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## Appeal Decision

Inquiry held on 13 - 15 January 2015

Site visit made on 15 January 2015

**by Katie Peerless Dip Arch RIBA**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 24 February 2015**

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**Appeal Ref: APP/Q1770/C/14/2219401**

**Land to the rear of Shedfield Nursery and Equestrian Centre, Botley Road, Shedfield, Southampton, Hampshire SO32 2HN**

- 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 appeal is made by Mr Christopher Collins against an enforcement notice issued by Hampshire County Council.
  - The Council's reference is APP/Q1770/C/14/2219401.
  - The notice was issued on 16 April 2014.
  - The breach of planning control as alleged in the notice is the change of use of land to importation, storage and treatment of waste, exportation of screened soils, crushed concrete and other recycled aggregates.
  - The requirements of the notice are: (1) Cease the importation of waste. (2) Cease the importation and treatment of waste, including screening and crushing of waste. Remove all screening and crushing plant and equipment from within the compound indicated on the plan attached to the enforcement notice. (3) Cease the storage of waste on the land. Remove any stocks of unprocessed waste or processed materials from within the site.
  - The period for compliance with the requirements is: (1) within 2 days. (2) and (3) within 3 months.
  - The appeal is proceeding on the grounds set out in section 174(2)(b), (d) and (g) of the Town and Country Planning Act 1990 as amended.
  - All the evidence apart from that of Mr Storey and Mr Atkins was given under oath.
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### Decision

1. The enforcement notice is corrected by the substitution of the plan annexed to this decision for the plan attached to the enforcement notice. Subject to this correction the appeal is allowed and the enforcement notice is quashed.

### Main Issues

2. On ground (b): whether the enforcement notice correctly identifies the areas on which the breaches of planning control have occurred.

On ground (d): whether the uses enforced against have been carried out continuously on the site for at least 10 years prior to the issue of the notice and

On ground (g): whether the times for compliance are reasonable.

### **Procedural matter**

3. At the opening of the Inquiry, the appellant's barrister asked the County Council to demonstrate that the enforcement notice (EN) had been signed by a person with the authority to do so. It appeared that it was not signed in person by the Head of Legal Services, but on his behalf by someone working for the County Council.
4. On the morning of the last day, the Council produced statutory declarations from the solicitor who signed the EN and from the Council's Principal Solicitor relating to the signing of the document, together with extracts from the Council's Constitution and the Scheme of Authorisation for delegation. These documents demonstrated that there is a procedure that allows the signing of certain legal documents such as an EN, which would normally be done by the Head of Legal Services, to be delegated to another Officer.
5. However, the Council also drew attention to an 'anomaly' caused by the fact that, at the time the EN was signed, the Constitution had been recently updated by the inclusion of an additional chapter and the numbering of the paragraph relating to delegation had changed from 14.3 to 15.3. This was not updated in the Scheme of Authorisation which still referred to the powers conferred under paragraph 14.3. This error has now been corrected but the appellant submits that, at the time the EN was issued, there was no authority in place for it to be signed by the solicitor, as there was no clear link between the documents. He submits that the mismatch between the Constitution and the Scheme of Authorisation has consequently rendered the EN a nullity.
6. The Principal Solicitor gave evidence and agreed that '*as a matter of strict construction*' there was no authority for anyone to sign the EN on behalf of the Head of Legal Services. In re-examination he qualified this answer by stating that '*as a matter of purpose of approach*' there was such authority as there had been no change in the wording of either the Constitution or Scheme of Authority and the numbering issue could be regarded as a typographical error that did not affect the substance of the documents. To support the Council's case that this is a technicality that does not render the notice a nullity, I have been referred to paragraph 9.04 of Chapter 9, Section 4 of 'The Interpretation of Contracts 5<sup>th</sup> Edition' – Lewison, *Fenclose Securities Ltd v Derby City Council* and the comments in the JPL on *Cheshire CC v SSE 1988 JPL 30*.
7. It seems to me that there is no question that, at all times, the Constitution allowed for the signature of legal documents by the Head of Legal Services to be delegated. The Scheme of Authority lists the hierarchy of how that delegation will take place. The wording of the 2 documents did not vary between the different versions and, had the wrong paragraph in the Constitution been consulted to check the authority, it would clearly have been seen to be a mistake. Nevertheless, the correct paragraph was contained in the Constitution and was not rendered inoperative by the typographical error in the Scheme of Authority.
8. Consequently, I conclude that the power to sign on behalf of the Head of Legal Services was not extinguished by the mistake in the Scheme of Authority and the enforcement notice is consequently not a nullity.

