



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 18
XA22/21

Lord President
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal under section 239 of the Town and Country Planning (Scotland) Act 1997

by

MARTIN GIBB

Appellant

against

THE SCOTTISH MINISTERS

Respondents

Appellant: Carolann Curran, lay representative
Respondents: N McLean (sol adv); Scottish Government Legal Directorate

29 March 2022

Introduction

[1] The appellant challenges a decision by the respondents' reporter to uphold, in part, an enforcement notice served upon him by Angus Council. He contends that the reporter erred in certain procedural respects, drew erroneous conclusions, failed to consider relevant evidence, and considered irrelevant factors.

[2] The enforcement notice, concerning his property west of Boath Burn, Muirdrum, Carnoustie, was served on the appellant in October 2020. The Council considered that two breaches of planning control had occurred, *viz*: (i) the land was being used to store and site storage containers, motor vehicles, plant, machinery and machinery parts, which represented a change in use of the agricultural land; and (ii) fencing and gates in excess of one metre in height had been erected on the southern boundary of the site, adjacent to a main road, without permission.

The appeal

[3] The appellant appealed to the Scottish Ministers on several of the grounds set out in section 130(1)(b) – (g) of the Town and Country Planning (Scotland) Act 1997. He argued that the land continued to be used for agricultural purposes, notably the care of horses. No change of use had occurred. The containers were used to store animal feed. The vehicles were required for the maintenance of the agricultural land. In any event, the containers, gates and fencing had all been there for more than four years and the enforcement notice was time-barred (1997 Act, s 124(1)).

[4] The reporter conducted an unaccompanied site visit on 26 November 2020. He observed motor vehicles, plant, machinery and machinery parts on the site, and gates and fencing on its southern boundary. The storage containers were all empty, other than one which contained tools, probably for the maintenance of the machinery and plant. Large trailers, plant and equipment relating to the construction and forestry industries were on site. Some of the equipment was consistent with agricultural use, including tractors and farming plant. No animals were present. The ground was wet and boggy and would be difficult for animals to occupy. Fencing and gates were situated throughout the site.

[5] The appellant provided: a bovine registration document dated May 2019; photographs of two cattle and two horses, which were said to graze together upon the land; and a receipt for animal feed, dated after that of the appeal. He produced a series of photographs said to depict the containers in 2015, and the fencing and gates in October 2016. These photographs were not date-stamped, although some had overlaid text which gave dates correlating to the appellant's position. They included a photograph showing the bottom of a fence post encased in concrete (4 October 2016) and one of a tractor with a container in the background (28 July 2015). The Council lodged photographs which were annotated on the basis that they were taken between March 2017 and January 2020. Two of the Council's photographs were date-stamped 24 March 2017. They were the only date-stamped (cf overlaid text) photographs produced by either party. They showed the southern boundary. A Google street-view image of the southern boundary dated October 2016 was produced. No gates or fencing exceeding 1 metre were visible on any of the date-stamped photographs.

[6] The reporter issued his decision on 29 March 2021. He upheld the appeal on ground (f) (excessive steps to remedy the breach), and varied the terms of the notice. He refused the appeal on all other grounds. Given the presence of the machinery, plant, gates and fencing on site, the appeal on ground (b) (that the matters stated in the notice had not occurred) therefore failed.

[7] The reporter determined that the number of shipping containers on site was neither necessary nor appropriate for the storing of feed for the number of animals involved. Some of the equipment on site was related to agricultural use. However, motor vehicles, plant, machinery and machinery parts, which were unrelated to the agricultural management of the site, were also being stored. A change of use from agricultural to the storage of

containers would only become lawful development after ten years, not four (1997 Act, s 124(3)).

[8] The height of the fencing and gates on the southern boundary was such that planning permission was required. The date-stamped photographs produced by the Council, which showed the land without gates or fencing on the southern boundary, were to be preferred to the photographs produced by the appellant, which did not bear date-stamps (cf overlaid text). The enforcement notice was not time barred. The appeal on the grounds in subsections (c), (d) and (g) failed.

[9] The appeal was upheld on the ground in subsection (f) because the enforcement notice made no allowance for the storage of items which were reasonably necessary for the agricultural use of the land. The notice was amended to specify that the removal of gates and fencing related only to those present on the site's southern boundary, and that only those motor vehicles, machinery, plant and machinery parts which were not necessary for the agricultural management of the land required to be removed.

Submissions

Appellant

[10] The appellant appealed on a number of grounds. First, the reporter considered matters not previously before the Council, notably that the appellant was using the land for the storage of vehicles related to the construction and forestry industries. He misidentified a log trailer. Section 47A of the Act precluded the reporter from including new matter in his decision.

[11] Secondly, the reporter did not provide reasons for his unaccompanied site visit within the letter giving notice of that visit. The appellant had emptied the storage containers

prior to the visit. He had been advised to do this because he understood that the reporter wished to inspect them.

