The Planning Inspectorate

Appeal Decisions

Site visit made on 18 October 2016

by Alan Woolnough BA(Hons) DMS MRTPI

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

Decision date: 1 December 2016

Appeals A & B: APP/V2255/C/16/3149567 & APP/V2255/C/16/3149568
Land at Seed Road, Newnham, Faversham, Kent ME9 0NN

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Paul Mead (3149567, Appeal A) and Mrs K Mead (3149568, Appeal B) against an enforcement notice issued by Swale Borough Council.
- The enforcement notice, numbered ENF/NEM/13/002, was issued on 18 April 2016.
- The breach of planning control as alleged in the notice is: 'Without planning permission, the alterations to an existing field entrance and the laying of hard-surfacing to form a new access on to land immediately adjacent to Seed Road, the approximate position of which is highlighted in yellow on the plan which in the opinion of the Council would require the benefit of planning permission'.
- The requirements of the notice are:
  (i) Remove the metal entrance gates;
  (ii) Remove the hard-surfacing material from the Land;
  (iii) Remove all debris from the Land caused by complying with paragraphs 5 (i) and (ii) above;
  (iv) Restore the Land to its previous condition similar to the surrounding land within the site.
- The period for compliance with the requirements is three months.
- Appeal A is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the 1990 Act as amended. Since the prescribed fees have not been paid within the specified period for Appeal B, the appeal on ground (a) and application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered in that case. Appeal B is therefore proceeding on grounds (c), (f) and (g) only.

Summary of Decisions: The appeals are dismissed and the enforcement notice is upheld with corrections.

Procedural matter

1. The Appellants are critical of the Council's pre-application service and the manner in which enforcement action has been pursued. However, these are not matters for me and, if necessary, fall to be addressed by other means separate from the appeal process. They have not therefore informed my decisions.

The notice

2. The Appellants have not appealed against the enforcement notice on ground (b) on the basis that matters stated therein have not in fact occurred. Nonetheless, there is no dispute between the main parties that before the subject development took place there was already a gated field entrance at this point. Indeed, this is acknowledged in the alleged breach of planning control

set out at section 3 of the notice and, having viewed an historic photograph of the site, I concur. Reference in the allegation to the formation of a new access as well as alterations to an existing access is therefore contradictory and should be deleted.

3. Additionally, in the interests of consistency within the notice the metal entrance gates targeted by requirement (i) should be included in the allegation. The phrase 'which in the opinion of the Council would require the benefit of planning permission' at the end of the allegation is superfluous, the perception that permission is required already being evident through conclusion of the words 'Without planning permission' at the beginning.

4. Also, requirement (iv) lacks sufficient precision for enforcement purposes, the term 'similar to the surrounding land within the site' being open to wide interpretation. I will correct the notice accordingly and am satisfied that no injustice to any party arises as a result.

The appeals on ground (c) – Appeals A & B

5. In appealing against the enforcement notice on ground (c), the onus of proof is firmly on the Appellants to demonstrate on the balance of probabilities that matters stated in the enforcement notice did not amount to a breach of planning control. The Appellants' case in this regard is confined to a contention that removal of the previous fencing and gate and re-orientation of the field access did not require planning permission.

6. I acknowledge that removal of the gate and fencing would have benefitted from deemed planning permission by reason of Class B of Part 31 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 as amended (the GPDO)[1]. I give little credence to the notion that 'permitted development' status in this regard is precluded on the basis that removal took place as part of a single operation that included works requiring express permission. Whether this was the case is a matter of fact and degree and requires a judgment to be made on the facts available.

7. On the limited evidence before me I find, having regard to the judgment in *Garland v MHLG* [1968] 20 P&CR 93, that the removal of the gates and fence would more reasonably be interpreted as 'building operations' separate and distinct from any 'engineering operations' associated with alterations to the access and creation of the hardstanding. This being so, and as that specific action of removal is not targeted by the enforcement notice, it cannot form a valid basis for any ground (c) appeal.

8. Nonetheless, from the historic photograph before me it appears in the absence of evidence to the contrary, bearing in mind where the burden of proof lies, that the access into the field has been both widened and resurfaced. Such works amount to 'development' for the purposes of section 55 of the 1990 Act as amended, there being no specific exclusion to the contrary from the meaning of the term 'engineering works'. Moreover, I am satisfied that they

[1] The 1995 GPDO was replaced on 15 April 2015 by the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended, in which Class C of Part 11 of Schedule 2 makes the same provision. However, as the Appellants indicate that the works took place in July 2013 (and I have seen no evidence to the contrary), the 1995 GPDO remains the relevant legislation for the purposes of my decisions on ground (c).

also amount to 'alterations to an existing field access' and thus fall within the scope of the allegation.

