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## Appeal Decision

Site visit made on 30 July 2024

by **F Cullen BA(Hons) MSc Depp MRTPI IHBC**

an Inspector appointed by the Secretary of State

Decision date: 07 April 2025

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**Appeal Ref: APP/U2750/C/23/3325027**

**Ibbotsons, Mill Hill, Braegate Lane, Colton, Tadcaster LS24 8EW**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended).
- The appeal is made by Yorkshire Initiatives Limited against an enforcement notice issued by North Yorkshire Council.
- The notice was issued on 26 May 2023.
- The breach of planning control as alleged in the notice is 'Without planning permission, the unauthorised material change of use of the agricultural buildings and land to a commercial use for the storage, processing (sorting, washing, bagging) and distribution of imported produce at the Land along with the unauthorised buildings and the associated engineering works (hardstanding's, water tanks and lagoons).'
- The requirements of the notice are to:
  - Step 1: Cease the unauthorised use of the buildings and surrounding Land (as identified on the enclosed plan) for storage, processing (sorting, washing, bagging) and distribution of imported produce by Braegate Produce;
  - Step 2: Cease the use of the hardstanding area to the rear of the site (highlighted with the hatching on the enclosed plan) for outdoor storage;
  - Step 3: Remove the hardstanding areas (as indicated on the attached plan) from the Land; and
  - Step 4: Remove the lagoons from the Land (as identified on the attached plan) by infilling the basins with soil and sowing grass seed/laying turf to the area.
- The periods for compliance with the requirements are:
  - Step 1: 12 months.
  - Step 2: 14 months.
  - Step 3: 16 months.
  - Step 4: 16 months.
- The appeal is proceeding on the ground[s] set out in section 174(2)(a) and (d) 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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**Summary Decision: The appeal is allowed following correction of the enforcement notice in the terms set out below in the Formal Decision.**

### Preliminary Matters

1. On 1 April 2023 Selby District Council merged with a number of other Councils to form the new unitary authority of North Yorkshire Council. Development plans for the merged Councils remain in place for the area within the new Unitary Authority they relate to until such time as they are revoked or replaced.
2. In December 2024 the Government published a revised version of the National Planning Policy Framework, to which I have had regard in determining the appeal. Policies in the Framework that are material to the determination of this appeal have not fundamentally changed. Therefore, I have not sought the views of the main

parties on the revised version and I am satisfied that their interests are not prejudiced by this approach.

3. Paragraph 3 of the enforcement notice (the notice) refers to the alleged breach of planning control (BoPC) as being 'without planning permission' and 'unauthorised'. The notice is concerned with a breach of planning control rather than other areas of legislation, and therefore the former is the more appropriate. The words 'unauthorised' within the BoPC are superfluous and I shall delete them.
4. The power under section 176(1)(a) of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended) allows that a notice may be corrected provided that no injustice would be caused by doing so. I am satisfied that no injustice would be caused by correcting the notice in the above respect.
5. On my visit no activities/operations were taking place at the site. The buildings were mostly empty and one of the two water tanks<sup>1</sup> cited in the alleged BoPC, had been removed. The appellant confirmed that the site had ceased operating and closed down. The Council were not aware of this. For the avoidance of doubt, I have determined the appeal on the basis of the operation and circumstances at the site when the notice was issued and from the evidence before me.

#### **The appeal on ground (d)**

6. The appeal on ground (d) is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. On this ground of appeal, the onus is on the appellant to make out their case to the standard of the balance of probabilities.
7. The alleged BoPC includes the material change of use (MCU) from agricultural to commercial / storage, processing and distribution; and the operational development of buildings and engineering works. There is no dispute between the parties that the alleged MCU and operational development have occurred. The crux of the disagreement is when these matters occurred or were substantially completed.
8. In terms of time limits of when enforcement action may be taken, the Council's reasons for issuing the notice sets out that the MCU of the land has occurred within the last 10 years, but does not reference any time limit in relation to the operational development on the land.
9. However, in its statement, the Council submits that the land where the lagoons are located is outside the planning unit for Ibbotson's potatoes and asserts that there was a change of use of this land within the last 10 years. The Council does not explain why it considers the land to be a separate planning unit, or what the change of use of this land from agricultural is to.
10. It is held in settled caselaw 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; the concept of physical and functional separation is key.