## Site and surroundings

9. The land owned by the appellant includes not only that identified in the EN but also additional areas adjacent to it that include a shop and associated car park and an equestrian centre with stables where horses are kept at livery. The compound where the appellant says the waste screening operation has been taking place for many years is positioned centrally on the southern boundary of the land holding and is accessed via a track leading from the main entrance to the whole complex, which is situated on Botley Road.
10. At the time of the site inspection, the waste operation was confined to the fenced compound, which contained stock piled materials, both treated and untreated, a screener, a crusher and an inner compound containing further materials and equipment. The materials included construction and demolition waste, road scalplings, screened soil and imported sand and shingle.

## Planning history

11. The Environment Agency (EA) issued a waste removal notice in 2004 alleging that the appellant was importing waste materials and screening them on the site. The appellant lost an appeal against this notice and was asked to remove the waste. The EA reported in May 2005 that the site was '*improving*'.
12. In November 2005, the EA again visited the site and subsequently wrote to the appellant telling him that the activities that he was undertaking (which he claimed was screening imported waste to produce soil for use on site) would be exempt from the requirement to obtain a licence provided the exemption was registered and the activities complied with the terms of the exemption. The appellant obtained the exemption which was in place by January 2006, and continued with that activity. This exemption did not, however, remove the need to obtain any planning permission required for this operation.
13. Following a complaint, the County Council visited the site in January 2006 and a contemporaneous note recorded that, whilst soil was being imported onto the site and was being screened, it was then being used to improve the agricultural land which is part of the equestrian operation outside the compound. The County Council subsequently wrote to the appellant confirming that screened soils could be used in connection with levelling and landscaping small areas of field but that no screened soils should be exported from the site.
14. In 2012, an enforcement notice was served on the appellant requiring him to cease the carrying out of landraising activities on an area towards the south west of the site and including some land on the neighbouring property. This notice was, apparently, complied with.
15. The appellant applied for Lawful Development Certificates on 2 occasions, in 2012 and 2014, for the activities alleged in the EN subject of this appeal, and both were refused.

## Reasons

### *Ground (d)*

16. The appellant claims that he has been importing, screening, crushing and then exporting waste at the compound for more than 10 years prior to the issue of the EN on 16 April 2014 and that these activities are therefore immune from enforcement action.