9. Class B of Part 2 of Schedule 2 to the GPDO provides for the 'laying out' of a means of access to an unclassified road with the benefit of deemed planning permission in certain circumstances, which term is generally interpreted in planning law as including changes to the layout of an existing access. However, this provision is confined to situations where the access is required in connection with other development permitted by any Class in Schedule 2 (with the exception of Class A of Part 2).

10. The Appellants have not demonstrated that the alterations to the field access were required in connection with any other form of permitted development. Accordingly, these works would not in themselves have benefitted from permitted development rights and would have required express planning permission. Such permission never having been granted, I conclude on the balance of probabilities that all the matters stated in the allegation amount to a breach of planning control and that the appeals on ground (c) should fail.

The appeal on ground (a) – Appeal A only

Main issue

11. The main issue in determining the appeal on ground (a) is the effect of the development on the character and appearance of Seed Road and the surrounding area, including whether it conserves and enhances the natural beauty of the Kent Downs Area of Outstanding Natural Beauty (AONB) in which the site is located.

Planning policy

12. The development plan includes certain policies of the Swale Borough Local Plan 2008 (LP) which have been saved following a Direction made by the Secretary of State. Paragraph 215 of the National Planning Policy Framework (the Framework) records that due weight should be given to relevant policies in existing plans according to their degree of consistency with it. I find no significant conflict between the Framework and the development plan policies cited in this case. Accordingly, I will give them full weight insofar as they are relevant to the appeal scheme.

Reasoning

13. The appeal development currently provides the sole means of vehicular access to an equestrian livery yard, stables and associated paddocks. Formerly tenants of the land, the Appellant and his wife purchased it in 2013. I found this part of the AONB to be characterised by undulating land comprised for the most of part large open fields devoted to arable farming or pasture but bounded by substantial tree belts and high hedgerows. Pockets of woodland and isolated dwellings and agricultural buildings pepper the landscape.

14. Additionally, Seed Road is designated as a rural lane to which saved LP Policy RC7 applies. This specifies that development proposals should have particular regard to, amongst other things, the landscape importance of such lanes. I acknowledge that topography and vegetation effectively preclude long distance views of the appeal development across the wider AONB. Nonetheless, the lane is resolutely rural in character and makes an important,

albeit localised, contribution to the natural beauty of the area. Moreover, it is particularly attractive in its own right by reason of its narrow carriageway and long stretches of unbroken roadside vegetation, even when considered in isolation from its wider context.

15. The extensive hardsurfacing subject to the enforcement notice is very much at odds with the prevailing character of the lane as a whole. Although neither a new break in the roadside continuum nor the only one to have an unwelcome urbanising effect, the appeal development is nonetheless particularly harsh in terms of its visual impact and, unlike its predecessor, draws the eye as an intrusion that detracts markedly from the qualities that saved Policy RC7 is intended to safeguard. The re-orientation of the access renders this even more open to view than it would otherwise have been.

16. The Appellant suggests that it is quite common for fields to have hardstandings on approaches to accesses. However, these are not necessarily alongside protected lanes. In any event, this is not the case in Seed Road, where nothing of similar function and incongruity had been drawn to my attention. Certainly, installations of this kind are not so commonplace as to be characteristic of the area or subsume the impact of the appeal development. Nor does the appeal development read in juxtaposition with the stables on the Appellant's land or the nearby village and, consequently, arguments that it has a negative impact in relation thereto are effectively irrelevant.

17. Turning to consider the unauthorised gates, I find these merely to exacerbate the visual harm caused by the revised access and hardstanding by reason of their uncompromising appearance. The rudimentary and utilitarian nature of these very basic metal constructions is such that it is difficult to conceive of a design that would be less sympathetic to the prevailing character of the rural lane. Again, they draw the eye as incongruous intrusions that should not be tolerated in such a sensitive location.

18. I note that the Appellant cites a lawful fallback position whereby replacement means of enclosure up to 1 metre in height could be erected with the benefit of deemed planning permission (Class A of Part 2 of Schedule 2 to the GPDO refers). However, a fallback position only carries significant weight in circumstances where it is likely to be implemented in the wake of successful enforcement action.