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<sup>1</sup> Also referred to as water towers.

11. There is no substantive evidence before me which demonstrates that the area of land where the lagoons are situated was physically separate and distinct, and occupied for different and unrelated purposes to that of the rest of the land which is the subject of the notice. Consequently, it is reasonable to conclude that, historically, this land formed part of a single planning unit which had a primary use of agricultural, with other uses/activities, such as storage and distribution, which were ancillary to that use. Moreover, that the MCU to storage, processing (sorting, washing, bagging) and distribution still forms a single planning unit, where the unit of occupation has a primary use of storage and distribution, with other uses/activities, of processing, being ancillary to that use. The associated operational development of buildings and engineering works facilitate the use.
12. Having regard to the above, and for the avoidance of doubt, I have assessed the site on the basis that it is a single planning unit. Section 171B of the 1990 Act as amended sets out the time limits within which enforcement action may be taken.
13. In relation to the MCU, section 171B(3) states 'no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.' In relation to the operational development, section 171B(1)<sup>2</sup> sets out no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
14. In this context, the determination of the appeal under this ground concerns whether the appellant has demonstrated on the balance of probabilities, that the alleged MCU began more than 10 years before the date of the issue of the notice, namely before 26 May 2013, and continued without material interruption for a period of 10 years thereafter, so as to be immune from enforcement. Additionally, that the operational development was substantially complete more than four years before the date of the issue of the notice, namely before 26 May 2019, so as to be immune from enforcement.
15. In considering this ground of appeal, I am mindful that it is held in settled caselaw that evidence should not be rejected simply because it is uncorroborated. If there is no evidence to contradict the appellant's version of events or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted<sup>3</sup>.

*Material change of use*

16. The MCU as alleged in the notice is, 'the use of the agricultural buildings and land to a commercial use for storage, processing and distribution of imported produce'. The reasons for issuing the notice reference a change of use from agriculture where the use of the land and buildings within the site are a supplementary operation to the original associated farm holding, to a commercial operation for the processing, storage and distribution of potatoes, which involves the reuse of the existing buildings for employment purposes and an associated increased activity on site.
17. As set out above, it is common ground between the parties that the alleged MCU has occurred. However, there is disagreement as to when it took place, with the appellant advancing that the land and buildings changed from a primary agricultural

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<sup>2</sup> The time limit set out in section 171B(1)(a) was amended on 25 April 2024. However, the transitional provisions for this means that the amendment does not apply where the breach occurred before the day on which that section came into force.

<sup>3</sup> *Gabbitts v SSE & Newham BC* [1985] JPL 630.

use to a primary B8 storage and distribution use with onsite processing over 10 years prior to the issue of the notice; and the Council submitting that the MCU occurred around 2017/2018 when the land and buildings changed ownership and there was an increase in activity on the site<sup>4</sup>.

18. The concept of an MCU is not defined in statute or statutory instrument. The basic approach is that, for an MCU to have occurred, there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.
19. Consideration must be given to the relevant planning unit and its primary use over the relevant period. It may be necessary to go back more than 10 years to establish when the BoPC began and to consider not only when the MCU took place, but whether the use continued for a 10 year period.
20. The appellant submits that, during the 1990s and 2000s, there was change in the activities undertaken on the site. These involved not only the storage/ distribution of produce from the associated farm holding, but also the import of produce from a number of external producers in the wider area, to be stored, washed, bagged and distributed, with a letter from the Council in 2001, describing it falling within Classes B2 (General Industrial) and B8 (Storage and Distribution).
21. Additionally, that this change was in conjunction with an increase in the extent and level of activity within the site during this time. This is supported by the applications for planning permission in relation to storage areas and an office building<sup>5</sup> as well as an application for Building Regulations for a mezzanine and staff accommodation.
22. However, the information provided relating to this period is neither precise, nor continuous, in verifying the detail of the operations and their scale on site. I am also mindful of the differences in the descriptions of the activities on site between officer reports relating to the applications for planning permission cited above<sup>6</sup>. In these respects, the submitted evidence for this period does not indicate a significant difference in the character of the activities from what had gone on previously to confirm that an MCU had occurred.
23. The appellant has provided more detailed and comprehensive evidence of the activities and their scale being undertaken within the site over the period of 2011/2012/2013 through to the time of the issue of the notice. This includes invoice sheets for purchases and sales, along with details of the site's HGV operator's licence and corroborative statutory declarations.
24. The information confirms that, during the relevant period, produce was being imported into the site and then distributed to multiple customers; and that the site had an HGV operator's licence for, a not insubstantial, seven HGVs and 50 trailers. The assertion that storage and distribution was the primary use at this time is further supported by the payment of business rates since 2010, which the appellant highlights agricultural buildings are exempt from; and the construction of the water towers and excavation of the lagoons around 2013 (see below). Taking the

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<sup>4</sup> Confirmed by Companies House details.

