
Appeal Decision

Site visit made on 19 September 2016

by K R Saward Solicitor

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

Decision date: 29 September 2016

Appeal Ref: APP/M2460/C/15/3141474

Land adjacent to and including Sapcote Quarry, Leicester Road, Sapcote, Leicestershire LE9 4JF

- 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 John Mac against an enforcement notice issued by Leicestershire County Council.
- The enforcement notice was issued on 8 December 2015.
- The breach of planning control as alleged in the notice is :-
 - Without the benefit of a valid planning permission, engineering operations on the land comprising the removal of material from a mineral-working deposit and the deposit of material within and around the Sapcote Quarry void.
 - Without the benefit of a current planning permission, the erection of fencing adjacent the highway in excess of 1 metre above surrounding ground levels from points A to point B and C to D on Plan B attached to the notice.
 - Without the benefit of a current planning permission, the creation of new access at the approximate location marked with an X on Plan B attached to the notice, including the depositing of hardcore and erection of gates and gate posts off Leicester Road at the approximate locations between the points marked B and C on Plan B attached to the notice.
- The requirements of the notice are:- (i) Cease and do not resume all engineering operations involving the removal of material from a mineral-working deposit within the land outlined in red of Plan A attached to the notice. (ii) Cease and do not resume all engineering operations involving the spreading/depositing of material previously removed from a mineral-working deposit within the land outlined in red on Plan A attached to the notice. (iii) Remove the fencing between points A and B and C and D on Plan B attached to the notice. (iv) Remove the access gates and gate posts located between Points B and C on Plan B attached to the notice. (v) Plant a hedge along the blue line between points marked A-D on Plan B attached to the notice to the following specification: plant 45/60cm 1+1 bare root hawthorn quicks (*Crataegus monogyna*) at 6 plants per metre in a double staggered row 30cm apart. (vi) Maintain the hedge required under action point v for a minimum of five years from the date of planting ensuring that all failures within the five year maintenance period are replaced with the same species as those that failed.
- The period for compliance with the requirements is 1 day for steps (i) and (ii); 3 months for steps (iii)-(v); 5 months for step (vi) and 5 years after the date of planting the hedge required under step (vi).
- The appeal is proceeding on the grounds set out in section 174(2)(b),(c), (d) & (f) of the Town and Country Planning Act 1990 as amended.

Decision

1. The appeal is dismissed and the enforcement notice upheld.
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Preliminary Matters

2. The appellant raises no dispute with regard to the allegation contained in the first bullet point of paragraph 3 of the notice concerning engineering operations. He confirms that the associated requirements in paragraph 5.(i) and (ii) shall be complied with accordingly. Whilst the Council has made representations in respect of the engineering operations there is no need for me to comment on these given that this particular issue is uncontested.
3. Originally, the appeal was not brought on ground (d). This ground was added subsequently and the Council afforded opportunity to respond to the points raised.
4. An appeal has been brought on ground (b) which is that the breach of control alleged in the notice has not occurred. In order to succeed on this ground it would need to be demonstrated that the fence has not been erected on the land. The appellant does not dispute that as a matter of fact such development has taken place as alleged, and so a ground (b) appeal would fail with regard to the fence. The appellant's representations are brought on the basis that a fence existed previously thereby suggesting that express planning permission is not required. Such arguments are more properly addressed under ground (c) and I shall deal with the appeal on that basis.
5. The third allegation concerns the creation of a 'new' access. Arguments that the access is not new fall within ground (b) and shall be dealt with under that ground, accordingly.
6. In relation to the appeals under grounds (b), (c) and (d), the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is the balance of probability.

Background

7. Sapcote Quarry is a disused quarry forming part of a much larger area granted planning permission in 1949. That permission is now dormant so that quarrying operations cannot be lawfully recommenced unless and until a scheme of conditions has been submitted to the Council as Mineral Planning Authority. The appeal site itself extends to around 3.74 hectares and is located adjacent to Leicester Road.

Reasons

The appeal on ground (b)

8. To succeed on this ground the burden is firmly on the appellant to show that this is not a new access. The access is onto the highway at a point close to the boundary with the neighbouring land where there is a detached house known as Mill Bank. The appellant contends that the access has been there since 1903 and had become obscured by the hedgerow and creation of the footway. The appellant's evidence is adduced under ground (d), but is of relevance to ground (b). It principally takes the form of historic plans and the written transcript of an interview with Mr Keith Palmer, the owner of Mill Bank.
9. Ordnance Survey maps from 1887 and 1903 show an indent which could represent the start of an access, but it is further away from Mill Bank than the

current access. Plans from 1948 and 1989 are inconclusive as to whether there was an access and track in the position of the current access.

