



Appeal Decision

Site visit made on 4 July 2017

by Pete Drew BSc (Hons) DipTP (Dist) MRTPI

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

Decision date: 7 July 2017

Appeal Ref: APP/Q3305/C/17/3167974

Land south-west of Oxted House, Lydford on Fosse, Somerton, Somerset TA11 7BX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Graham Watts against an enforcement notice issued by Mendip District Council.
- The enforcement notice was issued on 16 January 2017.
- The breach of planning control as alleged in the notice is: Without planning permission the creation of a new vehicular access onto the A37 highway including the removal of a section of hedgerow and the installation of a five bar gate, and the creation of an area of hard surfacing.
- The requirements of the notice are: (i) Remove the 5 bar gate and posts; (ii) Take up the hard surfaced area and restore the land to its previous condition; (iii) Remove the resultant materials from the land; and, (iv) Permanently stop up the access.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c) and (f) of the Act.

Decision

1. I direct that the enforcement notice be corrected by:
 - the deletion of the phrase "*A(1)*" in the title under the words "*TOWN AND COUNTRY PLANNING ACT 1990*" on the first page of the notice;
 - the deletion of the phrase "*Planning and Compulsory Purchase Act 2004*" on the first page of the notice and its replacement with the phrase "*Planning and Compensation Act 1991*"; and,
 - the deletion of the word "*Oxtead*" in all instances that it occurs on the face of the notice including, but not restricted to, the title on the first page and paragraph 2, and its replacement with the word "*Oxted*".
2. 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 Act.

Preliminary matters

3. The address has been taken from the appeal form, but was corroborated by the sign that exists at the front of the property, which I observed during my site inspection. This requires the enforcement notice to be corrected, which I consider can be done without injustice because this is a factual matter¹.
4. The face of the enforcement notice refers to "*Section 172A(1)*" of the Act, which is incorrect and should be section 172. I have considered whether there

¹ For this reason I have also disregarded a local resident's reference to Oxstead House.

would be any injustice if I were to correct what appears to be an error. Noting that the Appellant is legally represented, it is material that no claim in pursuit of this aspect of the legal validity of the notice is advanced. In that context, my view that the Appellant would not suffer injustice if I were to exercise the power in section 176 of the Act is confirmed by the fact that the example notice² in the Planning Practice Guidance [“the Guidance”] does not quote any section in its title. The notice is otherwise plain on its face as to what it is and since it is not essential to even quote the section it is correctable in my view.

5. A further point is that the model notice in the Guidance says: “*As amended by the Planning and Compensation Act 1991*” [“the 1991 Act”], rather than the Planning and Compulsory Purchase Act 2004 [“the 2004 Act”]. The Council is not wrong insofar as the 2004 Act has amended the Act in certain respects, but the 1991 Act introduced, amongst other things, section 171A(1), which is expressly referred to in paragraph 1 of the enforcement notice. I suggest this is why the model notice refers to the 1991 Act and not the 2004 Act. I consider this defect, rather than error, is again capable of correction without injustice.

Ground (b)

6. Under this ground of appeal the Appellant needs to show that: “...*the breach of control alleged in the enforcement notice has not occurred as a matter of fact*” [as per section E. (b) of the appeal form]. The Guidance says³ in enforcement appeals the onus of proof in respect of matters of fact is on an Appellant.
7. The grounds of appeal assert that the access gate was existing in the hedgerow and that a contractor replaced the very old gate with a new one, such that no access was created. However the Appellant’s statement of case acknowledges that no photographs of the old gate exist and whilst it was suggested that a statutory declaration might be submitted and/or that the contractor might give a statement, neither has been provided. Whilst I have noted the conveyance from 11 November 1930 this adds very little to the Appellant’s case in my view. Even if I were to accept the unsubstantiated claim that the area highlighted yellow on the conveyance plan was a dwelling that does not show that there was an access at the point where the current access has been constructed.
8. In contrast to that imprecise evidence the photographs put forward by, in particular, the Parish Council are in my view exceptionally clear. They appear to show that the only gate that was in existence along this boundary was a pedestrian gate, that there was a substantial hedgerow along the remainder of the frontage and, whilst it is slightly less clear, there is no obvious sign of a dropped kerb in any of these images⁴. I acknowledge that the precise date on which these photographs were captured is not clear⁵, but in the absence of a ground (d) claim that is not significant. They were plainly taken before the works that are the subject of the allegation in the enforcement notice. In my view these photographs clearly contradict the Appellant’s version of events.
9. In reaching this view I have taken account of the Appellant’s final comments. Whilst the Appellant might claim personal knowledge of the gate, he has not discharged the burden that falls on him to demonstrate its existence. To assert

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/548727/17b-061-20140120_example-enforcement-notice-operational-development.pdf

³ See for example paragraph: 053, Reference ID: 16-053-20140306.

