

Appeal Decision

Site visit made on 25 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

Appeal Ref: APP/U1430/C/16/3146467

Land to the east of Sempstead House, Sempstead Lane, Ewhurst, East Sussex TN32 5TP

- 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 William Gordon-Harris, Sempstead Ltd against an enforcement notice issued by Rother District Council.
- The enforcement notice, numbered ENF/111/14/EWH, was issued on 3 February 2016.
- The breaches of planning control as alleged in the notice are:
 - 'Without planning permission
 - i) The alteration of ground levels to form a levelled area, and
 - ii) The construction of a hard-surfaced tennis court with perimeter fencing on that part of the land shown hatched in the approximate position on the attached plan'; and
 - 'Without planning permission a material change of use of the land from agriculture to a mixed use of agriculture and recreational use'.
- The requirements of the notice are:
 - (i) Dig up and remove the hard surface including any base or sub-base and dismantle the perimeter fencing from the tennis court located on the land shown hatched.
 - (ii) Return topsoil to the land shown hatched after complying with (i) above and seed with grass.
 - (iii) Remove all building materials and debris from the land shown hatched arising from compliance with requirements (i) to (ii) above.
 - (iv) Cease the use of the land shown hatched for recreational purposes.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the 1990 Act as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections.

Procedural matter

1. I note that the Appellant submitted a statement on the appeal on 21 May 2016, after the statutory deadline for such submissions had passed. The statement was therefore returned by the Inspectorate, with subsequent documentation received from the Appellant being confined to comments on the Council's equivalent statement, which had been received in good time on 28 April 2016. Consequently, I have not seen the Appellant's returned statement and it has not informed my decision on the appeal.
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The notice

2. The enforcement notice alleges, at section 4, the material change of use of 'the land' to a mixed use of agriculture and recreational use. In the absence of any indication to the contrary, 'the land' for the purposes of that part of the allegation must be taken to be the area identified at section 2 of the notice, being the wider parcel of land edged red on the plan attached thereto. However, the requirements at section 6 specify only the cessation of use for recreational purposes of the much smaller area shown hatched on the plan, rather than the wider parcel of land.
3. The consequence of framing the notice in this way is that, should it be upheld and complied with in full, planning permission would automatically be granted at that point for any recreational use of the remainder of the land edged red (excluding the hatched area) that was ongoing when the notice was issued by reason of section 173(11) of the 1990 Act as amended, should that have been unlawful. Nothing before me indicates that this was the Council's intention.
4. Having said that, I have not seen anything (other than the wording of the allegation itself) to the effect that the Council actually perceives recreational use of land in addition to the hatched area to have occurred. However, I cannot be certain of its stance in this regard. In any event, if the Council did not consider recreational use to have taken place outside the hatched area then that wider parcel of land should not have been targeted.
5. It seems more likely that the wider area is subject to the change of use allegation in the notice simply because the Council has identified that as the relevant planning unit. Nonetheless, whilst it is necessary to identify the planning unit as a whole in order to assess whether a material change of use of land has occurred, there is no reason why an enforcement notice need target the whole unit.
6. In resolving this discrepancy it is not open to me to amend requirement (iv) so as to relate to the whole of the wider land rather than just the hatched area, as that would widen the scope of the notice, thereby giving rise to injustice. Therefore, I will instead restrict the area to which the change of use allegation relates to the hatched area alone, through amendments to the wording of sections 3 and 4.
7. In doing so I find no need to depart from the description of the alleged use as a mixed one that includes agriculture, given that the hatched area takes in some land that falls outside the perimeter fencing of the subject tennis court and, on the evidence before me, the planning unit as a whole was subject to such a mixed use at the point of issue.
8. I am satisfied that no injustice to any party would be caused by correcting the notice in this way, there being no suggestion on the Appellant's part that any land outside the hatched area has been used for recreational purposes. Although I am invited by the Appellant to consider granting planning permission on the deemed application for a material change of use of the land to general recreational use even if I find the tennis court itself to be unacceptable, there is no basis in law for doing so in circumstances where the land in question has never been so used. I will address this question further so far as it is relevant to the hatched area occupied by the tennis court in due course.