10. Mr Palmer moved to Mill Bank as a child in 1937 after the quarry was closed down. Whilst no longer residing there, he keeps goats on land next to the house. Mr Palmer refers to there being an access to the quarry without gates, but does not explicitly identify the access as being in the same position as the current access. Notably, he describes the access being blocked up in the early 1950's.
11. The Council maintains that if an access did exist in this location, which it disputes, then it has since been abandoned. The factors to be considered in coming to a view on whether or not an established use has been abandoned are physical condition, the period of non-use, other intervening uses and the owner's intentions. Merely to cease exercising a use will not, by itself, generally amount to an abandonment of that right. Case law indicates that the land must be unused for a considerable time in such circumstances that a reasonable man might conclude that the previous use has been abandoned. An intention to abandon the right may be inferred from conduct.
12. On the available evidence, even if there were an access in this locality it has not been in use for a very considerable time. Prior to the works identified in the notice, there was a well-established hedgerow stretching across the frontage. The appellant indicates that it grew across the access in the 1970's. It was clearly there for a significant time and would have prevented use of the access. The quarry has not apparently been worked in decades, a point not disputed by the appellant. All of these factors point to the previous access having been abandoned.
13. Therefore, the appellant has not discharged the burden of proving on the balance of probabilities the existence of an access in the same place. Even if it did exist in that location, the evidence indicates that it has since been abandoned. I conclude as a matter of fact, there has been the creation of a new access. The appeal on ground (b) fails.

The appeal on ground (c)

14. The appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control. The appellant claims that the fence replaced a previously existing fence. In addition, it is maintained that the gates are permitted development. I deal with each in turn.

Schedule 2, Part 2, Class A

15. The fence attacked by the notice is high metal palisade fencing that stretches along part of the front boundary of the appeal site in Leicester Road. It is next to the grass verge which appears to form part of the highway. The fence cuts into the site on each side of the access and where it links into metal gates. Both the access and gates are also attacked by the notice.
16. The erection, construction, maintenance improvement or alteration of a gate, fence, wall or other means of enclosure is development permitted under the provisions of Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO) subject to certain limitations. Limitation A.1 says that such development is not permitted if (a) the height of any gate, fence, wall or means of enclosure, erected or

- constructed adjacent to a highway used by vehicular traffic, would, after the carrying out of the development, exceed (ii) ".....1 metre above ground level".
17. It is the appellant's case that there had been a fence in this position since at least 1948, but it had fallen into disrepair and the remaining parts had become obscured by dense hedgerow. Details of this earlier fencing and its precise location are somewhat unclear, but a copy photograph of part of the old fence shows post and wire fencing. The appellant says that it measured 1.8m in height although it appears to be less than that in the appellant's photograph.
 18. Measurements taken by the Council indicate that the new fencing exceeds 2m above ground level in places. Photographs produced by the Council to illustrate this are disputed by the appellant who maintains that as the measuring rod is not straight, the height shown is actually 1.7m. From my own observations on site, the new fence is closer to 2m and may be marginally over. It seems likely to me that it exceeds the height of the previous fence. In any event, whatever the precise height, the replacement of a fence of wholly different construction is not permitted development.
 19. Moreover, there can be little doubt that the new fence is adjacent to the highway when it is next to the grass verge. Being in excess of 1m in height, the fence falls outside the scope of Schedule 2, Part 2, Class A.
 20. The double gates are of the same height and specification as the fence. If any part of the gates exceeds 2m in height above ground level then they cannot be permitted development. No issue has specifically been raised regarding their height; rather the issue in contention is whether or not they are "adjacent to the highway".
 21. There is no definition of "adjacent" within the GPDO, but in past Orders where the word "abutting" was used, the Court of Appeal declined to rule that "abutting" equated to touching. A normal everyday dictionary definition of adjacent is 'being near or close'. The assessment of what constitutes "adjacent" must therefore amount to a question of fact and degree. Previous appeal decisions¹ produced by the Council concern highway safety issues rather than this specific point and do not therefore have any bearing on my decision.
 22. In this case, the gates are set back from the highway. Neither party has commented on the exact distance, but they are not far from the carriageway. Together with the fence they visually form one continuous line of enclosure. The space in front of the gates has been laid with a broken hard-surfacing, but there is otherwise no physical feature in between the gates and the start of the highway. The gates thus serve the function of forming a boundary between the highway and the quarry site.
 23. I find in the particular circumstances of this case that as a matter of fact and degree the gates are sufficiently close to the highway to be adjudged 'adjacent' to the highway for the purposes of the GPDO. As the gates exceed 1m in height they are not permitted development.

¹ Appeal Refs: APP/K2420/A/13/2205416 & 2205393 dated 17 December 2014; APP/K2420/A/09/2107400 dated 29 October 2009.