⁴ The point is made at the end of paragraph 6.22 of the Council’s statement and was not rebutted. Moreover my site inspection corroborated this because no dropped kerb exists along the site frontage.

⁵ They are imprinted as the copyright of Google in 2016 and 2017, but it is possible that they might pre-date this.

it was in the hedgerow in these photographs and so not visible is not a credible basis on which I could reasonably be expected to allow this ground of appeal. This is particularly so in the absence of a statutory declaration. I conclude that the ground (b) appeal must fail because the onus of proof to show that the alleged breach has not occurred as a matter of fact has not been discharged.

Ground (c)

10. The Guidance states that the Applicant is responsible for providing sufficient information to support an application for a Lawful Development Certificate. Lawful development is development against which no enforcement action may be taken, amongst other things because it did not involve development or require planning permission. Since this is the equivalent of ground (c) in an enforcement appeal the Appellant needs to show that: "*...there has not been a breach of planning control*" [as per section E. (c) of the appeal form].
11. The Appellant's final comments fairly concede that: "*The Ground C appeal is based on the fact of there being a previous gate in place*". In the light of my finding on ground (b) it is clear this ground cannot succeed. However, for completeness, I deal with the points in the order they have been put forward⁶:
 - Given my finding on ground (b), as there is no evidence of a pre-existing access the construction of a new vehicular access and the erection of a new gate and pillars appears to constitute development;
 - Whilst it is accepted that the mere clearance of vegetation might not have amounted to development, it is clear that is not all that has taken place in this instance;
 - I accept the laying of the membrane and scalplings does not constitute a building operation. However no basis is advanced to support the claim that there has not been an engineering operation within the definition of development in section 55 of the Act. Among other things it is material to note that an engineering operation is expressly defined in section 336 of the Act to include "*...the formation or laying out of means of access to highways*". This is the A37 trunk road and so is plainly a highway. This view is corroborated by what I saw during my site inspection, including the significant extent of the hardstanding that has been laid; and,
 - The class of permitted development to which the Appellant has made reference is Class A of Part 2 to the Town and Country Planning (General Permitted Development) (England) (Order) 2015 [the 2015 Order]. That Class permits: "*The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure*". However the Council's unchallenged claim is that the gate exceeds one metre in height and such development is not permitted where any such gate is erected adjacent to a highway used by vehicular traffic, as is the case here. Moreover this Class would not permit the other works, including the formation or laying out of a means of access to a highway. Whilst the Appellant has made no express reference to Class B of Part 2 to the 2015 Order it only permits: "*The formation, laying out and construction of a means of access to a highway which is not a trunk road or a classified road...*", and so that Class would not apply in this instance.
12. For the above reasons I conclude that it has not been shown that there has been no development or that such development as has taken place is permitted

⁶ At paragraph 5 of the Appellant's statement of case.

by the 2015 Order. Since no claim is advanced that the works have been granted express planning permission I conclude that there has been a breach of planning control. In the circumstances the ground (c) appeal must fail.

Ground (a): Preliminary matters

13. Attached to the Appellant's Agent's letter dated 6 April 2017 are 2 drawings, numbered P-01 Rev P2 and SPA_01 Rev P2. When one compares the area edged red on these plans with the area edged red on the enforcement notice plan it is obvious that there are differences. Noting again the onus of proof that falls on an Appellant under ground (b) it is appropriate to record that no claim has been advanced that the access has not been constructed within the land edged red on the enforcement notice plan. Although there is no scale stated on that plan my inspection leads me to find that "*the Land*", as defined, includes the access and hardstanding, i.e. generically the area of the breach⁷.
14. The Council has expressed doubts about whether the scale of the submitted plans is as stated and there might be some truth in that. However I am also concerned as to whether the land edged red on, in particular, drawing No P-01 Rev P2, correlates with the deemed application site area. The area edged red on the enforcement notice plan is rectangular but the long side is at right angles to the A37, whereas on the Appellant's plans the rectangle is orientated the other way around. My site inspection revealed that the area of the breach, notably the extent of the hardstanding, broadly accords with the shape of the area edged red on the enforcement notice plan⁸. I am also concerned the gap between the southern projection [domestic garage] of Oxted House and the respective areas edged red is significantly greater on drawing No P-01 Rev P2⁹.
15. For these reasons I am only able to attach limited weight to drawing Nos P-01 Rev P2 and SPA_01 Rev P2. The enforcement notice plan determines the extent of the deemed planning application site and there is no evidence before me as to the extent of the Appellant's land ownership beyond this area. For these reasons I would be unable to impose a condition to ensure delivery of all that is shown on the submitted drawings, e.g. part of the turning head appears to extend beyond the area of hardstanding on the deemed application site.