<sup>5</sup> Application Refs CO/1997/0145; CO/1997/0326; CO/1998/0946; and 2008/1118/FUL.

<sup>6</sup> 1997 Officer Report 'the site provides a central point for the storage of potatoes from several farms, rather than for the storage of potatoes specifically grown by the applicant. A potato washing and sorting operation also runs from the site'; and 2008 Officer Report acknowledges that the site is a potato storing, processing and distribution facility, but states that 'a minority of the potatoes processed and distributed at the facility are imported from separate farms'.

evidence together, I am persuaded that, on the balance of probabilities, there was a change in use of the site around that time.

25. It is difficult to determine an exact date at which the MCU occurred, with the process being more of a cumulative, but appreciable, change. Nonetheless, having regard to the information provided as a whole, I am satisfied that as a matter of fact and degree there is sufficient evidence to demonstrate that there was a significant change to the character of the activities from what had gone on previously prior to 26 May 2013. Namely, that the historic primary use of the site of agricultural with an ancillary use of storage/distribution, was fundamentally changed to a primary use of storage and distribution, with some on site processing.
26. Moreover, whilst there may have been seasonal fluctuations in the scale of the activity on site over this period, as a matter of fact and degree, there is no substantive evidence which indicates that there was any material interruption to that use for 10 years. In other words the Council could have taken enforcement action against the use at any time in this 10 year period.
27. I note the Council's comments regarding the sale of the site to Yorkshire Initiatives Limited in 2017, which appears to coincide with an increase in the activity on the land at that time. Whilst I acknowledge that the intensity of the use may have further increased at this point in time, I am of the opinion that, on the balance of probabilities, an MCU had already occurred prior to 2013.
28. That the appellant submitted applications in the first instance to regularise the MCU and operational development does not, in my opinion, demonstrate that they questioned the lawfulness of these matters. As such, it does not alter my conclusion.
29. Consequently, taking the evidence as a whole, I conclude that, on the balance of probabilities, the MCU began more than 10 years before the date of the issue of the notice, namely before 26 May 2013, and continued without material interruption for a period of 10 years thereafter, so as to be immune from enforcement.

#### *Operational development*

30. The operational development cited in the alleged BoPC comprises hardstandings, lagoons and water tanks.
31. The extent of the 'hardstandings' are as shown on the plan attached to the notice and relate to internal roads, paths and storage areas. At the time of my site visit, the internal road and storage area comprised a combination of concrete base hardstanding and what appeared to be compacted broken stone/gravelled hardstanding. The path, indicated by the hatched line on the southern edge of the site comprised a narrow gravelled track.
32. The appellant sets out that all of the hardstanding cited in the notice was completed by 2017, which they advance is corroborated by an invoice dated May 2017<sup>7</sup> and statutory declarations<sup>8</sup>. No detailed evidence has been provided with regard to specific areas of the 'hardstandings'.

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<sup>7</sup> Exhibit D(6) JL6. Invoice for works including 'digging out for part of new hardstanding parking area and spreading stone already on site and digging out concrete floor in potato store and stockpiling on new stoned area'.

<sup>8</sup> By Antony Edwards (para 7) and Jayne Lazenby (para 14).

