The Planning Inspectorate

Appeal Decision

Site Inspection on 1 December 2016

by Graham Self MA MSc FRTPI

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

Decision date: 08 December 2016

Appeal Reference: APP/P1615/C/16/3150579
Site at: Land at the A48, Awre, Newnham, Gloucestershire GL14 1EF[1]

- The appeal is made by Mr G Moore (see "Procedural Matters" below) under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by Forest of Dean District Council.
- The council's reference is EN/001/16.
- The notice is dated 4 March 2016.
- The breach of planning control alleged in the notice is: "Without planning permission, the change of use of the land from agricultural use to the use of the Land for the siting of containers, storage use, the associated deposit of inert materials and the creation and use of an access onto the A48".
- The requirements of the notice are:
  - i) cease the use of the Land for business purposes in connection with storage and the tipping of inert materials;
  - ii) cease the use of the access created on the Land to allow for vehicular access to and from the A48;
  - iii) remove from the Land all containers, fencing, plant, equipment and vehicles stored on the Land in connection with the unauthorised use of the Land;
  - iv) permanently close off the access to the A48 and reinstate the boundary hedge to a height consistent with the adjoining hedgerow;
  - v) restore the Land to its former condition.
- The periods for compliance with the above steps are:
  - i) Three months from the date this notice takes effect
  - ii) One month from the date this notice takes effect
  - iii) Three months from the date this notice takes effect
  - iv) Three months from the date this notice takes effect
  - v) Four months from the date this notice takes effect.
- The appeal was made on grounds (a), (b), (c), (d), (e), (f) and (g) as set out in Section 174(2) of the 1990 Act. However, ground (a) later lapsed as the fee due for the application deemed to have been made under Section 177(5) of the 1990 Act was not paid.

Summary of Decision: The notice is amended and upheld. The appeal fails.

[1] This is the site location as stated in the enforcement notice. The appeal form and some other documents refer to the site as: "Former grit store, Sparks Hill, Awre, Newnham, Gloucesteshire GL14 1EF".

Costs

1. The appellant has applied for an award of costs against the District Council. This application is the subject of a separate decision.

Procedural Matters

2. Because of the non-payment of the deemed application fee, the issue of whether planning permission should be granted for the development enforced against is not before me. All the other grounds of appeal remain to be considered.

3. It is not clear from the appeal form whether the appeal is intended to be by Mr G Moore or by a company, Ricochet Development Ltd. Mr Moore is named as the appellant but some of the submitted documents refer to the company as if it were the appellant. I have decided to treat the appeal as being by Mr Moore. This is not a crucial point since if the appeal was intended to be by Ricochet Development Ltd (of which Mr Moore is evidently a director), Mr Moore can be regarded as acting on behalf of the company.

Format of this Decision

4. Before considering the grounds of appeal, I comment on the allegation in the enforcement notice. Each ground of appeal is then considered in logical sequence, not in alphabetical sequence. This is standard practice where multiple grounds of appeal are pleaded because if, for example, an enforcement notice were not properly served (in which case an appeal on ground (e) would succeed), the notice would be quashed and all other grounds of appeal would become redundant; if the matters alleged in a notice have not occurred (ground (b), all subsequent grounds of appeal would become redundant; and so on in the sequence set out below.

The Allegation in the Enforcement Notice

5. The enforcement notice alleges (in part) the change of use of land "from agricultural use". However, it is clear from all the evidence that the use of the land immediately preceding the development enforced against was not agricultural. I return to this matter when considering ground (b) below.

Ground (e)

6. This ground of appeal enables an appellant to claim that the enforcement notice was not properly served on all those with an interest in the land. In the appeal statement, Mr Moore states that the company (which I take to mean Ricochet Development Ltd) was not notified of a planning enforcement hearing on 9 February 2016. The "planning enforcement hearing" seems to have been a meeting of some sort held by the council. That has no bearing on the actual issuing and service of the enforcement notice.