Main issue

16. The main issue is the effect of the development on highway safety.

Reasons

17. The Development Plan [DP] includes the Mendip District Local Plan Part 1 [LP], which was adopted in December 2014. Since it has been adopted after the National Planning Policy Framework ["the Framework"] was published and one of the tests for soundness is that a Local Plan must be consistent with national policy, it is appropriate to attach full weight to relevant LP Policy DP9.
18. The policy supports development where it avoids direct access on to a National Primary or County Route outside designated Development Limits, unless access

⁷ My view is corroborated by the Appellant's answer at point 10 to the Planning Contravention Notice [PCN] that says: "*The plan appears to represent the land with in a fair judgement...*". On the balance of probability the PCN plan being referred to in that answer has been re-used as the enforcement notice plan noting, amongst other things, that the same reference [ENF/2016/0415] is used on the PCN response as on the enforcement notice plan.

⁸ The hardstanding occupies roughly the northern half of the enclosed area on the ground.

⁹ On the ground I estimated the distance between the southern wall of the domestic garage at Oxted House and the fence along the northern boundary of the land on which the access has been constructed to be less than 10 m, but drawing No P_01 Rev P2 appears to show this distance to be larger. On the limited information before me it is unclear whether it is the boundary that is wrong or the base plan in not showing the full extent of the building.

via a National Primary or County Route location is essential for the type of development proposed and mitigation on and off site is fully undertaken as part of the development to the satisfaction of the Highway Authority. There appears to be no dispute that the appeal site is outside the designated LP Development Limits and hence the key policy test is whether the access is essential.

19. On the limited information before me it is entirely unclear what the site is to be used for. The Appellant's statement of case says the development proposal is the access itself and no details of the existing or intended use of the land is given. The Appellant's final comments say: "*...the site is already in use for the intended - light use - purpose*", but it is not understood what is meant by the term "*light use*". Having regard to the letters that have been submitted by third parties it might be that the land was formerly used as a garden in association with a nearby dwelling, but as the land now appears to have been physically separated it is possible that it has a nil use. No copy of a Lawful Development Certificate [LDC] has been provided to show what the lawful use of the land is.
20. At the time of my visit the hardstanding subject of the deemed application was in use for the storage of, amongst other things, a commercial type of waste disposal container¹⁰, approximately 16 chairs, 2 tables and a tyre. What appeared to be a small building had been erected in the north-east corner of the site behind the hedgerow, which had a ridge height of approximately 2 m, within which other items appeared to be stored. On the limited information before me it is unclear whether this use is lawful or what the planning status of what appeared to be a building is. Based on my site inspection it would appear that the "*light use*" already taking place includes some sort of storage use.
21. In my view it has not been shown why a vehicular access is essential to serve the light use of the appeal site, which appears to include storage. There is no reason to think that the pedestrian gate that continues to exist within the hedgerow could not usefully serve this "*light use*", if indeed such use were to be granted planning permission or otherwise shown to be lawful for any reason.
22. Even if it were shown to be necessary to provide a vehicular access to the site, that case not having been made out on the evidence before me, it is unclear whether this site could be served by an existing access on adjoining land. Although third parties have given information about transactions of adjacent land that have allegedly taken place, the Appellant has not commented on this information nor provided any evidence as to the extent of his landownership. It must follow that the key policy test has not been met in this instance.
23. LP Policy DP9 also requires development to provide: (a) safe and satisfactory provision for access and parking; and (b) avoid causing traffic or environmental problems within the wider transport network or generating any requirement for transport improvements which would harm the character or locality.
24. Dealing initially with (a) the Council require a visibility splay of 2.4 m x 43 m, rather than 60 m as shown on the submitted plans. However the information before me does not show that such splays can be provided on land within the control of the Appellant or otherwise within the public highway¹¹. Particularly to the south-west there appears to be a lamppost at a distance of circa 10 m

¹⁰ One of the submissions made to The Planning Inspectorate says: "*Westcome waste collect from this site...*" [sic] and whilst the container appeared to be labelled Westcombe Waste, its existence appears to support this claim.