9. I note that section 173(11) would also have effect in relation to the alleged alteration of ground levels to form a levelled area, as set out in section 3.i), in the event that the notice is upheld and complied with, that matter not having been addressed by the requirements. However, as it is clear from the Council's submissions on the appeal that this was intentional, I will leave the notice unchanged in that regard.

The appeal on ground (a)

10. The tennis court and associated works have been the subject of a refusal of planning permission, an appeal against which was dismissed in June 2015 (ref no APP/U1430/W/14/3001849). Whilst that dismissal is necessarily a material consideration for the purposes of my decision, I have nonetheless assessed the development afresh having regard to all the evidence before me.

Main issue

11. The Appellant suggests that the previous Inspector should have identified the development plan as the primary issue for consideration, rather than listing the effect of the development on the character and appearance of the area as their sole main issue. However, this is incorrect. 'Main issues' for the purpose of determining appeals made under sections 78 or 174(a) of the 1990 Act as amended should always be identified in terms of relevant 'planning merits' topics that are themselves the focus of national or development plan policies.
12. Determination of the appeal, dealing with each topic in turn, should then be made in accordance with the development plan unless material considerations indicate otherwise, as directed by section 38(6) of the Planning and Compulsory Purchase Act 2004. However, compliance or otherwise with planning policy is not in itself an adequately framed 'main issue' in such a context.
13. The main issue in determining the current appeal on ground (a) is therefore the effect of the development on the character and appearance of the surrounding area, including whether it preserves and enhances the natural beauty of the High Weald Area of Outstanding Natural Beauty (AONB) in which it is located.

Planning policy

14. The development plan includes the Rother Local Plan Core Strategy 2014 (CS). 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

15. I found this part of the AONB to be characterised by undulating land comprised largely of open fields devoted to arable farming or pasture but bounded by substantial tree belts and high hedgerows. Pockets of woodland, isolated dwellings and agricultural buildings pepper the landscape. Aside from its landscape designation the area is also defined as part of the 'Countryside' by the development plan, where stringent policy restrictions apply to most forms of development.

16. Sempstead Lane itself 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 mature roadside planting, despite the obvious domestic presence of Sempstead House to the immediate west of the appeal site, and exudes a resolutely rural sense of place.
17. Although its use is clearly associated with the adjacent dwelling, the tennis court lies well outside any established residential curtilage within a large parcel of open land that, at the time of my visit, was in part devoted to agriculture. Separation from Sempstead House is such that, rather than being subsumed by the residential property, the tennis court reads in isolation as a large, indisputably recreational feature with domestic characteristics set within open countryside.
18. Despite the Appellant's assertions to the contrary, the subject development is readily visible from public viewpoints. Although local topography essentially precludes long distance views of the tennis court across the wider landscape, it can be seen clearly over the field gate that provides access to and from the road and through gaps in the roadside vegetation. Such views take in not only the high perimeter fencing but also the hard surface of the court, which contrasts markedly with the grassland that surrounds it. Additionally, when in use, recreational activity on the court must itself draw the eye as something one would not expect to find in the countryside outside the boundaries of a residential property or commercial facility.
19. I therefore find the development as a whole to be an unwelcome, incongruous intrusion that detracts markedly and unacceptably from its very sensitive rural setting, irrespective of its relatively localised impact in that regard. Although the Appellant suggests additional planting as an adequate means of mitigation, this would take several years to establish an effective screen if comprised of suitable indigenous species and, even then, would by its very nature provide only a temporary solution.
20. The Appellant pursues an argument to the effect that the appeal development is actually a visual improvement on what went before, having replaced an untidy area lacking grass and topsoil which was used by the previous landowner for the disposal of unsightly hardcore, rubble and similar. However, there is no photographic evidence before me to the effect that this was the case immediately before the targeted breach of planning control occurred.
21. Indeed, of the several historic aerial photographs spanning 2003 to 2013 provided by the Council (the dates of which have not been contested), only that dated 23 May 2009 appears to show any sign of anything other than grassland in the area now occupied by the tennis court. Moreover, the photographs indicate that grassland seemed to have been reinstated by 2011 and was still in place in 2013.
22. Even if it was not, I have seen nothing to indicate that use of the land for purposes other than agriculture had by then endured for so long that it had become lawful, such that it could not have been remedied through conventional planning control rather than by replacement development. Nor does it follow that the replacement of an unsightly activity with an incongruous (albeit more considered and manicured) recreational intrusion is an acceptable solution to a visual anomaly, rather than merely displacing one problem with another.

