



Appeal Decision

Site visit made on 24 July 2024

by Mrs H M Higenbottam BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 January 2025

Appeal Ref: APP/A2280/C/23/3315555

Land at Factory Farm, Wouldham Road, Rochester ME1 3TL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr John Treeby against an enforcement notice (the Notice) issued by Medway Council.
 - The notice was issued on 22 December 2022.
 - The breach of planning control as alleged in the notice is:
"Without planning permission, the material change of use of the land, to a mixed use for the importation, deposit, processing and transfer of waste, stationing of shipping containers for storage, vehicle breaking and repair, and a residential caravan site, including the construction of buildings, fencing, gates and hard surfacing ("the unauthorised use")."
 - The requirements of the notice are:
 - (i) Cease the Unauthorised Use of the Land
 - (ii) Remove from the Land any and all waste materials equipment, plant, containers, vehicles, caravans, park home buildings, fencing, gates, structures and any other items associated with the Unauthorised Use
 - (iii) Restore the Land to its condition before the Unauthorised Use took place.
 - The period for compliance with the requirement is: 6 months.
 - The appeal is proceeding on the ground[s] set out in section 174(2)(b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended).
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Decision

1. It is directed that the enforcement notice is varied by the deletion of 6 months and the substitution of 6 months for requirement 5 (i) and 9 months for requirements 5 (ii) and 5 (iii) as the periods for compliance. Subject to these variations the enforcement notice is upheld.

Application for costs

2. An application for costs was made by Medway Council against Mr John Treeby. This application is the subject of a separate Decision.

Appeal on ground (b)

3. This ground of appeal is directed to the consideration of whether the matters alleged in the notice have occurred as a matter of fact. The burden of proof is on the appellant and the relevant test in this case is the '*balance of probabilities*'.
4. The appellant considers that by not annotating the plan and simply putting a red line around the land owned by the appellant the Notice is incorrect.
5. In relation to what is alleged the appellant states the following:
 - Waste transfer - this has since ceased, and the Council has been made aware of this.

- Residential Caravan Site - there were two mobile homes being stored and the site is in no way a caravan site.
- Construction of buildings, fences and gates - the buildings, gates and fences are not new and have been in place for a period exceeding four years and were not erected in connection with any unauthorised use. The buildings can be seen on the aerial photos.
- Hardstanding – the aerial photos indicate a clear area of hardstanding.

Whether the site is a single planning unit

6. The appeal site is accessed by a single track road which the Council refer to as Brambletree Cottages off of Wouldham Road, approximately 0.5 miles west of Borstal. It is approximately 1.92 hectares in area.
7. The allegation relates to a mixed use with facilitating operational development. Paragraph 4(i) refers to the breach occurring within the last 10 years. The concept of a mixed use is one or more primary uses existing within the same planning unit. It is therefore necessary to assess whether or not the appeal site is a single planning unit and then whether the mixed use alleged is correct.
8. The leading case for determination of the planning unit is *Burdle*¹ which held that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct and occupied for different and unrelated purposes. Three broad categories of distinction were identified:
 1. A single planning unit where the unit of occupation has one primary use, and any other activities are incidental or ancillary;
 2. A single planning unit that is in a mixed use because the land is put to two or more activities, and it is not possible to say that one is incidental to another; and
 3. The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.
9. The whole of the site is owned by the appellant. The narrow part of the site as you enter from the south had, at the time of the site visit, 15 containers, 4 lockups and 7 compounds within it. To the northern end of the site, it appeared to be made up ground with no subdivisions. Large areas of the site appeared to be available to everyone using the site and there were vehicles and other items outside the compounds. The access and space between the compounds appear communal and available for use by any of the occupiers of the site. In my view, there is no clear physical and/or functional separation to be seen on the site such that separate planning units exist within. The appellant has not identified separate planning units and on the evidence available, and what I saw at the site visit, I consider that the site is a single planning unit. The purpose of the plan attached to the Notice is to identify the site and it is not required to be annotated. I find that the plan and redline adequately identify the site attacked by the Notice.
10. The Council has provided correspondence from the appellant as part of its evidence. In an undated letter replying to the Council's letter dated 12 January 2023, the agent for the appellant refers to the waste transfer facility use ceasing