¹¹ The existing gate is set back approximately 2.4 m from the carriageway edge and whilst I have noted the extent of the public highway shown on drawing No P_01 Rev P2 it is unclear what the derivation for this line is and in any event I have already given reasons for attaching this plan limited weight.

from the centre of the point of access and, beyond that, a hedgerow that might not be within the Appellant's control¹². It is unclear how much of the hedgerow to the north-west of the A37 would have to be removed to provide the required visibility splay. Cumulatively the removal of hedging to provide the required visibility splay on either side of the point of access has the potential to harm the area's character, contrary to 2. b) of LP Policy DP9.

25. Allied to the above the Council seeks pedestrian visibility splays of 2.4 m x 2.4 m, as shown on drawing No APPENDIX_11_2 Rev A. Since this splay must be provided to the rear of the footway, this would require more of the hedge to be removed. It remains ambiguous whether the deemed application site extends to the south-west of the point of access, because there is no area of hardstanding at this point and so it is not part of the area of the breach. It has not been shown that such a condition could be imposed within the deemed planning application site area. Whilst I note the claim that pedestrian activity along this stretch of road is minimal I find no evidence to support this view.
26. As built it is clear that a vehicle entering or leaving the site has to stop on the carriageway whilst the gate is opened and/or closed, which is likely to cause an obstruction to other road users, including pedestrians, e.g. where the vehicle pulls onto the nearside footway when approaching from the south-west. The Appellant has proposed setting the gate back 5 m from the carriageway edge and ensuring that the gate is hung to open inwards. I am satisfied that this could be achieved by the imposition of a planning condition because it would relate wholly to the deemed application site. However given the modest size of the deemed application site it remains unclear whether a vehicle, even a car, could turn on site and exit in a forward gear. It is highly improbable that a waste collection vehicle could enter the site, let alone turn and exit the site in forward gear, in order to empty the container. For the reasons I have given the turning head shown on the submitted plan appears to extend beyond the deemed application site. Even if a turning head could be achieved by imposing a condition it is likely that a large proportion of the site would be taken up with a turning area, which would need to be kept clear of obstructions at all times.
27. The submitted plans show the turning area would also serve as a parking area and so if a second vehicle were to enter the site it might have to reverse out¹³. Noting that the Standing Advice plainly says: "*Turning will be required, independent of the necessary parking provision where an access is onto a classified road*", it has not been shown how a turning and separate parking area can be provided within the restricted deemed application site area. This reinforces my view as to the weight to be given to drawing No P_01 Rev P2. Taken together with my earlier concerns it is clear that the submitted drawings will not deliver improvements that represent sufficient mitigation in order to comply with the Standing Advice that is given by the Highway Authority.
28. For these reasons I find a clear conflict with criteria a), b) and c) of relevant LP Policy DP9 (2). Against a finding of a conflict with the DP, I turn to consider whether any material considerations indicate that the determination should be made otherwise than in accordance with the DP. The main point outstanding is the Appellant's claim that the running line of vehicles is some distance from the carriageway edge. Given the nature of the route, which is likely to be used

¹² It is plainly outside the deemed application site and by virtue of not having been cut, in contrast to the remainder of the hedgerow on the appeal site frontage, it might be in different ownership.

¹³ It is material to note that whilst the Standing Advice refers to the parking requirements/dimensions at Appendix 11.7 and a turning diagram at Appendix 11.8, I have not been provided with a copy of either diagram.

by HGVs and other large vehicles, even allowing for the white line along the carriageway edge, it does not appear to be a particularly wide road for a main strategic route of this nature. Amongst other things, cyclists are likely to use the inside of the carriageway and for this reason it is crucial to ensure that the visibility requirements for emerging vehicles can be achieved. As this has not been demonstrated to be deliverable I attach this factor very limited weight.