7. The appellant appears to have misunderstood the scope of ground (e). He has confirmed that both the owner and the then occupier of the site (a tenant, Mr Greedy) received copies of the enforcement notice. Thus there is no basis for a finding that the notice was not properly served on the relevant parties. The appeal on ground (e) fails.

Ground (b)

8. Ground (b) is a claim that what is alleged in the enforcement notice did not occur, as a matter of fact. Many of the appellant's arguments about the site's past history relate to whether what happened constituted a breach of planning control, and I consider these points under the heading of ground (c).

9. As for the facts relating to events on the site, the site was evidently disused, and had been disused for around 30 years since the 1980s, before Mr Greedy became the occupier. There is no evidence that the land was in active use for agriculture. Indeed, the council in their own statement describe the former state of the land as being "totally overgrown". The council also write: "Due to the time the land was not used for anything, it is considered that the land reverted back to an agricultural use". That is an illogical statement. Where land is not used for anything, it is properly described as disused, not used for agriculture.

10. Therefore the description in the allegation as drafted by the council "change of use of the land from agricultural use…." is flawed, as it refers to what might have been a potentially authorised use rather than the actual situation on the land. The flaw is not fatal to the notice, because I can use the powers available to me under Section 176 of the 1990 Act to make a correction. Moreover, it is not necessary for an enforcement notice alleging a material change of use to specify the previous (or "from") use. I shall therefore correct the allegation by deleting the words "from agricultural use".

11. The rest of the allegation refers to two different types of development, as defined in Section 55 of the 1990 Act. One type is making a material change of use of land; the other type is carrying out what is called "operational development" - in this instance the operations involved in the creation of an access onto the A48. Although including both "change of use" and "operations" in one enforcement notice is unusual (and not normally advisable because of the complications which can arise relating to different immunity periods), doing so is legally valid.[2]

12. From what I have seen and read, it is clear that the change of use described in the enforcement notice occurred. It is also clear that works were carried out to create a usable access where previously there was no such access, despite the presence of the old length of lowered kerb. I conclude that what is alleged in the enforcement notice happened, so the appeal on ground (b) does not succeed.

Ground (c)

13. Under this ground it is contended that the matters alleged in the enforcement notice did not constitute a breach of planning control. The appellant's main argument is that following the former use by the County Council, a planning permission as a commercial site with highway vehicular access remained.

14. The exact nature of the activities carried out by the County Council many years ago is not clear. It seems possible that the use of the land as a gritting depot was unauthorised, since the then extant permitted development order only granted permission for certain operations, which may not have covered the actual use of the land by the County Council. More probably, a planning permission may have been granted by the then applicable permitted development order; but any such permission would only have covered use by the highway authority, and cannot be "revived" by a body other than the highway authority.

15. Nor has planning permission been granted for the works involved in re-creating a vehicular access. The pre-existence of a lowered kerb is not a compelling point of support for the appellant's case, since it is apparent from the photographic evidence that work was required to create a usable access across the verge and into the site.

[2] This point was confirmed in the High Court judgment in the case of *Valentina of London Ltd v LB Islington* [1992].

16. In summary, there is no planning permission for the use enforced against, or for the access. Both types of development constituted breaches of planning control. I therefore find that the appeal on ground (c) fails.

Ground (d)

17. Ground (d) is the means of claiming that when the enforcement notice was issued it was too late because the development enforced against had become "immune" and therefore lawful through the passage of time. For the "use" part of the allegation, the relevant period is ten years; for the operational development, the relevant period is four years.

18. In the appeal statement Mr Moore argues that if the District Council wanted to take enforcement action they should have done so some 60 years ago against Gloucestershire County Council. This argument is irrelevant and artificial. As noted above, the County Council apparently used the land for purposes in connection with road improvement works, probably under rights conferred by the then applicable Permitted Development Order; but such rights would only have extended to the highway authority, and no planning permission for any other person or body to use the land would have continued to exist.