17. To support his own evidence, he called witnesses who confirmed that waste materials had been imported into and exported from the site for the relevant period. These witnesses include his son, who runs a landscaping business that uses products from the site, an employee who was the former manager of another waste transfer site in the appellant's ownership and who was also employed as transport manager for the appeal site and a former employee who drove lorries to and from the site.
18. The Council accepts that the activities have been going on for some time, as evidenced by the issue of the Waste Removal Notice in 2004 but believes that the activities ceased after the notice was issued and did not re-commence until late 2005/early 2006 (the disputed period). It submits that this break 're-set the clock' in terms of the 10 year immunity period, which has not, therefore, been achieved.
19. It notes that, despite visits from the EA and County and District Council Officers during this period, no record was made of any unauthorised activities taking place. However, the evidence of the appellant's witnesses is that there was no change in the type of activities carried out during the disputed period from those undertaken before and after it.
20. It was accepted at the Inquiry that waste was being brought to the site and screened to produce soil for use on the land during the disputed period and, following the issue of the exemption by the EA, the Council appeared to regard this as an authorised activity. It was also agreed that surplus material from the screening process would have been removed from the site on an occasional basis by lorry.
21. It is clear that lorries have brought waste to the land at Shedfield for screening on site since at least 2004 and that this process has continued up to the present day. It is therefore only the alleged '*exportation of screened soils, crushed concrete and other recycled aggregates*' that could now be enforced against.
22. It is a well established principle that, if the evidence produced to support an appeal on ground (d) is sufficiently precise, unambiguous and not contradicted by other evidence sufficient to make the appellant's version of event less than probable, the appeal should succeed. In this case, a considerable weight of oral evidence on behalf of the appellant was given, under oath, to the Inquiry. This is supported by some documentary evidence and other written evidence from third parties.
23. However, the documentary records for the disputed period are not complete as three of the companies operating from the site have since gone into liquidation<sup>1</sup> and the loss adjusters removed the majority of the paperwork. Neither has the EA kept full records of its activities and site visit notes from that time and the Council's written records during the disputed period relate only to 4 site visits, 2 of which took place in October 2005 and 2 in January 2006.
24. Although the documentary evidence is incomplete, there seems to me to be no absolute requirement for specific and precise oral evidence given under oath to be confirmed in written form. Although such documentation might strengthen the appellant's case, lack of it does not necessarily make the evidence less credible.

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<sup>1</sup> Swanwick Construction went into administration in 2008 and Swanwick Civil Engineering in 2011. J&W Demolition and Recycling Ltd ceased trading in 2011.

25. The evidence of the appellant and his witnesses has been criticised as being evasive and unreliable but, in respect of that given at the Inquiry relating to the operations on the site during the disputed period, I find it to be generally consistent. Mr Collins Snr. (the appellant) accepted that he was aware that he needed to avoid enforcement action for a period of 10 years to obtain immunity for the activities on site. He gave this as one of the reasons for obtaining the exemption from the EA for screening soils in 2005/6 so that he could '*get the established rights to carry on doing what we had been doing for years*'. He stated that he did not specifically draw the Council's attention to the exportation of materials from the site at the times of the visits or on the responses to the planning contravention notices (PCN) issued in 2006 because he knew this activity was considered to be unauthorised. However, he maintained that he answered all the questions he was asked on site truthfully, albeit perhaps not fully.
26. These questions and those asked in the 2 PCNs with which he was served appear to have been deliberately taken literally by Mr Collins and the answers given were consequently narrowly focused. For instance, when the PCN asked '*are you using the land for any of the activities outlined above?*', although he mentioned the land raising operations being carried out with the soil produced on the land, Mr Collins did not refer to the other waste operation because it was '*other people who were doing it, not me*'. Similarly, when he was asked if soil was being exported from the site in early 2006 he said that it was not, because it was not happening at that particular moment.
27. Mr Collins appears to have had regular dealings with the authorities on planning and environmental matters and was aware of the time limit necessary to become immune from enforcement action. I consider that he tailored his answers to questions to give the impression that he was not carrying out unauthorised activities whilst, in fact, continuing to do so.
28. These kinds of evasive answers have naturally cast doubt on the reliability of what Mr Collins had to say when questioned under oath but the evidence given by his other witnesses nevertheless supports his version of events and there is no other clear contradictory evidence to indicate that it is incorrect.
29. The EA noted in February 2005 that the '*site was improving*' and that by October 2005 the waste operations had '*appeared to cease*'. Neither of these statements is definitive nor do they positively indicate that there was no unauthorised activity taking place. It must also be remembered that the appellant had been required to remove waste from the site by the EA notice and loaded lorries leaving the site would be needed to achieve this. It would, I consider, be difficult to distinguish between these lorries and those taking other waste from the site on an unauthorised basis.
30. In January 2006 the EA said that they had no evidence of the exemption being breached, but there is no detail of whether they had visited the site to confirm this or whether they were relying on the fact that they had not been informed of any breach. Neither is it definitive that no lorries were observed leaving the site loaded with products of a screening operation or other materials at the time of the County Council's site visits. The Council took Mr Collins' answer that no soils were being exported from the site at face value but, as noted above, it is now submitted that this answer did not reflect the wider situation that other witnesses now confirm was actually occurring.