19. In this case, the design of the existing installations is such that they do not lend themselves readily to a reduction in height through alterations or adaptation. Moreover, I have seen nothing to suggest that any replacement at only 1 metre in height would either meet the Appellant's functional requirements (to ensure the security of horses) or be likely to replicate such poor visual quality. I therefore attach little weight to this possibility.

20. I conclude that the appeal development in its entirety causes harm to the character and appearance of the rural lane and the natural beauty of the AONB over and above anything likely to arise from a lawful fallback position. Its retention would therefore be contrary to saved LP Policies E1, E6, E9 and RC7 and the relevant provisions of the Framework.

Other matters

21. I have considered all the other matters raised. Two accesses to the north-east which once served the Appellant's land are not currently available for use in connection with the appeal site. One of these, via a steep unmade track set at an oblique angle to the road, is considered by the Appellant to be unsafe and, having viewed it for myself, I find no reason to disagree. However, I note that the planning permission granted in 2006[2] for the livery yard within the appeal site was conditional upon sole access thereto being via the former Tapster car park entrance, located closer to the village and linked to the appeal site by a long off-road track.

22. Whilst it is evident that the track is not currently fit for purpose, subject to legal considerations I see no reason why it could not be improved so as to comply with the planning permission and thus provide a far more visually acceptable solution to the access dilemma. The Appellant advises that this route has been blocked by a third party and that the right of way over it is disputed. However, I have seen no documentation to that effect.

23. Nor is there any explanation before me of how or why such a situation has arisen or any report of the progress made in resolving the purported dispute. This being so I have no sound reason to suppose that any legal difficulties there may be in this regard are insurmountable, such that the Appellant's equestrian undertaking could once more comply with saved LP Policy RC9 and contribute to the rural economy in accordance with saved LP Policy RC1 (both currently contravened by reason of the detrimental impact on landscape character caused by the subject development). I therefore give the matter little weight.

24. Reference is made to a further potential fallback position in that, should the appeal fail, the land served by the subject access might be used for agricultural purposes and benefit from the permitted development rights associated with such use which, in certain circumstances, can include the creation of extensive hardstandings with the benefit of deemed planning permission[3]. However, I have seen nothing to substantiate the view that active agricultural use is likely to transpire should the enforcement notice be upheld or that, if it did, the farmer would choose to create an agricultural hardstanding at this particular point. Saved LP Policy E6 is therefore of limited relevance in this regard.

25. I appreciate that the hardstanding helps to prevent mud and debris being dragged onto the public highway and enables the access to be used in all weathers. However, that in itself does not justify use of this entrance point to serve the whole site in the first place. Nothing before me suggests that, were an alternative access to be used to serve the livery yard then the subject field entrance would continue to be used so extensively.

[2] Planning permission ref no SW/05/1405, granted by the Council on 3 February 2006 for 'Change of use to keeping and grazing of horses, and as a livery yard with single storey stable block and storage area'.

[3] The Appellant points out that the grazing of horses can constitute agriculture for planning purposes. However, this would only benefit from associated permitted development rights if used for agriculture for the purposes of a trade or business (paragraph D.1(1) of the GPDO refers). On the evidence before me, the appellant's business is first and foremost an equestrian undertaking to which the grazing of horses is incidental, rather than an agricultural one. Permitted development rights for hardstandings do not therefore apply at present.

26. The Appellant points out that the changes to the subject access and installation of the hardstanding have not increased traffic generated by the site overall. Nonetheless, I am mindful that the unavailability of the access stipulated by the 2006 permission will have drawn large vehicles and trailers further along this narrow rural lane than would previously have been the case when heading to and from the north-east and will have increased vehicular use of the field entrance itself. Having said that, I note that the Council have not pursued a highway safety objection to the scheme and, this being so, I see no reason to do so either.

27. However, neither this nor any other matter is of such significance as to outweigh the considerations that have led to my conclusion on the main issue. The appeal on ground (a) therefore fails.

The appeals on ground (f) - Appeals A & B

28. It is readily apparent from the wording of the enforcement notice that its intended statutory purpose is to remedy the breach of planning control in full, in accordance with the provisions of section 173(4)(a) of the 1990 Act as amended. This being so, in pursuing appeals on ground (f) the Appellants must show that the steps required by the notice exceed what is necessary to remedy the breach.

