



Appeal Decision

Site Visit made on 12 March 2024

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 May 2024

Appeal Ref: APP/Z1585/X/22/3309022

Norton Field Farm, Norton Lane, High Ongar, Ongar CM4 0LN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Daniel Chisholm, D Chisholm Demolition & Groundwork Contractors Ltd against the decision of Essex County Council.
 - The application Ref ESS/94/21/EPF, dated 29 October 2021, was refused by notice dated 3 August 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is inert transfer/recycling yard screening/crushing demolition waste.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. I made an unaccompanied site visit on the above date. Whilst I was unable to see the entire site, I am satisfied I was able to see sufficient of it from public land. Since the appeal falls to be determined on the written evidence regarding the use of the land at the date of the LDC application, an accompanied site visit is not necessary, and I am satisfied I can proceed with the appeal on the evidence before me.
3. The WPA amended the description of development on its decision notice to inert transfer/recycling yard including screening/crushing demolition waste. The appellant has used the same description on their appeal form, and I have proceeded on that basis.

Main Issue

4. The main issue is whether the Waste Planning Authority's (the WPA) decision to refuse the application for an LDC was well-founded.

Reasons

5. S191(2) of the Act states that uses are lawful at any time if: (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason; and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

6. S171B(3) of the Act sets out that in the case of a breach of planning control involving a change of use, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
7. It is therefore necessary for the appellant to demonstrate, on the balance of probabilities, that the material change of use of the Land to inert transfer/recycling yard including screening/crushing demolition waste took place on or before 29 October 2011 and continued uninterrupted for ten years thereafter, such that the WPA could have taken enforcement action against the use at any time in the period.
8. For a material change of use to have occurred, there must be some significant difference in the character of the activities from what had gone on previously, as a matter of fact and degree. The parties do not explicitly state what the previous use of the land was. The appellant nonetheless indicates that the site previously formed part of the wider farm which, it is said, up until May 2013, operated primarily as a free-range poultry enterprise.
9. The appellant states that the use commenced on 20 October 2009. The parties accounts of events prior to that date are broadly consistent. The appellant states that material was crushed on the site to carry out approved development at the farm. The WPA visited the site in September 2008 where it noted that demolition waste had been deposited on the site and the material was principally being used as part of the construction of a new building and hardstanding on the farm. There was no evidence at that time of materials being exported.
10. Further visits from the WPA in October and November 2008 are said to have confirmed no recycling activities were ongoing. Whilst materials and plant were evident, the WPA concluded there was no "waste use" occurring. The appellant has provided an invoice which indicates his father purchased a jaw crusher in February 2008. There is a letter dated 13 December 2012 from State Securities which indicates the appellant's father entered into a Lease Purchase Agreement on 19 March 2008 for a midi excavator.
11. Notes from a January 2009 joint inspection by the WPA and Epping Forest District Council indicate that the appellant's father told officers that a mobile concrete crushing machine, small, tracked digger and a mobile screener were being kept on the site to be hired out to customers. It was also said to the WPA officers at that visit that the stockpiles of crushed brick and concrete were being used as part of on-going building works.
12. The WPA consequently reached the conclusion that the site was being used for the storage of plant and machinery and that the stockpiles of material were for use as part of the ongoing development at the farm.
13. The appellant states that after crushing sufficient material to carry out the development at the farm, he continued to crush concrete and other material with the machinery continuously thereafter. He does not, however, indicate what happened with that material that point.
14. The appellant states that by the autumn of 2009, his circumstances meant he was able to stockpile imported rubble and hardcore at the site. At that point it is said the site contained more than double the amount of material compared to what had been there previously. The appellant states that the materials

were put to non-farm use and that the stockpiles were to ensure there was sufficient crushed material for the appellant's groundwork contracting enterprise.