33. Be that as it may, the Council has not directly challenged, nor provided any evidence of its own to contradict, this claim. Moreover, aerial photographs<sup>9</sup> appear to show the internal road and storage area hardstandings having been laid down at some point between 2017 and 2018. Although the narrow width of the route, local tree cover and quality of some of the aerial images mean that it is more difficult to detect the presence of the path at this time, a track of some form in this location appears to be present in June 2018.
34. Consequently, on the balance of probabilities, I conclude that the 'hardstandings' on the land were substantially complete more than four years before the date of the issue of the notice, so as to be immune from enforcement.
35. The lagoons comprise four adjacent rectangular pits that manage the water from the processing of the potatoes (washing). The appellant's evidence sets out how the lagoons operate, the first receives the water, two are settling lagoons where silt builds up, that is periodically dug out into the fourth pit, which fills with material. The latter can become vegetated which makes it difficult to see in aerial images. At the time of my site visit all of the land where they are located was heavily vegetated and overgrown.
36. The appellant submits that they were relocated from elsewhere on the site and constructed there in 2013, as confirmed by an invoice dated September 2013<sup>10</sup> and statutory declarations<sup>11</sup>. The Council set out that aerial images show there are no lagoons in this location in May 2013. Although the Council accepts some works appear to have been undertaken by April 2014, it asserts that 'they do not appear to have been created' and 'grass is still visible'. Nonetheless, the Council's evidence acknowledges the existence of a 'lagoon area' at around 2014/2015, but highlights the changing nature of the presence of the lagoon pits with only two or three of them being visible in images at different times over the last 10 years.
37. Having regard to the appellant's evidence concerning the nature of the lagoons and how they operate, it is reasonable to conclude that the pits would not necessarily readily display the presence of water in aerial images, and would be predisposed to the growth of vegetation within them. On this basis, I am satisfied that the appellant's evidence demonstrates that the lagoons were substantially complete by September 2013 which ties in with the construction of the water towers nearby.
38. In any event, given my earlier findings that this land is part of a single planning unit and that the creation of the lagoons is operational development, the evidence is clear, and the Council accepts, that the lagoons were substantially complete well before the relevant date of 26 May 2019.
39. Consequently, on the balance of probabilities, I conclude that the construction of the lagoons on the land was substantially complete more than four years before the date of the issue of the notice, so as to be immune from enforcement.
40. At the time the notice was issued, the two water tanks referred to in the notice were located to the south-east of the lagoons. The appellant submits that they were relocated from elsewhere on the site and constructed there in 2013, with the statutory declarations attesting to this<sup>12</sup>. No other evidence has been advanced in

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<sup>9</sup> In the Council's evidence.

<sup>10</sup> Exhibit D(6) JL5. Invoice for 'Excavation of Lagoons'.

<sup>11</sup> By Antony Edwards (para 6) and Jayne Lazenby (para 13).

<sup>12</sup> By Antony Edwards (para 6) and Jayne Lazenby (para 15).

respect of this. Even so, the Council has not challenged, nor provided any evidence of its own to counter this assertion.

41. Having regard to the information before me, given the fairly modest size of the water tanks, tree cover in this part of the site and quality of some of the aerial images, it is difficult to decipher the presence of water towers in this location in 2013. However, it is reasonable to conclude that they would have been constructed at around the same time as the lagoons, for which the evidence set out above is more compelling. On this basis, I am satisfied that they were constructed and substantially complete in this location in 2013.
42. Even if I had not accepted this date as the date of their construction being substantially complete in this location, which I have, the aerial image dated June 2018, clearly shows the presence of two water towers, which is before the relevant date of 26 May 2019.
43. Consequently, on the balance of probabilities, I conclude that the erection of two water tanks on the land was substantially complete more than four years before the date of the issue of the notice, so as to be immune from enforcement.
44. Drawing all of the above together, I am satisfied that, on the balance of probabilities and as a matter of fact and degree, the operational development set out within the alleged BoPC in the notice was substantially complete more than four years before the date of the issue of the notice, so as to be immune from enforcement.

### **Other Matters**

45. I note the representations received in relation to the applications for planning permission and a certificate for lawful use or development at the site, which raised matters in relation to the planning merits of the development. However, as I have found the MCU and operational development to be lawful, the planning merits of the development do not fall to be considered.

### **Conclusion**

46. On the balance of probabilities, the appeal on ground (d) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control.
47. The enforcement notice will be corrected and quashed. In these circumstances, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended does not fall to be considered.

### **Formal Decision**

48. It is directed that the enforcement notice is corrected by:
  - In paragraph 3, the deletion of the words 'unauthorised'.
49. Subject to the correction, the appeal is allowed and the enforcement notice is quashed.

*F Cullen*

INSPECTOR