29. The Appellants' case in this regard is confined to requirement (iv) of the notice. In their initial grounds of appeal they pursue the argument that they were entitled to erect a new fence and gate in this location of up to a height of 1 metre if abutting[4] the highway and 2 metres if not and that, accordingly, it is not reasonable that requirement (iv) should stipulate restoration of the land to its previous condition. However, as I have already pointed out in the context of the appeals on ground (c), the notice does not go so far as to target the removal of the pre-existing gate and fencing, which amounted to permitted development. Nor does requirement (iv) specify their reinstatement.

30. In my view, it can only reasonably be interpreted as requiring restoration of the previous land surface and access layout (alterations to which I have found to be unlawful in considering ground (c)), with the latter to be secured either by physical barriers that mirror those that were removed or, alternatively, replacements that do not in themselves require express planning permission. The planting of hedging, which is not in itself development, would therefore satisfy the requirement, as would any means of built enclosure that did not exceed 1 metre in height.

31. The notice as issued does not have the effect of removing or overriding permitted development rights, that being beyond its lawful scope. In any event, as touched on in the context of the appeal on ground (a), the replacement gates are not of a design that readily lends itself to height reduction. It follows that rewording requirement (iv) to make reference to permitted development allowances is neither necessary nor appropriate.

32. The Appellants approach ground (f) slightly differently in their main statement, there suggesting that requirement (iv) is not sufficiently precise in stipulating

[4] This is a partly erroneous reference to the provisions of Class A of Part 2 of Schedule 2 to the 2015 GPDO which, subject to certain conditions and limitations, provides for the erection of means of enclosure of up to 1 metre in height *adjacent to* a highway used by vehicular traffic [my italicised emphasis] as permitted development with the benefit of deemed planning permission.

restoration of the land to its previous condition. They instead promote the more specific alternative that it should require reseeding of the area coloured yellow on the plan with grass.

33. However, this would not remedy the breach of planning control in its entirety so as to fulfil the statutory purpose of the notice. Moreover, section 173(4)(a) of the 1990 Act as amended is explicit in defining one of the statutory purposes as 'restoring the land to its condition before the breach took place'. This being so, it is not surprising that the Courts have long held that a remedial step framed in the manner of requirement (iv) (subject to the necessary correction identified earlier) is adequate in most cases.

34. The underlying principle is that it is reasonable for the perpetrator of a breach to know what condition the land was in previously, so that a requirement thus worded should leave them in no doubt as to what needs to be done. In any event, in this case there is uncontested photographic evidence to assist in this regard. I conclude that the requirements of the enforcement notice are not excessive and, accordingly, the appeals on ground (f) fail.

The appeals on ground (g) - Appeals A & B

35. The Appellants have appealed against the enforcement notice on ground (g) on the basis that the period prescribed for complying with its requirements falls short of what should reasonably be allowed. Their argument is that the entrance in question is the only one currently available as a means of gaining access to all the land in their ownership and that securing an acceptable alternative would take longer than three months. Although not stated explicitly, the implication seems to be that reinstatement of the former access layout and removal of the hardstanding as required by the notice would render it unfit for that purpose, despite the fact that it would remain available for vehicular use.

36. I have already set out the shortcomings of the Appellants' case to the effect that this is now the only access available to serve their land in the context of the appeal on ground (a) and need not repeat those points here. Nonetheless, I must briefly address their additional argument under ground (g) that they would need 12 months in which to secure alternative access options. Information as to why this should take so long is scant indeed.

37. Insufficient evidence has been provided to persuade me that resolution of any legal obstacles so as to enable reinstatement of the access arrangements specified in the 2006 planning permission should take more than three months. Nor is there anything of substance before me that addresses any difficulties there may be in establishing a safe and visually acceptable alternative within the period specified.

38. I conclude in the absence of any substantiated indication to the contrary that the period for compliance prescribed in the notice as issued is not too short. The appeals on ground (g) therefore fail. It remains within the Council's power to further extend the period for compliance under section 173A(1)(b) of the 1990 Act as amended in the event that this is shown to be necessary or desirable.

Conclusion

39. For the reasons given above I conclude that the appeals should not succeed. I will uphold the enforcement notice with corrections and refuse to grant planning permission on the deemed application.

Formal decisions

40. It is directed that the enforcement notice be corrected by:
    (i) in section 3, the insertion of the words ', the installation of metal entrance gates' after the word 'entrance' and the deletion of the words 'to form a new access on to land immediately adjacent to Seed Road' and 'which in the opinion of the Council would require the benefit of planning permission'; and
    (ii) in requirement (iv) in section 5, the deletion of the words 'similar to the surrounding land within the site'.

41. Subject to these corrections, the appeals are dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Alan Woolnough

INSPECTOR