¹ *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207.

and being cleared. It goes on to state that the appellant was under the impression the mobile homes were being stored and used as restrooms and refers to the residential element not being allowed to continue by the appellant and that it will cease/already has. The agent also refers to the appellant's poor health. In a letter dated 16 January 2023 the appellant's agent refers to storage but not a waste depot. The appellant refers to waste, vehicle repair/breaking being cleared and a B8 use in a letter dated 23 January 2023. It is also stated that there are unauthorised uses of the land and that these were not permitted by the owner.

11. The Council record that at the site visit on 25 August 2022 the officers were told by 'Jim' that he lived in a caravan on the site with agreement from the appellant. The caravans were occupied residentially. It is also recorded that the site contained vehicles, vehicle parts, trailers, full and empty skips, containers, caravans, boats, building materials, wood, tyres, plant machinery, tools, domestic items, and a park home. Waste was also noted as being deposited, transferred and processed by separation and burning, vehicles were being broken and repaired, shipping containers were being used to store items. The Council noted that gates, fences and buildings had been erected and hard surfacing installed to facilitate these uses.
12. The term caravan site is not defined in the Notice but it is clear that two caravans were on the site and have been lived in. The appellant has not proposed an alternative description for this element of the mixed use. I therefore consider it is an adequate description.
13. There are clearly hardsurfacing, fences, gates and buildings on the site. The appellant accepts that these exist on the site.
14. On the evidence before me, on the balance of probabilities, it has been demonstrated that the land has been used for a mixed use prior to the issue of the Notice, notwithstanding that some activities may have ceased subsequently. This comprised the importation, deposit, processing and transfer of waste, stationing of shipping containers for storage, vehicle breaking and repair, and a residential caravan site. It also included the construction of buildings, fencing, gates and hard surfacing. As such, the use and operational development did in fact occur. The development as alleged by the Notice has taken place as a matter of fact and the appeal must therefore fail on ground (b).

Appeal on ground (c)

15. An appeal on this ground is that, if the matters alleged have occurred, they do not constitute a breach of planning control. The onus of proof is on the appellant. The appellant is pursuing this ground only in relation to the fences and gates. He considers that the fences and gates are permitted development.
16. The Council state that the means of enclosure exceed more than 2 metres in height. The appellant states the fences and gates have not been identified and that they are compliant with permitted requirements of the land and do not require planning permission.
17. The appellant does not refer to any particular class of permitted development within the of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (2015 GPDO). Class A of Part 2 of Schedule 2 permits gates fences walls etc subject to certain conditions and limitations. The

appellant has not demonstrated that the fences and gates comply with the conditions and limitations of Class A of Part 2 of Schedule 2.

18. Furthermore, even if the fences and gates had been demonstrated to fall within the limitations and conditions of any class of permitted development, the Notice is framed as the gates and fences are facilitative of the breach of planning control attacked which is a material change of use. In *Murfitt*² it was held that where a Notice is issued in respect of a material change of use and works were carried out to facilitate the material change of use the Notice may require that the 'ancillary' works are removed in order that the site is restored to its previous condition and the breach is remedied. As such the permission granted by Schedule 2 does not apply by virtue of Article 3(5) of 2015 GPDO, because the use was unlawful.
19. The evidence does not substantiate that the gates and fences are permitted development for the reasons set out above. The gates and fences therefore required express planning permission which has not been obtained. As such the appeal on ground (c) fails.

