



Appeal Decision

Site visit made on 4 February 2020

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 March 2020

Appeal Ref: APP/Y9507/C/19/3220029

Land at Lithersgate Common, Bedham Lane, Fittleworth, West Sussex

- 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 Josh Juniper against an enforcement notice issued by Chichester District Council on behalf of the South Downs National Park Authority.
 - The enforcement notice was issued on 28 November 2018.
 - The breach of planning control as alleged in the notice is:
Without planning permission, change of use of the Land to a BMX cycle track.
 - The requirements of the notice are:
 - (i) Cease the use of the Land as a BMX cycle track;
 - (ii) Remove the earth mounds using hand tools and level the earth to the natural lay of the Land without compacting earth material around the existing tree radius; and
 - (iii) Remove the wooden structures and plastic sheeting from the Land.
 - The period for compliance with all requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (c), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be varied by extending the period for compliance with requirement (ii) only from 6 months to 12 months. Subject to this variation the appeal is dismissed and the enforcement notice is upheld.

Reasons

The Notice

2. The appellant describes the enforcement notice as defective, invalid, a nullity, hopelessly ambiguous, uncertain and confusing. In particular, the appellant states the enforcement notice does not tell the person on whom it was served fairly what he has done wrong. The notice contains all that is required having regard to section 173 of the above Act, including a clear allegation and requirements. So I do not accept any of the appellant's descriptions above.
3. The appellant states the alleged breach of planning control is incorrectly stated on the enforcement notice as it alleges a material change of use rather than operational development. From the information provided, the earth mounds, wooden structures and plastic sheeting, referred to in the requirements of the notice, were installed as part of the change of use. They facilitate the change of use, are integral to it, and, the notice may require their removal, as is well established in case law¹. Whilst they may be operational development it is not

¹ *Murfitt v SSE & East Cambridgeshire CC* [1980] JPL 598

necessary for them to have been referred to in the allegation. As such, I am satisfied the breach of planning control is not incorrectly stated in the notice.

The appeal on ground (e)

4. The enforcement notice was served on the owner of the land and on the appellant. The appellant is concerned other interested parties were not served. Evidence indicates the appellant is Vice Chair of Birchwood Trails. This is a club which has an agreement with the landowner to use the appeal site for the use alleged in the notice.
5. Moreover, it was the appellant who responded to the Council during the Council's investigation into the alleged breach of planning control, despite the Council's communications having been addressed to someone else. I therefore consider it is reasonable for the Council to have served the notice on the appellant as the occupier of the land.
6. Even if I am wrong in this regard and the notice should have been served on other officers of the club, having regard to section 176(5) of the above Act, there is no evidence that the appellant or other officers of the club have been substantially prejudiced. Nor is there any evidence that there is any other person with an interest in the land (that being an interest which is materially affected by the notice) that has been substantially prejudiced. Considering all of the above points, the appeal on ground (e) fails.

The appeal on ground (c)

7. The appellant states that no material change of use has occurred and describes the use as the private riding of BMX bikes on 10 – 15 days a year by a small group of riders. However, it is clear that there is permanent operational development facilitating the change of use, in particular the earth mounds.
8. The notice identifies that the use, and the scale and extent of engineering work (the tracks and jumps), results in unacceptable impacts on the National Park landscape and its relative tranquillity. Therefore, in my judgement, a significant difference in planning terms in the character of the land and the activity on it has occurred. So I am not satisfied the change of use is not material, notwithstanding that the land may be open for this use on a relatively low number of days of the year.
9. My attention has been drawn to Schedule 2, Part 4, Class B of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). This grants planning permission for the use of any land for any purpose for not more than 28 days in total in any calendar year and the provision on the land of any moveable structure for the purposes of the permitted use. However, it is clear that operational development which constitutes part of the use alleged is not moveable. Therefore, the use is not permitted development under the above Order.
10. Moreover, there is no evidence that planning permission has been granted for the appeal development by any other means. So considering all of the above points the appeal on ground (c) fails.

The appeal on ground (f)

11. Under section 173(4) of the above Act, when serving an enforcement notice the Council may seek to (a) remedy the breach of planning control, or (b) remedy any injury to amenity which has been caused by the breach. The notice in this case requires the use to cease as well as the removal of the operational development which facilitates the use. Therefore, in this case, the purpose of the enforcement notice is to remedy the breach of planning control.
12. The appellant considers that the notice should only require the use to cease as it is only the use which is identified in the breach of planning control. However, it is not necessary for operational development to be referred to in a notice where the allegation is a material change of use. If removal of the operational development had not been required, the land would be left with unauthorised development on it and this was not the purpose of the notice.
13. The notice requires removal of the earth mounds by hand tools. The Council states this is to prevent damage to trees and their roots as well as to ecology and wildlife in this location. Having seen the wooded nature of the site, in my judgement, removing the earth mounds with anything other than hand tools would be likely to cause significant damage and disturbance. So I am satisfied the steps required by the notice do not exceed what is necessary to achieve the purpose of the notice. As such, the appeal on ground (f) fails.

The appeal on ground (g)

14. The appellant seeks a period of 12 months to comply with the requirements of the notice. In my judgement, the 6 months specified in the notice is adequate to cease the use of the land and remove the wooded structures and plastic sheeting i.e. to comply with requirements (i) and (iii). However, given the constrained and wooded nature of the site and the requirement for the earth mounds to be removed by hand tools, 6 months is not a reasonable time for compliance with requirement (ii). Therefore, I shall vary the time for compliance for requirement (ii) only to 12 months.
15. The appellant also seeks a 12 month compliance period to allow time for any planning application for operational development and any subsequent appeal to run their course. But no information has been provided to explain what such an application would seek permission for or how this would be different to that already applied for in 2018. Therefore, I am not satisfied more time is required for a further planning application or appeal. Accordingly, the appeal on ground (g) succeeds in respect of requirement (ii) but fails in respect of requirements (i) and (iii).

Other Matters

16. The appellant has referred to an inability to pursue an appeal under ground (a). However, the appeal form in this case is explicit that the appellant is not pleading ground (a) and there is no evidence the appellant could not plead ground (a) in this case if they wished.
17. The appellant states that appealing under ground (a) would be fruitless as it would not grant planning permission for the earth mounds. But it was open to the appellant to apply for planning permission for these and I note the Council considered a planning application for a development which reflects that alleged in the notice in 2018. Moreover, planning merits were considered at that time.

As there is no ground (a) appeal before me I am not able consider any planning merits of the appeal development.

18. The appellant has referred to an inability to pursue an appeal under ground (d). They state the earth mounds have been in-situ for more than four years and are therefore immune from enforcement action. However, the notice alleges a material change of use for which the immunity period is ten years, and section 173(5) of the above Act gives power to require the removal of works for the purposes of remedying the breach, even if such works on their own might be immune from enforcement action². Accordingly, the earth mounds may be removed by the notice in accordance with the Act.
19. The way in which the Council handled a planning application on this site and their enforcement investigation for this enforcement notice are not matters for me to consider in the context of this appeal under section 174.

Conclusion

20. For the reasons given above, I conclude that the period for compliance with requirement (ii) in the notice falls short of what is reasonable so I vary the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to that extent.

L Perkins

INSPECTOR

² *Murfitt v SSE & East Cambridgeshire CC* [1980] JPL 598