23. The Appellant suggests in the context of the appeal on ground (f) that the existing perimeter fence around the tennis court could be replaced with something lower, reference being made to both a post and rail fence and green mesh fence limited to one metre in height. I have considered this in the context of ground (a) as the potential subject of a condition that might be attached to a grant of planning permission.
24. However, the incongruous surface of the tennis court, together with the recreational activity it hosts would still remain open to public view and, this being so, even a lower fence would draw the eye as part of an incongruous and obtrusive facility. In any event, despite the Appellant's contention to the contrary it is readily evident that a one metre high fence would not be sufficient to ensure that stray tennis balls remained within the playing area. Therefore, neither option provides an acceptable solution.
25. I am mindful that the reprofiling of the site would remain in place and find that this in itself, even if completely resurfaced with topsoil and grass, would appear somewhat artificial in the context of an otherwise natural landscape. Indeed, I am surprised that the Council has effectively endorsed such works by means of the current notice and section 173(11), given the previous Inspector's comments in relation thereto. However, such an outcome would not be nearly so obtrusive or visually detrimental as the tennis court itself.
26. I conclude that the appeal development is harmful to the character and appearance of the surrounding area, fails to conserve and enhance the natural beauty of the AONB and could not be rendered acceptable through mitigation. Retention of the tennis court would therefore be contrary to CS Policies OSS2, OSS4, RA2, RA3 and EN1 and the relevant provisions of the Framework.

Other matters

27. I have considered all the other matters raised. The Appellant suggests that a number of tennis courts have benefitted from planning permission within the AONB. However, each development falls to be assessed primarily on its own merits and, as I do not know the full circumstances associated with any other such scheme in the locality, I am not in a position to draw any meaningful comparisons. Notwithstanding this, it is readily apparent that, despite the Appellant's contention to the contrary, tennis courts are not so commonplace in the surrounding rural area as to be characteristic of it, particularly outside established residential curtilages.
28. The Appellant refers to the presumption in favour of sustainable development inherent in national policy. However, the appeal scheme fails to fulfil the environmental role of such development as defined in paragraph 7 of the Framework by reason of the harm it causes to the natural beauty of the AONB. National objectives concerned with improving the conditions in which people take leisure and the role of planning as a creative exercise in finding ways to enhance and improve the places in which people live their lives are also cited. Nonetheless, nothing in national or local policy suggests that such aims should take priority over protection of the visual environment.
29. The Appellant suggests that there is a lawful fallback position insofar as a means of enclosure lower than the existing tennis court perimeter fence could

be erected with the benefit of deemed planning permission¹. However, a fallback position only carries significant weight if it is likely to be implemented in the wake of successful enforcement action. Nothing before me suggests that the Appellant is likely to erect an enclosure pursuant to permitted development rights if it cannot be used recreationally.