[12] Thirdly, the reporter erred in failing to prefer the appellant's photographs which, contrary to the reporter's decision, had been dated. The reporter failed to establish the provenance of the photographs produced by the Council. In particular, the Google street-view image could have been uploaded much earlier than October 2016. A photograph of 18 August 2016 showed a young tree which was not in the Google Maps photograph which the Council had said had been taken in October 2016. That of 28 July 2015 showed that a container had been on site since then. The image of the concrete post had been blown up from a larger photograph showing the fence in October 2016. The two date-stamped photographs were not time-stamped. None of the other photographs were date-stamped.

[13] Fourthly, no matter what the appellant produced, the reporter rejected it. This was excessive and oppressive, and contrary to the appellant's human rights under Article 6 of the European Convention. Fifthly, the reporter failed to ask the appellant any questions regarding the storage containers. He was wrong to assume that the site was being used to store containers. The appellant could have explained why the containers were empty. Sixthly, the reporter failed to have regard to the terms of section 277(1) of the Act, which included "grazing" within the definition of "agricultural". The land was not used as an equine yard; it was used only for horses to graze.

[14] The reporter failed to have regard to the fact that all the fencing of neighbouring properties breached the one metre limit. The appellant ought to have been given the chance to reduce his fencing to the same height as that of the neighbouring properties. There had to be planning permission in place for these neighbouring fences, and such permission ought

to be granted to the appellant too. The fencing had been in place for several years and the enforcement notice was served out of time.

Respondents

[15] The respondents submitted that section 47A related to what the parties could do in the conduct of an appeal. It did not apply to the actions of the reporter.

[16] Contrary to the limited scope for an appeal such as this under section 239(1) of the 1997 Act, the appellant's grounds of challenge were an attempt to re-argue the merits. The decision on change of use was based on what the reporter had observed on his site visit. There was no reason for the appellant to empty the containers for the purpose of the site visit. The reporter considered the photograph bearing the text "Tuesday 4 October 2016 13.08" as well as the fact that other photographs did not bear any date or time. The reporter preferred the evidence provided by the Council, ie the photographs date-stamped between March 2017 and January 2020. The reporter was entitled to reach the conclusions he did on the basis of the material before him. He took into account all relevant considerations. The decision did not make any findings about the use of the land for equestrian purposes or the grazing of horses.

Decision

[17] Section 47A of the Town and Country Planning (Scotland) Act 1997 applies to appeals under section 47(1); appeals against planning decisions. The appeal under consideration was against an enforcement notice under section 130. Nevertheless, the procedure which was followed required to give the appellant fair notice of the breach which he was alleged to have committed (see *Taylor v Scottish Ministers (No. 2)* 2019 SLT 681,

LP (Carloway), delivering the opinion of the court, at paras [34] and [35]). The reporter was entitled to determine the appeal based, at least in part, on his observations during a site visit. The appellant had been put on notice that the alleged breaches involved, in part, the location and use of storage containers, motor vehicles, plant machinery and machinery parts on the site. These were said not to constitute agricultural use. The appellant, having been given due notice of the alleged breach, was afforded an opportunity to provide evidence relating to, and to make submissions about, the use of the containers. He did so.

[18] There was no need for the reporter to provide reasons for his site visit. He was entitled to carry out an unaccompanied visit (Town and Country Planning (Appeal) (Scotland) Regulations 2013 reg 12). The reason for the visit was obviously to assist in the determination of the appeal. The reporter, in light of the photographic evidence, his site visit and other information, was entitled to reject the appellant's contentions on the use of the containers. He did not require to pose further questions to the appellant, as if he were cross-examining him. The appeal on the ground of fairness is rejected.

[19] The Council had produced two photographs which were dated 24 March 2017. The appellant's contention was that these date-stamps are, putting it at its lowest, inaccurate. He pointed to the photograph of the concrete fence post to show that inaccuracy. The reporter rejected this, as he was entitled to do. The post is not readily identifiable as being on site and the larger photograph was not, for whatever reason, before the reporter. In any event, the reporter did not accept that this, or the other photographs were date-stamped, in the sense of being marked by the relevant camera, as distinct from bearing superimposed text. These were all matters for determination in the first instance by the fact-finder; that is the reporter. There is no basis upon which this court could review those findings.

[20] The reporter did not base his decision on the land being used for grazing horses. He accepted that some of the plant and equipment was for agricultural use, including the storage of animal feed. His decision was based upon his conclusions on the use of the containers and other plant and equipment. The reporter did not identify any trailer as being specifically for logs. He did say that he considered that certain of the equipment was for use in forestry and construction. The appellant was given an ample opportunity to provide his explanation relative to the use of the equipment on site.

[21] The fact that other fencing in the neighbourhood was in excess of one metre does not detract from the reporter's finding that the appellant had breached planning controls on the site by reason of the height of his fencing. The appellant's need for high fencing does not do so either. The reporter considered the appellant's photographs and other materials and, as he was entitled to do, rejected either their provenance or relevance or both.

[22] The appeal seeks to re-open matters concerning the merits of the case which are outwith the scope of an appeal to this court (1997 Act, s 239(1)). The appeal is refused.