

Appeal Decision

Site visit made on 3 July 2019

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 10 July 2019

Appeal ref: APP/P4415/C/18/3218443

Land off Osborne Drive/Osborne Road, Todwick, Sheffield, South Yorkshire S26 1HY

- The appeal is made by Mr D A Smith 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 Rotherham Metropolitan Borough Council.
- The notice was issued on 22 November 2018; reference No. EN2018/0254.
- The breach of planning control was: Without planning permission, the unauthorised formation of access and exit points (marked in green on the plan attached to the notice) and construction of hard core track (marked in blue on the plan attached to the notice).
- The requirements of the notice are:
 1. Remove hard-core forming the access track and reinstate the land to its former condition.
 2. Close the access points by erecting, and there after retaining, the fence or other non opening means of enclosure of 1m maximum in height in the approximate alignments marked in green on the plan attached to the notice.
- The period for compliance with the requirements is 3 months.
- The appeal was made on grounds (a), (c), (e) and (f) as set out in the amended Act.

Summary of decision: The enforcement notice is corrected, varied and upheld

Appeal development

1. The appeal concerns the construction of a hardcore surfaced track using inert builder's waste that has been built on an area of open grassland in the Green Belt, on the north-eastern edge of the village of Todwick. The track connects the cul-de-sac ends of Osborne Drive and Osborne Road in a 'U' shaped loop extending to a length of some 280m.

The appeal on ground (e)

2. An appeal on ground (e) says that the enforcement notice was not properly served on everyone with an interest in the land. Mr D A Smith, the Appellant, said that part of the land shown on the plan attached to the notice was owned by a third party. The enforcement notice had not been served on that owner. He said that either the third party land should be excluded from the notice plan or that the owner of that land should be served with the enforcement notice.

3. The Council accepted that part of the land enclosed by the red edging on the notice plan was in the ownership of a third party. However, the edging mirrored that submitted by the applicant himself for the retrospective planning application for the track. The Council pointed out that the third party land was not affected by the track the subject of the enforcement notice. If the red boundary was incorrect, they requested that the Inspector should, if necessary, amend the plan.
4. It is evident the Council's inclusion on the enforcement notice plan of a small area of land owned by a third party was inadvertent. The need to correct the notice plan is not, strictly, a ground (e) matter in that circumstance. The obvious remedy is to correct the plan attached to the notice. An appropriately amended plan is attached to this decision. The appeal on ground (e) fails.

The appeal on ground (c)

5. An appeal on ground (c) asserts that there has not been a breach of planning control. In an appeal on legal grounds such as this, the burden of proof lies with the appellant. The case of *Nelsovil v MHLG* [1962] 1 WLR 404 is authority for that position. The standard is the balance of probabilities.
6. Mr Smith accepted that the construction of the access road amounted to operational development that required planning permission. But he said planning permission was not required to form an access onto an unclassified road.
7. Article 3, Schedule 2, Part 2, Class B of the The Town and Country Planning (General Permitted Development) (England) Order 2015, (the Order), 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, where that access is required in connection with development permitted by any Class in this Schedule (other than by Class A of this Part).
8. However, in my view, the 2 accesses from the ends of Osborne Drive and Osborne Road cannot persuasively be said to be required in connection with development permitted by a Class in the Schedule to the Order. Even if it was argued it was so required, the operational development to construct the hardcore road required planning permission, as was accepted by Mr Smith. As an integral part of the unlawful construction of the hardcore road, work to construct the accesses from Osborne Drive and Osborne Road was also unlawful. The appeal on ground (c) must fail.

The appeal on ground (a)

9. The appeal track is in the Green Belt. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence, (MHCLG - National Planning Policy Framework, (NPPF) - para. 133). Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances, (NPPF para. 143).
10. It is necessary here to determine whether the road was inappropriate development in the Green Belt having regard to the revised Framework and any relevant development plan policies. I need to consider its effect on the

openness of the Green Belt, and, in relation to non-Green Belt issues, to consider its effect on the character and appearance of the area. If the road is inappropriate in the Green Belt, would the harm by reason of inappropriateness, and any other harm, be clearly outweighed by other considerations. If so, would this amount to the very special circumstances required to justify the hardcore roadway.