Schedule 2, Part 17, Class C

24. It is further argued that the fence and gates are permitted under Schedule 2, Part 17, Class C of the GPDO. This permits the carrying out of development required for the maintenance or safety of a mine or a disused mine.
25. The appellant quotes section 151(2)(c) of the Mines and Quarries Act 1954, as amended, as compelling the provision of the fencing. The appellant says there is a sheer drop of 30m into deep water immediately inside the site. It is considered that a 1m high fence would not be adequate to deter entry into the site, there having been past instances of trespass by persons gaining access through the previous fence and hedge.
26. Section 151(2) makes it a statutory nuisance for a quarry (whether in the course of being worked or not) which (i) is not provided with an efficient and properly maintained barrier so designed and constructed as to prevent any person from accidentally falling into the quarry; and (ii) by reason of its accessibility from a highway or a place of public resort constitutes a danger to members of the public. The appellant may have chosen a fence and gates to fulfil this duty, but this section does not compel or necessitate a fence along the site perimeter as long as there is an 'efficient barrier'. Nor does it make the fencing lawful if it has been erected in breach of planning control.
27. Nonetheless, there is a safety requirement to secure the site and so Class C could apply. Planning permission pursuant to Class C is subject to the prior approval of the mineral planning authority unless one of the prescribed circumstances applies. The appellant relies upon Condition C.2.(2)(a) which provides that prior approval is not required if the external appearance of the mine or disused mine at or adjacent to the development is to be carried out would not be materially affected.
28. The Council has undertaken a Landscape and Visual Impact Assessment. The appellant has drawn my attention to the conclusion which states that the assessment "has not identified any impacts of unacceptable significance". I read this as a reference to the wider landscape character of the area as set out in the body of the report². The conclusion also clearly sets out "the unauthorised developments do result in the loss of landscape features and have an adverse impact on the landscape setting of the immediate area."
29. The appeal site is located in the countryside for the purposes of planning policy. This part of Leicester Road is characterised by long stretches of mature hedgerow broken by occasional development. Whereas before there had been mature planting along this section of boundary, there is now high metal fencing and gates which jar with the softer surroundings. They also fail to screen the site in the same way that the hedgerow and tree would have achieved. Although views of the fencing and gates are limited in the approach from each direction, they are still a highly visible and obtrusive feature when viewed from the public highway.
30. Thus, the external appearance is materially affected and the prior approval of the Council was required. Consequently, the fence and gates fall outside the scope of the permission granted by Schedule 2, Part 17, Class C of the GPDO.

² In particular, paragraph 6.2 of the LVIA.

31. Arguments regarding the existence of similar height fencing at other quarries and a failure by the Council to take enforcement action in other cases, are not relevant in a ground (c) appeal where the planning merits are not under consideration. Equally, the district council having taken action to secure fencing at a neighbouring quarry has no bearing in this appeal.

Conclusion on Ground (c)

32. I conclude that the appellant has not shown that the erection of the fencing and gates are permitted development pursuant to the GPDO. The matters alleged in the notice constitute a breach of planning control and the appeal on ground (c) fails.

The appeal on ground (d)

33. The ground of appeal is that at the time the notice was issued it was too late to take enforcement action. It is argued that the fence and access have been in existence for more than 4 years.
34. The appellant insists that the fence is a replacement. There may have been a fence in the past along the highway frontage, but this is a new fence of a different specification. It is not disputed that the new fence was erected within 4 years of the issue of the notice and it will not be immune from enforcement action.
35. I have already concluded on ground (b) that this not an historic access, but one that has been newly created. There is no evidence before me to indicate that the works to facilitate the access took place over 4 years before the issue of the notice. That being so, it was not too late for the Council to take enforcement action.
36. The appeal on ground (d) fails.

The appeal on ground (f)

37. The ground of appeal is that the steps required by the notice to be taken are excessive. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. These are either to remedy the breach of planning control which has occurred (section 173(4)(a)), or to remedy any injury to amenity that has been caused by the breach (section 173(4)(b)).
38. The Council has not specifically identified which of those two purposes it seeks to achieve. Its reasons for issuing the notice include reference to the loss of mature hedgerow and a tree along with "amenity issues" with a requirement to reinstate a hedge. This indicates a purpose of remedying injury to amenity. By the same token, the steps required in the notice also seek removal of the fence and gates. This is consistent with the purpose, whether in whole or part, of remedying the breach of planning control. That can only be achieved by the fence and gates being removed in their entirety. No lesser steps such as planting a hedge in front of them would satisfy the requirements of the notice. Therefore, they do not exceed what is necessary.
39. It would be a matter for the appellant if he chose to apply separately for a lawful development certificate or planning permission. Such step could not be required by the notice.

40. Furthermore, planning permission cannot be granted in this appeal for part of the development pursuant to s177(1) of the Act when there is no ground (a) appeal and deemed planning application. It follows that no consideration can be given to any arguments concerning the planning merits for reducing the height of the fence and gates.

41. The appeal on ground (f) fails.

Conclusion

42. For the reasons given I conclude that the appeal should not succeed.

KR Seward

INSPECTOR