



Appeal Decision

Site visit made on 17 January 2017

by Elizabeth Jones BSc (Hons) MCTP MRTPI

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

Decision date: 16 March 2017

Appeal Ref: APP/J1860/C/16/3156498

Land at Temeside Cottage, Temeside Way, Powick, Worcestershire WR2 4QP

- 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 Mrs Tina Dolan against an enforcement notice issued by Malvern Hills District Council.
- The enforcement notice, numbered E/16/00103/PHY3, was issued on 13 July 2016.
- The breach of planning control as alleged in the notice is without planning permission, the unauthorised raising of the level of the ground together with the construction of a roadway and hardstanding on the land.
- The requirements of the notice are:
 - i) Permanently remove the roadway and adjacent hardstanding from the Land (the course of the roadway is shown on the attached plan for identification purposes only marked in green between points A and B), including the lawful disposal of the resultant materials.
 - ii) Restore the ground on the Land to its condition and level before the breach took place.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2) (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

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

Application for costs

1. An application for costs was made by Mrs Tina Dolan against Malvern Hills District Council. This application is the subject of a separate Decision.

The Enforcement Notice

2. The appellant questions the validity of the enforcement notice as she considers that the enforcement plan is unclear. There is no requirement for a notice to include a plan. Regulation 4 of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 says that an enforcement notice shall specify the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise.
 3. In this case the notice itself describes the site address, and that the alleged breach of planning control is the raising of the level of the ground together with the construction of the roadway and hardstanding. The plan shows the boundaries of the land and indicates the approximate location of the roadway. The notice is sufficiently clear and the recipients of the notice appear to have understood what is being attacked and where it is.
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4. In their costs application the appellant has drawn my attention to a recent appeal decision¹ and considers that the requirements of the notice are unclear and fail the test of *Payne*². Requirement ii) of the notice states “restore the ground on the Land to its condition and level before the breach took place”. This case is not directly comparable with *Payne* because the notice does not require the submission and approval of details of what has to be done. The appellant questions how compliance with the notice can be proven. The appellant will know how much material was used to create the roadway and hardstanding. Moreover, the appellant is the person with the best knowledge of what the previous condition of the land was. The enforcement notice enables the appellant to understand the matters considered to constitute the breach of planning control and what steps are required to remedy this. Thus, the notice is not a nullity.

Site Description

5. The appellant occupies Temeside Cottage. The notice relates to the raising of land levels, construction of a roadway and hardstanding on land to the south west of Temeside Cottage across which access is afforded to the dwellinghouse, its outbuildings and a holiday let caravan.

The appeal on ground (c)

6. The appeal on ground (c) is that the matter alleged in the notice does not constitute a breach of planning control. The questions are whether the matter represents development for which planning permission is required and, if so, whether planning permission has been granted. The onus of proof is on the appellant to show that there has not been a breach of planning control and the standard of proof is the balance of probabilities.
7. The appellant’s case is that the works carried out are repairs to an existing track and are de minimis and therefore do not amount to development. In the alternative, the works are permitted development under Schedule 2, Part 1, Class F of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).

Do the works amount to operational development for which planning permission is required?

8. The meaning of development is set out in s55(1) of the Act and includes the carrying out of building, engineering, mining or other operations in, on, over or under land.
9. There is no dispute between the parties that there existed a track in the approximate location as identified between the points marked A and B on the plan attached to the notice. The Council’s view is that the importation of material to raise the level of the land not only along the pre-existing track but in areas adjacent to it, the construction of the roadway and hardstanding amount to an engineering operation. The appellant submits that the land levels adjacent to the track have not changed and that the greatest increase in land level is where pot holes have been filled in to repair and level the pre-existing track.

¹ APP/G1630/C/15/3133109.

² *Payne v National Assembly for Wales* [2007] J.P.L. 117.