11. The Framework says certain forms of development are not inappropriate in Green belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. They include local transport infrastructure which can demonstrate a requirement for a Green Belt location. That does not apply to this private land access roadway. Para. 90 of the Framework says, amongst others, that engineering operations are not inappropriate provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land within it. Mr Smith said the openness of the Green Belt was unaffected by the track, which was not higher than the land on each side. Its surface could be top dressed with soil and seeded to reduce what was accepted to be an element of urbanisation. It was not inappropriate development in the Green Belt.
12. In the Court of Appeal case of *Timmins and another v Gedling Borough Council [2014] EWHC 654 (Admin)*, against the Judgement of Green J. in the High Court, where the proposal was for the development of a crematorium and cemetery in the Green Belt, Green J. had said, (para. 74), that: "[any] construction harms openness quite irrespective of its impact in terms of its obtrusiveness or its aesthetic attractions or qualities". He went further. He said, apparently as general propositions, that "there is a clear conceptual distinction between openness and visual impact", and that "it is ... wrong in principle to arrive at a specific conclusion as to openness by reference to visual impact". In the unsuccessful appeal to that, those propositions were not contentious. The Court said nothing about them. In *Timmins*, Richards LJ said there was: "... no general test that development is appropriate provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Had such a general test been intended, in my view it would have been spelled out in express terms and would also have affected the way in which the specific exceptions were expressed."
13. In *R. (on the application of Lee Valley Regional Park Authority) v Epping Forest District Council [2016] EWCA Civ 404*, when referring specifically to the broad and basic statement of national Green Belt policy in paragraph 79 of the NPPF, with its emphasis on the "essential characteristics of Green Belts" as "their openness and their permanence", Lindblom LJ said that "[the] concept of "openness" here means the state of being free from built development, the absence of buildings – as distinct from the absence of visual impact" (Judgement *Lee Valley* para. 7). In *Samuel Smith*, Lindblom LJ went on: "This reflects the essential and enduring function of government policy for the Green Belt in keeping land free from development inimical to its continued protection as Green Belt, even where the visual impact of such development on the openness of the Green Belt may not be unacceptable. It recognizes that Green Belt policy regards most forms of development as, in principle, "inappropriate" in the Green Belt simply because it would be there."

14. Following in particular the comments of Lindblom LJ above, I do not accept the apparent suggestion that because the track does not stand above the original ground level it follows that the construction of a hardcore track on this previously undeveloped land and its use was appropriate development in the Green Belt. Inappropriate development is described in paragraph 87 of the Framework as being, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
15. The Council said the Appellant, Mr Smith, proposed the site on which the access track has been constructed as a potential residential development site as part of the adoption of the Rotherham local plan. That allocation was not supported by the Council. It may be that Mr Smith's aspiration for the possible residential development of his land is connected with the justification or need for the track. The track was said to be necessary to gain access to the land. However, the layout and route of the appeal track is more akin to that of a residential estate roadway than an access to a field. The track as built appears unwarranted and unrelated to the lawful use of the land. No special reasons were put forward to justify a need for the track.
16. I find there are no considerations in this case that needed to be shown to clearly outweigh the harm to the Green Belt. The very special circumstances necessary to justify the development do not exist. The appeal on ground (a) fails. Planning permission is not granted for the retention of the track.

The appeal on ground (f)

17. An appeal on ground (f) asserts that the requirements of the enforcement notice are too onerous and that some lesser requirement would be appropriate.
18. Mr Smith accepted that the hardcore surfaced track has an element of urbanisation. But, he said, it was easily remedied. As the track was at the same level as the adjoining land, a top dressing of soil and grass seed would allow the grass to germinate into the surface, resulting in the camouflage of the hardcore. There would be no visual offence and no apparent incursion of urbanisation into the Green Belt. Mr Smith said the second element of the requirements, that of requiring closure of the access points, could not legally be applied. A recent County Court Judgement in Mr Smith's favour had allowed for access onto the appeal land from Osborne Drive and Osborne Road.
19. I deal with the 2 aspects of the notice's requirements in turn. To accept the camouflaging of the hardcore track by topsoiling and seeding to grass would be tantamount to the granting of a conditional planning permission for its retention. It would not be acceptable to retain this inappropriate development in the Green Belt.
20. Requiring that the access points from Osborne Drive and Osborne Road be fenced off would not conflict with Mr Smith's County Court Order. The Order allows Mr Smith to cross land belonging to others to gain access to his land. It does nothing to stop the Council requiring fencing works to be placed upon Mr Smith's land that prevent access to the unlawful development. However, I see no good reason to require Mr Smith's land to be fenced off. I delete that part of the requirements of the notice because, after removal of the unlawful track, Mr Smith should not be prevented from accessing his land to use it for its lawful purposes. To that extent, the appeal on ground (f) succeeds.

FORMAL DECISION

21. It is directed that the enforcement notice be corrected by the deletion of the plan that was attached to the notice as issued and the substitution of the plan numbered JW1 attached to this decision. The notice is also varied by the deletion of para. 5.2. on page 3 of the notice. Subject to that, the appeal is dismissed and the corrected and varied 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.

John Whalley

INSPECTOR