30. Needless to say, such a fence would not of itself be permitted development if it was intended as an integral part of a recreational scheme involving other operational development². Moreover, even a fence 2 metres in height or less erected as the sole item of operational development associated with recreational use of the land would not be immune from enforcement action³. The perceived fallback position is therefore of limited relevance to my decision.
31. The Appellant has suggested that it is open to me to grant planning permission for a material change of use of the land to recreational use even if the enforcement notice is upheld in relation to the tennis court. I have already addressed this question so far as it applies to the land edged red on the plan attached to the notice as issued. Focussing now on the smaller hatched area I am mindful that on the evidence before me the recreational use of this has, to date, been bound up with the tennis court. It is not apparent to me what type of alternative recreation the Appellant seeks planning permission for in that location if tennis is no longer an option or why general recreation of an unspecified nature might be deemed acceptable in planning terms in this sensitive rural location.
32. Sempstead House, to the immediate west of the appeal site, is a grade II listed building. However, separation from the subject development by way of distance and screening is sufficient to ensure that its setting remains unharmed. I acknowledge that the tennis court has no adverse impact on the supply of agricultural land or the living conditions of neighbouring residents. It is also apparent that the scheme complies with some of the relevant development plan policy criteria. However, neither these nor any other matters are 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 appeal on ground (f)

33. Given that compliance with the enforcement notice does not require full remediation of the alleged breach of planning control (the alteration of ground levels not being one of the remedial steps specified), it is evident that the statutory purpose of the notice is to remedy any injury to amenity caused by the breach in accordance with paragraph (b) of section 173(4) of the 1990 Act,

¹ Class A of Part 2 of Schedule 2 to the Town and Country Planning (Permitted Development) (England) Order 2015 as amended provides for the erection of means of enclosure of up to 2 metres in height as 'permitted development' if, subject to compliance with certain other restrictions, they are not adjacent to a highway used by vehicular traffic.

² The judgment in *Garland v MHLG* [1968] 20 P&CR 93 makes it clear that operational development must be considered in its entirety and cannot be subdivided into parts that constitute permitted development and parts that do not.

³ The judgment in *Murfitt v SSE* [1980] JPL 598 confirms that a notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or be immune from enforcement action.

rather than to remedy the breach as a whole in accordance with paragraph (a). This being so, lesser steps designed solely to address amenity issues are eligible for consideration in the context of an appeal on ground (f).

34. To this end the Appellant has suggested that the existing perimeter fence could be replaced with something lower. However, I have already dismissed that option as an acceptable way forward in the context of the appeal on ground (a) and need not repeat my reasoning here. The Appellant also contends that, in the event that the tennis court is removed, the requirement to replace it with topsoil and seed with grass is excessive, on the basis that there was previously no topsoil and grass in place. However, I have already found in the context of ground (a) that the claim that the site was an unsightly dumping ground devoid of topsoil or grass has not been substantiated.
35. Finally, although the argument is less clearly stated, the Appellant appears to suggest that even if the tennis court surface is deemed to be unacceptable it could be buried beneath topsoil and grass, rather than the hard surface and base or sub-base being removed from the site. I give this little credence, there being nothing before me to support the hypothesis that a grass surface laid in this slipshod way would be likely to survive in the longer term. Therefore, in the absence of cogent evidence to the contrary I do not find the steps prescribed to exceed what is necessary to remedy injury to amenity. Accordingly, the appeal on ground (f) fails.

The appeal on ground (g)

36. The Appellant concedes that the removal of materials and debris in order to comply with the enforcement notice may take no longer than six weeks, well within the prescribed compliance period of three months. Nonetheless, an extended period of six months is sought to take account of the possibility of inclement weather and unsuitable ground conditions.
37. I am mindful that the timing of my decision is such that the compliance period as prescribed by the notice as issued will span the winter months. However, this suggests merely the possibility that site and weather conditions *may* be unsuited to the works required, rather than a likelihood that this would be so.
38. 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 proves to be necessary. Moreover, I note that the Council is willing to take a reasonable approach in that regard. I therefore conclude that, subject to the above caveat, the period specified in the notice does not fall short of what should reasonably be allowed. Accordingly, the appeal on ground (g) fails.

Conclusion

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

Formal decision

40. It is directed that the enforcement notice be corrected by:
(i) in section 3, the deletion of the words 'that part of'; and

- (ii) in section 4, the insertion after the word 'land' of the words 'shown hatched in the approximate position on the attached plan'.

41. Subject to these corrections, the appeal is 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