
Appeal Decisions

Site visit made on 2 June 2020

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 July 2020

Appeal A Ref: APP/Y9507/C/19/3224642

Appeal B Ref: APP/Y9507/C/19/3228447

**Land at Northend House, Polecats, Heyshott, Midhurst, West Sussex
GU29 0DD**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- Appeal A is made by Mr A Davey and appeal B is made by Mrs Davey against an enforcement notice issued by South Downs National Park Authority.
- The enforcement notice, numbered HY/3, was issued on 31 January 2019.
- The breach of planning control as alleged in the notice is without planning permission, the erection of iron gates, brick pillars, bollards and kerb lighting and the laying of a shingle and tarmac hardstanding with grey cobbled retaining strips in the approximate positions shown on the attached plan.
- The requirements of the notice are:
 - (i) Remove the said iron gates, brick pillars, bollards and kerb lighting shown in the approximate position on the attached plan from the Land;
 - (ii) Remove the shingle, the grey cobble retaining strip and the tarmac strip (in the approximate positions shown on the attached plan) from the land.
- The period for compliance with the requirements is three months.
- The appeals are proceeding on the grounds set out in section 174(2)(c), (d) and (f) of the Town and Country Planning Act 1990 as amended (the Act). In addition, appeal A is proceeding on the ground set out in section 174(2)(a) of the Act. Since the prescribed fee has been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act on appeal A also falls to be considered.

Summary Decision: Appeal A succeeds in part and permission for that part is granted, but otherwise the appeals fail and the enforcement notice is upheld in the terms set out below in the Formal Decision.

Appeal C Ref: APP/Y9507/X/19/3234602

Northend House, Polecats, Heyshott GU29 0DD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr and Mrs Davey against the decision of South Downs National Park Authority.
- The application Ref SDNP/19/01293/LDE, dated 25 March 2019, was refused by notice dated 11 July 2019.
- The application was made under section 191(1)(a) and 191(1)(b) of the Town and Country Planning Act 1990 as amended.
- The use and development for which a certificate of lawful use or development is sought is retention and continued use of the existing driveway.

Summary Decision: The appeal is dismissed

Appeal D Ref: APP/Y9507/X/19/3234617
Northend House, Polecats, Heyshott GU29 0DD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr and Mrs Davey against the decision of South Downs National Park Authority.
- The application Ref SDNP/19/01322/LDE, dated 15 March 2019, was refused by notice dated 14 May 2019.
- The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is the retention of existing gates and brick piers serving access to Northend House.

Summary Decision: The appeal is dismissed

Preliminary Matters

1. Following issue of the enforcement notice, it was amended by the Council with changes to the requirements and the plan attached to the notice. I have dealt with the appeals on the basis of the amended notice.
2. The brick pillars in the enforcement notice under appeals A and B are the same as the brick piers in the LDC under appeal D. I have used the words pillars and piers interchangeably in my decision.
3. Appeals C and D relate to LDCs for the development described in the enforcement notice. That subject of appeal D includes the brick piers that were reduced in height during the course of the application. I note that amended plans have been submitted relating to the altered brick piers. However, LDCs for existing development are determined on the basis of the development existing on the date of application and I am required to consider the enforcement notice appeals on the basis of the development at the time the notice was issued. As the alterations took place after the enforcement notice was issued and the LDC applications submitted, I need to consider the appeals as they relate to the brick piers prior to their reduction in height. Nevertheless, I can consider the revised brick piers as an obvious alternative development under grounds (a) and (f) so will do so.
4. As the LDCs subject of appeals C and D are similar to the arguments put forward in the grounds (c) and (d) appeals, I will deal with these at that stage of my decision.
5. During the course of the appeal, the South Downs Local Plan (SDLP) was adopted. I have based my decision on the ground (a) appeal and deemed planning application on that new Local Plan

Application for costs

6. An application for costs was made by Mr and Mrs A Davey against South Downs National Park Authority. This application is the subject of a separate Decision.