Appeal on ground (d)

20. This ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. The burden of proof lies with the appellant. As such, he needs to show, on the balance of probabilities, that the mixed use for the importation, deposit, processing and transfer of waste, stationing of shipping containers for storage, vehicle breaking and repair, and a residential caravan site, began more than ten years before the notice was issued and continued without material interruption, for a period of ten years thereafter. The Notice was issued on 22 December 2022, so the appellant needs to show that the material change of use began not later than 22 December 2012 and continued without material interruption.
21. The appellant states that the land identified within the redline plan was used as a car park, and for storage of sewage pipes and heavy machinery by Morrisons Water. This was due to a new sewage pipe being laid under the adjacent river. This was carried out under permitted development by a statutory undertaker under Part 4 or Part 13. He also states that the storage area and associated hardstanding was never removed and never enforced by the Council. The Morrisons Water use is stated to have commenced in 2006/2007. It is not clear to me when Morrisons Water ceased using the site. However, the appellant believes that this evidence demonstrates an element of storage on the land in excess of ten years.
22. The allegation also includes the construction of buildings, fencing, gates and hard surfacing. The appellant states that the buildings on the aerial photographs were erected prior to the mixed use attacked in the Notice. He also states that they were erected more than four years ago, and they were not erected for the sole use of the unauthorised waste transfer and should therefore be immune from enforcement action along with the associated fences and gates.
23. The Council state that they have no record of any permissions in relation to Morrisons Water use of the land. The appellant has referred to Part 4 and Part 13. However, the appellant has not referenced the relevant GPDO document or the limitations or conditions that applied to such development under those parts of the

² *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598

relevant GPDO for 2006/7. In the current 2015 GPDO Part 4 relates to Temporary Buildings and Uses. The limitations and conditions require the land to be reinstated to its original condition as soon as reasonably practicable and so far, as reasonably practical after the Temporary Buildings or Use have ceased. As there is little information on the Morrisons Water use of the site it is not clear what Part 13 rights are being claimed.

24. At the 1 March 2013 site visit, the Council noted the site was unused except for a small deposit of aggregate and concrete blocks. In its view this did not amount to operational development, or a material change of use and that there was no storage use in 2013. Further evidence from the Council shows that the land at that time was enclosed by an agricultural style gate and was accessed via a track lined by hedgerow. There was an agricultural building in poor repair and a portacabin on the land. The photographs provided by the Council taken at the site visit support these findings. The appellant has not addressed this evidence, and it is therefore unchallenged. Although, the appellant does seek to rely on the Council's evidence to state that the B8 Storage use and hardstanding should be allowed as set out in the plan provided with the appeal documents.
25. An aerial photograph dated 7 March 2011 shows the appeal site green (probably grass or other vegetation) with hedging around the boundaries. In the first part of the site there are a few different coloured elements, which may be vehicles/lorry bodies/containers/structures. The aerial photograph dated 9 July 2013 shows bare earth where the different coloured elements had been and the land to the north is mainly still green (probably grass or vegetation). The aerial photograph dated 26 July 2014 shows a light-coloured strip going from the road towards the north of the site, possibly a dirt track. The land either side is mostly returned to green from the 2013 photograph.
26. On 25 August 2022, the Council conducted another site visit. They saw and recorded vehicles, vehicle parts, trailers, full and empty skips, containers, caravans, boats, building materials, wood, tyres, caravans, excavators, tools, domestic items, and a park home on the site. The Council considered that waste was being deposited, transferred, and processed, by separation and burning, and vehicles were being broken and repaired. The Council considered that parts of the land and buildings appeared to be used for the storage of a range of items ranging from construction materials and equipment to boats, shipping containers and domestic paraphernalia. The Council also noted that gates, fences, buildings, and hard surfacing had been constructed. In addition, it was noted at that time that a touring caravan and a park home appeared to be in residential use.
27. The Council served a Planning Contravention Notice (PCN) dated 25 August 2022 on the appellant and others. The appellant replied to the Council's letter dated 12 September 2022 and set out that he did not accept the PCN but provided answers to the questions in the PCN in any event.
28. A second PCN dated 30 August 2022 was served on various companies who were identified from skips carrying their company livery being on the land. They responded stating that they had no association with the site or the skips carrying their company livery, which they had sold in 2021.