10. Having regard to the aerial photographs provided in the Council's statement it is evident that the pre-existing track was a simple track grassed in the middle. The resultant roadway appears wider and of a uniform level along its entire length. Moreover, the deposition of imported material and the depth to which it has been constructed together with its edging has resulted in a permanent physical alteration of the land and amounts to an engineering operation. Whatever the justification claimed for the levelling of the pre-existing track, given its length, the scale of the engineering operation that has taken place in my mind amounts to development within the meaning of s55 for which planning permission is required.

Has planning permission been granted?

11. Article 3 of the GPDO grants planning permission for classes of development described as permitted development in Schedule 2. Class F of Part 1 of Schedule 2, addresses permitted development rights for (a) the provision within the curtilage of a dwellinghouse of a hard surface for any purpose incidental to the enjoyment of the dwellinghouse as such; or (b) the replacement in whole or in part of such a surface.
12. The development serves Temeside Cottage and a caravan which is let out as holiday accommodation. Thus, the use of the development is mixed and not solely incidental to the enjoyment of the dwellinghouse. Consequently, whether or not the development is within the curtilage of Temeside Cottage it is not permitted under Class F.
13. I note the appellant's comments made in relation to the other appeal decisions³. However, I have not been provided with the full details of these particularly cases and do not know if they are directly comparable with the appeal before me. In any event, each appeal falls to be considered on its own merits.
14. The matters alleged in the notice constitute a breach of planning control and the appeal on ground (c) therefore fails.

The appeal on ground (f)

15. The appeal on ground (f) is that the steps required by the notice to be taken or the activities required by the notice to cease, exceed what is necessary.
16. The purposes of an enforcement notice are set out in s173(4) of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). The notice requires the removal of the roadway and hardstanding, all resultant materials and restoration of the ground to its former condition and level. Thus, the purpose of the notice is clearly to remedy the breach of planning control in its entirety by restoring the land to its condition before the breach took place (s173(4)(a)) rather than to remedy injury to amenity by requiring some lesser steps to be taken (s173(4)(b)). That purpose can only be achieved in this case by the removal of the roadway, hardstanding and all resultant material.
17. The appellant argues that the development, which cannot be seen from the public path and road, once completed will be porous and will blend into the rural landscape and will not cause harm. I also note the reference made to

³ APP/Y3940/C/11/2159651 & APP/T5150/C/13/2197578.

obtaining a permit from the Environment Agency and the third party correspondence in support of the development. However, no appeal has been brought on ground (a) and an appeal on ground (f) cannot be used to consider the planning merits or to bring about a deemed application for the development. In these circumstances, the only point at issue under ground (f) is whether the requirements of the enforcement notice exceed those necessary to achieve the purpose which in this case is to remedy the alleged breach of planning control. Leaving the raised land levels and the roadway and hardstanding in position would not remedy the breach.

18. In order to remedy the breach of planning control, the appellant is best placed to know what the land levels were prior to the works being carried out and it is not excessive to require the removal of the roadway and hardstanding, all resultant materials and restoration of the ground to its former condition and level. I conclude that no lesser steps would remedy the breach of planning control that has occurred. The appeal on ground (f) therefore fails.

The appeal on ground (g)

19. The appeal on ground (g) is that the time given to comply with the requirements of the notice is too short. The appellant has suggested either a period of 6 months or one of 12 months to enable her to undo the works carried out and to avoid carrying out the remedial works at a time of year when flooding is more likely.
20. Given the length of the track it seems to me that a compliance period of one month would give the appellant insufficient time to complete the requirements in the notice.
21. Having regard to the submissions from both parties, I consider that it would be excessive to give the appellants 12 months to comply with the notice as a whole. However, for the reasons above, and taking into account the possibility of flooding, I consider that a 6 month period would be a realistic timescale. To this extent the appeal on ground (g) therefore succeeds.

Formal Decision

22. It is directed that the enforcement notice be varied by the deletion of the words "one calendar month" in paragraph 6 and the substitution therefor of the words "six months" as the time for compliance.
23. Subject to this variation, the appeal is dismissed and the enforcement notice is upheld.

Elizabeth Jones

INSPECTOR