The Appeal on Ground (c)

Appeal C

Appeal D

7. An appeal on ground (c) is that “those matters” (the matters stated in the alleged breach of planning control) do not constitute a breach of planning control. The burden of proof for this ground is on the appellants, with the relevant test of the evidence being on the balance of probability.
8. These appeals have been made in relation to the surfacing of the access, and the brick pillars and gates. Appeal C relates to the surfacing and appeal D relates to the brick piers and gates. I will deal with these matters separately. The use of the access is considered in the appeal under ground (d).

Surfacing

Appeal C

9. The appellants suggest that the changes to the surface of the access comprise maintenance that does not fall within the definition of development under Section 55 of the Town and Country Planning Act 1990 (s55 of the Act). As a result, they suggest that planning permission is not required for the works carried out.
10. The original surfacing of the access appears to have predominantly been a form of hardcore or stones, dark in colour, with kerbs to either side. This extended from the edge of the highway over the access. The works to the surfacing is within the kerbs such that the access has not been widened.
11. The works comprise laying of a substantial area of tarmac over a previous tarmac surface that had broken up adjacent to the highway, and with granite setts to the rear. These replace the previous surface and are a permanent and substantial form of hard surfacing. They comprise replacement surfaces that alter the character of the access and are more than can be considered as maintenance or improvement. As a result, as a matter of fact and degree the tarmac surfacing and granite setts comprise an engineering operation, such that they constitute development as defined by s55 of the Act.
12. Similarly, the gravel is of a light colour and a significant depth. The nature of the material results in a softer appearance than the tarmac and granite. Nevertheless, it replaces the previous dark surfacing such that it alters the character of the access. Consequently, I consider that laying of the gravel also comprises an engineering operation. I noted on my site visit that the gravel was laid on a plastic grid. Whilst that has not been mentioned in any of the evidence, it was likely to be laid in order to hold the gravel. As that would be further works, it would add weight to my conclusion that the development comprises an engineering operation rather than maintenance or improvement, such that it constitutes development as defined by s55 of the Act.
13. For these reasons, I conclude that planning permission is required for the surfacing of the access.

Brick piers and gates Appeal D

14. There is no dispute that the brick piers and gates constitute development within the meaning of s55 of the Act for which planning permission is required. No planning permission has been sought from or granted by the Council for the brick piers and gates.
15. The appellants suggest that the brick piers and gates benefit from the planning permission available within Class A, Part 2, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). This states that gates and walls, such as the brick piers, constructed adjacent to a highway used by vehicular traffic must not exceed 1 metre above ground level. If they are away from the highway, they must not exceed 2 metres above ground level.
16. During the course of the appeal, the Council re-measured the height of the brick piers and concluded that they were more than 2m in height. Although they have since been reduced in height, at the time the notice was issued and the LDCs were submitted, they were not in accordance with the requirements of the GPDO. As those are the relevant dates for these appeals, the piers and gates cannot constitute development permitted by the GPDO.
17. The appellants suggest that the gates and brick piers are located some distance back from the vehicle carriageway. However, the term "adjacent" is not defined in the GPDO or in the Act. There is no set minimum distance from the highway where a gate or wall would no longer be "adjacent" to it; it is a matter of judgement, and of fact and degree in each case, as to whether a gate or wall is "adjacent" to the highway.
18. The dwelling at Northend House is located some distance from this access. To the front of the dwelling is a hedge on a bank above the road, with another steeply sloping drive with gate close to the edge of the highway. The hedge and bank extend alongside the road for some distance with a narrow verge and end with a small wooded area before the grass verge in front of the gates and brick piers subject of this appeal. To the other side of this access is further woodland alongside the road edge. The gates and brick piers are located a substantial distance back from the road, with narrow grass verge to either side of the access. The woodland to either side of the grass verge disguises the gates and piers, such that they are visible in only in a brief glimpse when passing the site. Taking these factors into account, I consider that, as a matter of fact and degree, in this case the brick piers and gates are not adjacent to the highway.
19. Taking into account all of the above, as the brick piers and gates were more than 2m in height at the time the enforcement notice was served and the LDCs were submitted, I have to conclude that they did not benefit from the planning permission granted by the GPDO.

