1962] 1 WLR 404). That was not shown. The appeal on ground (c) fails.

The enforcement notice appeal on ground (f)

22. The appeal on ground (f) asserts that the requirements of an enforcement notice are too onerous and that something less should be substituted. Section 173(4) of the Act sets out the purposes of the requirements. They are:
 - (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
 - (b) remedying any injury to amenity which has been caused by the breach.
23. The Council sought to remedy injury to amenity. They said the deposited material detracted from the character and appearance of the open countryside. The site had been despoiled by historical mineral workings. But the Appellant's restoration had been carried out in an uncontrolled manner without consideration of the placement of the waste material in respect of a final landform and without appropriate protection to trees and hedgerows. The enforcement notice sought to mitigate the harm by re-grading the deposited waste material and the cultivation, restoration and appropriate remediation to hedgerows and trees.
24. Mr Allen said the notice's requirements for hedgerows and trees were an interference with the management of the agricultural land, resulting from interruption by the stop notice and by the enforcement notice. He would manage his land in accordance with the rules of good husbandry. The material deposited with, if necessary, other material ought to allow the uniform restoration and provide an improvement of the agricultural land. The material on site was insufficient, wastes or not, to complete the work to an adequate profile.
25. In my view, Mr Allen's comments do not fully address the ground (f) appeal. He appeared suggest that his own but unidentified scheme to restore the land would produce a better result than the notice's requirements would

achieve. No formal alternative to notice's requirements were put forward, however. Mr Allen said more soils would need to be imported to the site. It is not a matter I can consider in the absence of a deemed application for planning permission.

26. I agree with the Council that the requirements of the notice are entirely reasonable. They allow the retention of much of the deposited material and provide for an appropriate restoration of the land to agriculture. They provide some remediation of the harm to trees and hedgerow vegetation caused by excavation that exposed roots and in other areas placed excess soils on roots. The requirements do not exceed what is necessary to remedy the injury to amenity caused by the breach.
27. The appeal on ground (f) fails.

FORMAL DECISION

28. The appeal is dismissed and the enforcement notice is upheld.

John Whalley

INSPECTOR