29. The Notice the subject of the appeal, and a Stop Notice were issued on 22 December 2022. The Stop Notice required the importation, deposit, processing, and transfer of waste to cease.
30. The Council consider that the google aerial and street view photographs show that the unauthorised use began within 10 years of the date of the Notice.
31. The statements in the evidence of the appellant do not demonstrate when the mixed use for the importation, deposit, processing and transfer of waste, stationing of shipping containers for storage, vehicle breaking and repair, and a residential caravan site began. Furthermore, the evidence does not demonstrate that the mixed use for the importation, deposit, processing and transfer of waste, stationing of shipping containers for storage, vehicle breaking and repair, and a residential caravan site has been continuous since 22 December 2012. As such, I find that the mixed use for the importation, deposit, processing and transfer of waste, stationing of shipping containers for storage, vehicle breaking and repair, and a residential caravan site has not been demonstrated to be immune from enforcement action through the passage of time.
32. The appellant does not identify which buildings, fences, gates, or hardstanding he considers were in existence prior to the material change of use alleged, or what purpose those buildings or hardstanding were put to. In a letter dated 12 September 2022 he states:
- 'Buildings have been replaced new for old there were numerous dilapidated buildings in relation to the PCN question on erection of buildings that he replaced what was already there.
Front gate erected, middle gate and fence put in new for old replacing what was already there as can be confirmed by google earth'*
- The appellant does not provide a date when the buildings or gates were erected. The evidence is vague and imprecise in relation to the buildings, fences, gates, and hardstanding.
33. On the basis of the evidence before me, the purpose of the buildings, fences, gates and hardstanding are incidental to and facilitative of the material change of use, and they are not causative. No convincing evidence has been provided to the contrary, and having regard to the principles set out in *Murfitt* and which were more recently confirmed in *Caldwell*³, I find that the construction of buildings, fencing, gates and hard surfacing do not benefit from immunity from enforcement action.
34. The appeal on ground (d) fails for the reasons set out above.

Appeal on ground (f)

35. The Council has stated that the purpose of the Notice is to remedy the breach of planning control. Therefore, this ground of appeal is that the requirements exceed what is necessary to remedy the breach of planning control.
36. The appellant suggests that the breach of planning control could be remedied by allowing a B8 Storage Use to continue.

³ *Caldwell & Timberstore Ltd v SSLUHC & Buckinghamshire Council* [2024] EWCA Civ 467.

37. There is no ground (a) appeal before me, and ground (f) cannot be pursued to result in a grant of deemed planning permission under section 173(11). Moreover, as the allegation relates to a mixed use/composite use by pursuing a requirement to allow a B8 storage use to continue the appellant is seeking, in effect, a grant of a deemed planning permission under section 173(11) for matters other than those specified as constituting the breach of planning control.
38. Furthermore, I am clear that where the purpose of the Notice is to remedy the breach of planning control, any lesser step that would not remedy the breach cannot be accepted through ground (f).
39. The requirements go no further than securing the cessation of the unauthorised use and the removal of facilitative operational development (buildings, hardstandings, fencing and gates to facilitate the mixed use development). As such, the requirements go no further or beyond simply remedying the breach and are not excessive.
40. The appeal on ground (f) fails.

Appeal on ground (g)

41. This ground of appeal is that the time given to comply with the Notice is too short. The Council have given six months for compliance. The appellant seeks an extension of the compliance period to twelve months to relocate any relevant business and 18 months to remove all resultant materials/waste.
42. The appellant has not provided substantiated evidence to demonstrate why a longer period of compliance is either necessary or justified in relation to any specific business. However, the appellant in the letter of 23 January 2023 stated that it is a large site and that clearing it will necessitate finding a big enough company to take all the waste and cars. As such, he considers a 12-month compliance period is justified.
43. The Council in response to that letter on 9 February 2023 state that, in the circumstances set out, it would accept an extended compliance period for steps (ii) and (iii) to 9 months.
44. On the basis of the evidence before me I find no substantiated or demonstrable justification to support the extension of the compliance period in relation to ceasing the use (requirement (i)). I consider the compliance period of six months, on the basis of the evidence before me, to be a reasonable period in which to cease the use. I accept that a slightly longer period would be reasonable in relation to clearing the site and restoring the land and will extend the compliance periods for requirements (ii) and (iii) to 9 months.
45. For the reasons given above I conclude that the period for compliance with requirements (ii) and (iii) should be increased to 9 months due to the size of the site. I shall therefore vary the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to this limited extent.

Hilda Higenbottam

INSPECTOR