Conclusion

20. Since no planning permission has been granted for the development it thereby constitutes a breach of planning control.

Appeals A and B

21. For these reasons, I conclude that the appeals under ground (c) should fail.

Appeal C

22. Further considerations relating to appeal C are considered under the appeal on ground (d) so I shall not conclude on that here.

Appeal D

23. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the existing gates and brick piers serving access to Northend House was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

The Appeal on Ground (d) Appeal C

24. An appeal under this ground is that, at the date when the notice was issued, no enforcement action could be taken in respect of the breach of planning control which may be constituted by those matters. The burden of proof for this ground is on the appellants, with the relevant test of the evidence being on the balance of probability. Case law indicates that evidence does not need to be corroborated by independent evidence to be accepted, but does need to be precise and unambiguous, even if there is no evidence to contradict it.
25. The enforcement notice was issued on 31 January 2019 and the application for an LDC in appeal C for the retention and continued use of the existing driveway was dated 25 March 2019.
26. In the case of building or engineering works, they would become lawful where they have been substantially completed for a period of 4 years beginning with the date on which the operations were substantially completed. In the case of a breach of planning control other than those listed at s171B(1)-(2A) of the Act, they would become lawful were they to have been completed, or the use started, in a period of 10 years beginning with the date of the breach.
27. The appellants argue that the use of the access has become lawful due to the passage of time. The Council have accepted that the use as an access has become lawful as it has been used for a period in excess of 10 years beginning with the date of the breach prior to the date of issue of the notice. The enforcement notice does not require the use of the access to cease.
28. However, the appellants accept that the gates, pillars, bollards and lighting were constructed and the re-surfacing of the access took place within the four years prior to issue of the notice and application for an LDC. Amendments to the enforcement notice following its issue do not require the previous surface, assuming it remains under the new surface, and the kerbs to be removed. As a result, these are not affected by the notice.

Conclusion

Appeals A and B

29. For these reasons, I conclude that the appeals under ground (d) should fail.

Appeal C

30. S191(4) of the Act allows the local planning authority to modify the terms of the application, and to issue a certificate in somewhat different terms to those applied for, so that it accords with the facts and evidence. This power is also granted to the Secretary of State or an Inspector in the case of an appeal. In this case, the description given in the application is the retention and continued use of the existing driveway. As at the date of the application, the surfacing of the driveway was not lawful. That is an intrinsic part of the development. On that basis, I conclude that it would not be possible to alter the description of the development in such a form that I could issue a certificate.
31. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of retention and continued use of the existing driveway was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

The Appeal on Ground (a) and the Deemed Planning Application

Main issue

32. Whether the iron gates, brick pillars, bollards and kerb lighting and the laying of a shingle and tarmac hardstanding with grey cobbled retaining strips conserve and enhance the landscape and scenic beauty of the South Downs National Park.

Reasons

33. The land at Northend House is located within the South Downs National Park (SDNP) where the National Planning Policy Framework (the Framework) states that great weight should be given to conserving and enhancing landscape and scenic beauty. The house is located high on a hill overlooking farmland on the opposite side of the road. The access to which the enforcement notice relates is located some distance along the road, lower on the hill and is surrounded to either side and over the road with areas of woodland. It provides access to the property, with a long drive continuing beyond the gates and through the property to the house. Directly in front of the house is another access to the property that has banks and hedges to either side that restrict views from vehicles exiting the property.
34. The iron gates, brick pillars, bollards and kerb lighting and the laying of a hardstanding replace an earlier dark coloured hardstanding and timber five bar gate with piers that reflected the rural location. To the sides were kerb stones that have been retained and are not referred to in the enforcement notice. Given the design of the development and the predominantly light coloured materials used on the surfacing as well as the materials used in the gates and piers, the access has a significantly more prominent domestic character and appearance than the previous access. This will weather over time to reduce its