31. At my site inspection there was no screening taking place due to the adverse weather conditions that had made the imported materials too wet to process. An operation of this type is necessarily dependent on such factors and the level of activity on site will consequently vary. It is also the case that Mr Collins has carried out a considerable amount of work on the wider area of land under his control, including using recycled materials to lay down new tracks across it. The extent of exportation would therefore have fluctuated to a certain extent, depending on how much waste could be processed and used in this way. It is consequently entirely possible that no loaded lorries would leave the site during a site visit lasting up to an hour or so. The fact that the Council did not observe exportation of waste in 2005/6 on its limited number of short visits is therefore not, to my mind, necessarily inconsistent with the appellant's evidence, either at the Inquiry or previously to it.
32. A fluctuation in the level of exportation is not, however, an indication that the overall scope of the activities on site, which also consisted of the importation of waste materials and their screening and processing on site, ceased during 2004/6 such that there was a period in which the Council could not have taken enforcement action. The different operations taking place on a site such as this are naturally going to vary in intensity over time but this does not mean that they ceased for a period long enough to 'reset the clock' in enforcement terms.
33. One of the witnesses, Mr Ian Cox, was very specific about the operations taking place on the Shedfield site. He was involved with the J&W Group of companies for 30 years and was retained as a director when the group was bought by Mr Collins. He has qualifications which allow him to manage a waste transfer station and he undertook this role for the site at Shedfield, whilst based at the J&W Ltd. site in Woolston, visiting Shedfield, I am told, about twice a week. He was also the transport manager for Shedfield, so was in a position to know where lorries at the site were coming from and going to, both for the Swanwick companies and the J&W Group.
34. He specifically confirmed that materials were being exported from the site in 2004/6, which ties in with the evidence of Mr Russell Collins who explained that lorries from both J&W Ltd and the Swanwick companies would work from the Shedfield site and deliver to and export materials from it, either to use on sites where they were working as contractors or to deliver to customers purchasing the materials from them.
35. The evidence of what the Council's witnesses saw, or did not see, on site is not necessarily inconsistent with the appellant's version of events and, given the extensive use of the site in the years before and after the disputed period, it does not render the appellant's claims less than probable.
36. In these circumstances, I consider it likely, that the continuing importation of waste for the purpose of producing soil provided a convenient distraction from the wider activities that continued throughout the relevant period. Therefore, on the balance of probabilities, I find that the unauthorised use had continued for at least 10 years prior to the issue of the EN.

*Ground (b)*

37. On this ground of appeal, the appellant submits that the 'red line', delineating the extent of the land to which the enforcement notice applies, has been too widely drawn. Although the equestrian centre and shop area are excluded, the remainder of the land, including paddocks and woodland are not and the appellant considers that the alleged unauthorised uses have not taken place outside the fenced compound and the vehicular access to it.