15. The witness statement of Chris Davies corroborates the appellant's submissions. He states that the site became a place to dispose the waste arising from his building company, which he delivered in either a van or grab lorry. He goes on to state that from around 2009, he purchased materials from the appellant to use in his business.
16. Furthermore, the witness statement of Andrew Wallace states that he tipped inert material at the site and purchase crushed material from the site from 2009 onwards. Moreover, the witness statement of the appellant's father, indicates that the inert transfer and recycling facility became the primary use of the site in 2009.
17. To that end, the appellant's evidence points towards the use of the land for the transfer and recycling of inert, including the screening and crushing of demolition waste beginning in October 2009.
18. In contrast, the WPA argues that the evidence is insufficient to demonstrate that a material change of use of the land to a transfer and recycling use separate from the farm took place at that time.
19. The WPA has provided a series of aerial images. It points to an aerial image it says is from December 2009 which shows substantial quantities of material stockpiled at the site. However, the WPA states that the levels of material were similar to that witnessed by them in January 2009.
20. However, the reproduction of the aerial image is only dated 2009. There is no time when in 2009. Given the levels of vegetation apparent on the image, it is reasonable to conclude that the image is not from December. In any event, even if the image was from December 2009, the fact that the stockpiles were a similar level of January 2009, is not in itself conclusive that the materials were solely being stored for use on the farm at they were in January 2009. The WPA's suggestion that more material may have been imported to support the ongoing buildings work is unsupported by evidence. Indeed, the WPA does not provide any contradictory evidence to the appellant's signed witness statement the change of use took place at that point.
21. On that basis, I am satisfied that, on the balance of probabilities, the material change of use of the land to use for inert transfer/recycling yard including screening/crushing demolition waste took place in October 2009.
22. Nonetheless, to be immune from enforcement action, it is necessary for the appellant to demonstrate that the use continued uninterrupted for ten years thereafter, such that the WPA could have taken enforcement action against the use at any time in the period.
23. The appellant states in his witness statement that he sold his first crusher in 2014 and hired crusher buckets. He then hired another crusher in July 2015 as more material had been stockpiled and more inert was imported into the yard. It is said that the crushed product went into the appellant's groundworks projects. Thereafter he states he bought a crusher in October 2016 as he had had to hire one on 3 occasions before then. It is said that he did that from 2016 until July 2019 when he sold the crusher buckets to change to a mobile

- crusher due to the volume of material. He hired one first and then bought one in 2019.
24. However, the appellant says little about the activity on the site between 2009 and 2014. Moreover, he does not say how often waste was imported to the site nor how the yard operated in terms of the transfer or recycling of waste, including the screening and crushing of demolition waste. Furthermore, it is not stated how often recycled product or materials were exported from the site, either for use in the appellant's own projects or for sale to others.
 25. The witness statement of Ian Chisholm states that the use has been continuous and became lawful in 2019. However, he does not say when the use was continuous from or how often he visited the site to observe activities at first hand.
 26. Andrew Wallace states he visited the site about 25 times a year from 2009 to dispose of waste and buy crushed (presumably concrete). However, none of the invoices or waste transfer notes provided are of sufficient detail to demonstrate Mr Wallace did visit the site on such a consistent or regular basis.
 27. The witness statement of Chris Davies states that the appellant operated his crushing business from the yard continuously from approximately 2009 to the date it was signed in September 2021. However, again Mr Davies does not say how often he visited the site and or indeed what was happening at the site when he did visit.
 28. The appellant has also supplied several invoices from the years 2009 to 2021. The invoices are all from the appellant's business, UK Crushing and Development (latterly D Chisholm Demolition and Groundwork Contractors Ltd) with the business address in some instances as Norton Field Farm. In others, the business address is obscured. Some invoices indicate the supply of crushed concrete and type 1 aggregate. Others are wider invoices for demolition and groundworks jobs, some of which include the supply of materials or the removal of waste material.
 29. However, where the invoices indicate the supply of crushed concrete, type 1 or other materials, there is nothing in the invoices which demonstrates they were being sourced from stockpiles at the appeal site rather than elsewhere. Furthermore, there is no documentary evidence of the importation of waste for transfer or recycling at the site. The invoices provided are solely to the appellant's demolition and groundworks business. Indeed, where the invoices indicate that waste materials were to be removed from the job, they provide no information as to whether the waste was to be transferred to the appeal site for processing or whether it was to be taken elsewhere.
 30. Furthermore, there are several invoices where there is no customer information on the invoice nor any information regarding where material is to be delivered to or work to be carried out. For example, there are 12 invoices dated between 15 August 2016 and 22 November 2016 which indicate the delivery of several loads of type 6f2 aggregate ranging from loads of 2 to loads of 45. There is no indication in any invoices where the 6f2 is being delivered from or to. There are waste transfer notes accompanying the invoices but the names, delivery addresses, places of loading and dates are all either obscured or missing.