29. I acknowledge that there is no evidence, distinction from assertion, to support a finding that actual traffic speeds exceed the speed limit, but that does not assist the Appellant where it has not been shown that the required visibility splays can be achieved on land under his control or within the public highway. Although there is no evidence that the central hatching is speed related it is not wide enough to accommodate a vehicle, apart from a bicycle or motorbike. Thus, even if the gate was set back it is likely that most vehicles approaching the site from the north-east would have to stop on the carriageway and hence interrupt the free flow of traffic on the A37.
30. On the main issue I conclude that the development detracts from highway safety and no material considerations have been advanced that outweigh the clear conflict with LP Policy DP9. For the reasons given planning conditions could not overcome my concerns. In these circumstances, having regard to all other matters raised, I conclude that the ground (a) appeal should fail.

Ground (f)

31. Section 173(3) of the Act says an enforcement notice shall specify steps in order to achieve, wholly or partly, any of the purposes set out in section 173(4) of the Act. These include remedying the breach by restoring the land to its condition before the breach took place. The Council's position¹⁴ is not as clear as it might be on this point, but the second requirement of the notice does say: "*restore the land to its previous condition*". None of the other requirements lead me to find that the objective of the notice sought to achieve anything other than remedying the breach, which is within section 173(4)(a) of the Act.
32. The first point to make is that there is no requirement for the face of the notice to say what the purpose of the requirements is. The steps set out in the notice merely need to be crafted with sufficient precision in order to achieve one or more of the purposes section 173(4) of the Act. I consider that steps (i)-(iv) achieve this goal and so there is no defect, as is claimed. The photographs appended to the Parish Council's submission demonstrate the condition of the land before the breach took place. They can be used as a reference point in the event of dispute as to what steps are required. In these circumstances the requirements to remove the gate, the posts and the hard surfaced area are necessary and appropriate to remedy the breach of planning control. If, as a consequence, the building has to be removed and the use has to cease then so be it. A realistic alternative might be further enforcement action in this regard.
33. Paragraph 8.3 of the Appellant's statement claims that the lawful use of the land is "*...ancillary residential use*", but it is entirely unclear to which residence any such use is said to be ancillary. The letter from the occupier of Millway House dated 27 April 2017 says Mr & Mrs Watts sold Oxted House 3-years ago and whilst there is no evidence to support the contention, if this is correct then the Council's claim under this head that the site has a nil use might be correct. Since the Appellant's claim has not been made out and the photographs show

¹⁴ As set out in, amongst others, paragraph 6.31 of its statement.

the previous condition of the land to be a hedged plot with no evidence of a hardstanding or vehicular access, the requirement to remove the scalplings is reasonable having regard to the Council's objective that underpins the notice.

34. Paraphrasing paragraph 8.2 of the Appellant's statement I hope it is fair to say that it appears to be admitted that it is necessary to stop up the access in order to address any harm to highway safety. Paragraph 6.35 of the Council's appeal statement says that the most obvious means of stopping up the access is to replant the hedgerow. Having regard to the objective of the requirements of the notice, to restore the land to its condition before the breach, I agree. So whilst I have noted the claim in paragraph 2 of the Appellant's statement, and I acknowledge that it might have been better if the notice had expressly stated how the access should be stopped up, I decline to delete requirement (iv). As is effectively conceded, it is important to stop up the access in order to overcome the harm to highway safety as well as to restore the land to its condition before the breach took place.
35. In the circumstances I conclude that no reason is advanced as to why the requirements of the notice exceed what is necessary to remedy the breach or, as the case may be, remedy any injury to amenity, which is the limited scope of the ground (f) appeal in this case. As such, this ground of appeal must fail.

Other matters

36. In light of these findings, including the prospect of a replacement hedgerow being planted, I have reviewed the compliance period despite the absence of a ground (g). However, given the timing of my inspection and hence the likely date of issue of the decision, which is outside of my control, it does remain in prospect that the 3 month period for compliance would extend into October. It is generally recognised the planting season runs from October. On this basis I find no reason to extend the period for compliance, but in the event that the substantive requirements are met within the 3 months and a request is made to extend the period, e.g. because the weather is dry and not conducive to successfully planting a hedge, the Council has a discretion within section 173A of the Act to vary a notice, including by extending the period for compliance.

Conclusion

37. For the reasons given, and having regard to all other matters raised, I conclude that the appeal should be dismissed and I shall uphold the enforcement notice as corrected. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the Act.

Pete Drew
INSPECTOR