38. He submits that the fenced compound is, in effect, a separate planning unit from the remainder of the land and is physically and functionally separate from it. The County Council, at the Inquiry, conceded that the 2 paddocks to the east of the equestrian centre could be omitted from the notice and that, possibly, the area of woodland and pasture to the west could similarly be excluded. It was agreed that there would be no injustice to the appellant if the area of the EN plan was smaller than originally drawn.
39. The reason the County Council considers that the notice should include the remainder of land outside the compound is that it has previously recorded land improvement works taking place there, using materials produced by the screening process. It has also noted spoil heaps and the screener located outside the compound.
40. The appellant claims that the process of importing waste materials, screening them and then exporting the products of the screening is a separate operation from that of using screened soils to improve the quality of the remainder of the land. I agree that the fact that the soil for spreading is produced on adjacent land does not necessarily mean that the 2 operations are functionally linked, such that the areas form a single planning unit. The other land is still being used for agriculture and purposes connected with the equestrian centre and there is no indication that it is sharing any mixed use with the activities in the compound. The fact that some soil from the compound has been used on it is not determinative.
41. However, I would take a different view if the land outside the compound was being used for the processing, storage or onward distribution of material imported by the screening business or that was not specifically intended for use only on that land. The County Council has claimed that it has seen such waste on parts of the land, but I have no specific evidence of where or when this took place.
42. All that was evident from the site visit was that, where land levels have been altered, this has been done using soil which can then be seeded and used for pasture. If the operation in the compound had not been present, this soil could have been imported from elsewhere, screened on the site and legitimately used for improving the land. The fact that it came from the business operating within the compound does not indicate that the unauthorised activities enforced against were taking place outside that area. Similarly, the fact that a screener and soil stockpiles were on land outside the compound and were being used to produce soil suitable for landscaping that land does not link this activity to the others enforced against, i.e. waste importation, concrete crushing etc.
43. I have accepted the appellants other evidence in respect of the site and I see no reason to disbelieve his assurance that the waste screening operations have only been taking place in the compound. Although the enforcement notice will be quashed because of the acceptance of the evidence for the ground (d) appeal, it is nonetheless important to clearly define the area on which the activities took place so that the remaining areas are not, by default, authorised for the waste use established for the compound through the passage of time.
44. I therefore conclude that the compound is a separate planning unit and that the area in the EN should be reduced to include only it and the access to it. I will attach a revised plan to this decision indicating the areas that should now be included and the appeal on ground (b) succeeds to this extent.

## **Conclusions**

45. From the evidence at the Inquiry I conclude that the plan attached to the EN is incorrect, in that it should include only the compound and access to it. Accordingly the appeal should succeed on ground (b) to this extent. I shall correct the extent of the land included on the plan attached to the notice to reflect this.
46. As to the appeal on ground (d), I am satisfied on the evidence that the uses alleged have been carried out continuously for 10 years prior to the issue of the EN and the appeal on this ground should succeed in respect of those matters which are stated in it as constituting the breach of planning control. In view of the success on legal grounds, the appeal under ground (g) as set out in section 174(2) of the 1990 Act as amended does not fall to be considered.

*Katie Peerless*

**Inspector**



## **APPEARANCES**

### **FOR THE APPELLANT:**

Wayne Beglan	Of Counsel
He called	
Christopher Collins	Appellant
Russell Collins	Appellant's son
Ian Cox	Appellant's employee
Michael Rogers	Former employee of appellant
Peter Coe Dip Est Man, MRICS, AssocMCIWM	Planning consultant

### **FOR THE LOCAL PLANNING AUTHORITY:**

Gary Grant	Of Counsel instructed by Graeme Quar Solicitors on behalf of Mr Collins
He called	
Rosemary Box BSc(Hons) FGS MIQ	Monitoring and Enforcement Officer, Hampshire County Council
Robert Storey BSc(Hons) MSC	Principal Development Management Officer, Hampshire County Council
Corinne Vincent	Former Team Leader, Monitoring and Enforcement Section, Hampshire County Council
Ian Atkins	Principal Solicitor (Environment), Hampshire County Council

## **DOCUMENTS**

- 1 Notes of Mr Beglan's opening statement
- 2 Schedule of waste transfer notes
- 3 Witness statement from GeoInformation Group re. aerial survey
- 4 Statutory declaration of Caroline Strickland
- 5 Witness statement of Ian Cox dated 5 January 2005
- 6 Statutory declaration of Ian Austin + relevant authorities
- 7 Notes of Mr Grant's closing statement + authorities
- 8 Notes of Mr Beglan's closing statement

## **PLANS**

- A EMC/2014/0001v2  
B EMC/2014/0001v3  
Set C Plans attached to Mr Cox's witness statement (Doc 5)

## **PHOTOGRAPHS**

- 1 IC3 attached to Mr Cox's witness statement (Doc 5)
- Set 2 GQ1 – GQ14 attached to Mr Cox's witness statement (Doc 5)
- Set 3 Photographic record of Ms Box's site visits 2013