19. I make that finding even setting aside the concept of abandonment - and in view of the overgrown nature of the land before the current development began, any use rights which the highway authority may have had appear to have been abandoned anyway. I have had regard to court judgments on cases such as *Pioneer Aggregates v SSE & Another* [1983]. The gist of that judgment is that a planning permission cannot be abandoned if it is capable of implementation; but the judgment is of limited application to the present case because it is evident that the disputed development could only be implemented by carrying out new works which required planning permission, including the removal of soil to enable access to the site to be gained.

20. As for the operational development, the long existence of the lowered kerb does not mean that a usable access existed during the period leading up to 4 March 2012 (four years before the enforcement notice was issued). As explained above, operational development including earthworks were necessary to create a usable access and this development took place well within the relevant four year period.

21. I conclude that neither the change of use nor the operational development had become immune from enforcement, so the enforcement action was not too late. The appeal on ground (d) does not succeed.

Grounds (f) and (g)

22. The appellant maintains that the requirements of the notice are excessive. He suggests that suitable lesser steps would include placing lorry box containers either side, but not in front of, the gate, arranging them perpendicular to the A4, as a single storey (not two-storey), and leaving self-planted saplings alongside the A48 as a screen. Mr Moore also contends that the requirement to cease using the access to and from the A48 is not legal, since the A48 is in his submission "the King's highway" and access rights would have been acquired by prescription over 20 years.

23. The measures suggested by the appellant for arranging the lorry bodies and screening the site would not have overcome the objections to the development, and in any case they have little relevance to ground (f) - they might have been more relevant to ground (a) and a deemed planning application but as explained above there is no such application before me. The claim that access rights have

been obtained by prescription is misguided, bearing in mind the length of time during which there has been no access into the site from the road.

24. Step (v) (the restoration works) is imprecise and it would be difficult to restore the land to its "previous condition" - that is, largely or partly overgrown with semi-mature shrubs and other vegetation - within four months. On balance I consider that this step should be replaced by a lesser requirement to remove the rubble hardcore which appears to have been fairly recently laid, leaving the site to become naturally re-vegetated as evidently happened after it was vacated by the highway authority.

25. The other requirements of the enforcement notice are not excessive or unreasonable - they are what is necessary to remedy the breach of planning control.

26. As for the periods for compliance with the various steps specified in the notice, I agree with the appellant's argument that there is inconsistency between the requirement to cease using the access within one month, whilst allowing three months for the unauthorised use to cease and items such as the containers to be removed, since removing these items would be difficult without using the access. However, by the date of my inspection the only items on the land were an old, apparently abandoned car, some lengths of timber which might perhaps be used for logs and some heaps of vegetation which appeared to be the result of clearing parts of the site. Taking those factors into account I do not see any need to amend the compliance periods.

Other matters

27. Mr Moore states that the planning consultant he apparently engaged to advise him "has never heard of Murfitt". The court judgment in the case of *Murfitt v SSE and East Cambridgeshire District Council* [1980] is a well-known and frequently quoted judgment among professionals working in the field of planning law. It is one of the judgments which confirms that an enforcement notice directed at a change of use of land can, in some circumstances, require operational development which facilitated and was integral to the unauthorised use to be undone. Another standard and often-quoted judgment on this topic is *Somak Travel v SSE* [1987].

28. The judgments in other cases mentioned by the appellant, including *Pioneer Aggregates v SSE, Gillingham BC v Medway (Chatham) Dock Co Ltd,* and *Halsey v Esso Petroleum Co Ltd*, cover different issues, so their dates relative to *Murfitt* are irrelevant.

Formal Decision

29. I direct that the enforcement notice be corrected and varied in the following ways:

    (i) by deleting from the allegation the words "from agricultural use".

    (ii) by deleting step (v) from the text headed "What You Are Required To Do" and substituting: "(v) Remove the rubble hardcore from the land".

30. Subject to the correction and variation specified above, I dismiss the appeal and uphold the notice as corrected and varied.

G F Self

Inspector