31. Indeed, there are several instances in the evidence of waste transfer notes being provided where the names, address, dates, description of supply and place of loading are either missing or obscured.
32. Moreover, there are significant gaps of time between the invoices. For example, from the single invoice of October 2009 there is a gap of 8 months before the next in June 2010. Furthermore, from December 2010, there are no further invoices until March 2012, a period of 1 year and 3 months. Indeed, there is a single invoice from March 2012 and one from August 2012 before the next in January 2013. Thus, there are just two invoices from a period of over 2 years from December 2010.
33. Similarly, there is only a single invoice from September in the 11 months between that in April 2013 and that in March 2014. This is corroborated by the WPA's aerial image, which shows some materials on the site, but substantially lower in quantity than that from 2009.
34. Likewise, there are gaps of several months between invoices in 2014 and 2015. Again, the WPA's aerial image from 2014 shows much lower quantities of material or equipment on the site when compared with that of 2009.
35. The invoices do point towards an increase in activity in 2016, where there are more invoices than previous years and they are more evenly spread across the year. Nevertheless, activity appears to drop again in 2017, when just two invoices have been provided 1 in January and 1 in October 10 months later.
36. Activity appears to then increase again in 2018 and 2019 with a more even spread of invoices across the year, although I note again there is a significant gap between April 2019 and September 2019 with no documentary evidence. However, that contradicts the WPA's aerial image of 2018 which shows materials at a considerably lower level than 2009.
37. Activity understandably reduces considerably in 2020 around the time of the Covid-19 pandemic. But it is nevertheless notable that the number of invoices provided for the year 2021 increases substantially from previous years to around 42. In contrast, the highest number of invoices provided in previous years is 21 in 2016. The invoices from 2021 more prominently relate to the delivery or receipt of crushed concrete, hardcore or other materials, in contrast to invoices in earlier years which largely related to groundworks or other contracting jobs. This supports the submissions of the WPA that there was an increase in the intensity of operations on the site in 2021, as well as the aerial image of provided by the WPA which shows larger stockpiles of materials and machinery at that time.
38. To my mind, those gaps in the evidence are substantial. In the absence of documentary evidence of the use taking place in those periods, it would not have appeared to the WPA that a breach of planning control had taken place such that they could have taken enforcement action at those points. The evidence before me suggests that use would have ceased at those points in time and any breach would have been remedied by the cessation. Thus, any commencement of the use thereafter would have amounted to a fresh breach of planning control and the time period for immunity under S171B(3) of the Act would have started again.

39. I conclude, therefore, that it has not been demonstrated that the material change of use of the Land to use for inert transfer/recycling yard including screening/crushing demolition waste took place on or before 29 October 2011 and continued uninterrupted for ten years thereafter, such that the WPA could have taken enforcement action against the use at any time in the period.
40. On that basis, at the date the LDC application was made, the use would not have been lawful in the context of S191(2) of the Act.

Conclusion

41. For the reasons given above I conclude that the Council's refusal grant a certificate of lawful use or development in respect of inert transfer/recycling yard including screening/crushing demolition waste was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

J Whitfield

INSPECTOR