- prominence to some extent and the metal gates are largely open that restricts their visibility. Nevertheless, it results in a somewhat incongruous domestic character and appearance that does not reflect the location of the property within the countryside of the SDNP.
35. The lighting installed in the kerbs provides uplighters to the pillars that makes the access more visible from the road. It is relatively subtle, but nevertheless contributes in a small way to light pollution in the SDNP.
36. I note that there are similar styles of access in the surrounding area. Nevertheless, I need to consider this case on its individual merits and the access in this case is some distance from the dwelling it serves such that it appears somewhat incongruous in the rural surroundings.
37. For these reasons, I conclude that the iron gates, brick pillars, bollards and kerb lighting and the laying of a shingle and tarmac hardstanding with grey cobbled retaining strips do not conserve or enhance the landscape and scenic beauty of the South Downs National Park. As such, they conflict with Policies SD4 and SD5 of the SDLP and the Framework that seek to both conserve and enhance landscape character, including through high quality design that respects the context of the landscape in which the development is located. In addition, the lighting is contrary to Policy SD8 of the SDLP that seeks to protect dark night skies within the SDNP by avoiding the installation of lighting to reduce light pollution.
38. I note that this access has better visibility than the alternative access and that there may be benefits to highway safety through the use of this access. Nevertheless, the enforcement notice relates to the replacement materials on the access and the piers and gates. The ground (a) appeal only relates to the surfacing of the access, bollards, piers and gates such that the access would remain available for use. Consequently, this matter does not outweigh the harm I have found to the landscape and scenic beauty of the SDNP.
39. The tarmac surface adjacent to the junction with the road may protect the road surface from traffic coming and going over the access to some extent. Nevertheless, it is not clear that the surfacing provided is the only solution to protect the road surface such that this does not overcome the harm I have found.

Conclusion

40. For the reasons set out above, I conclude that on balance the proposed development would not accord with the development plan. The development in its current position and form is therefore unacceptable.

Amended brick piers

41. I have set out under the ground (c) appeal that replacement of the piers and gates under 2m in height would comply with the GPDO. This is a fall-back position that I need to take into account. I note that the piers have already been reduced in height such that they are now under 2m in height. In the circumstances, this must carry very substantial weight in the planning process.
42. The ground (a) appeal and deemed planning application is in respect of the matters stated in the enforcement notice as constituting the breach of planning

control (s177(5) of the Act). There is power when determining an appeal under s174 for the Inspector to grant planning permission in respect of the matters stated in the enforcement notice as constituting the breach of planning control, whether in relation to the whole or any part of those matters (s177(1) of the Act).

43. Well established case law confirms that the enforcement procedure is intended to be remedial rather than punitive. In this regard, where it appears there is an 'obvious alternative' which would overcome the planning difficulties with less cost and disruption, an Inspector should consider it. The key question therefore is whether the alternative scheme can be regarded as 'part' of the as-built development.
44. The removal of the top of the brick piers means that the resulting structures are clearly 'part' of the development against which an enforcement notice was served. Taking account of the fall-back position described above, the piers could clearly be demolished in accordance with the enforcement notice and subsequently rebuilt in the same form as they are now. As a result, I consider that this factor would overcome the harm I have found to the landscape and scenic beauty of the South Downs National Park, and the policy conflict identified. Consequently, I conclude that planning permission should be granted for the brick piers and gates that now exist on the site.

Conclusion

45. For the reasons set out above, I conclude that, on balance, the brick piers and gates as currently constructed should be granted planning permission. The appeal on ground (a) therefore succeeds to that extent.
46. The development has already taken place and no conditions relevant to the amended gates and piers have been suggested. The Council suggested a condition relating to lighting. However, the requirements of the notice will require removal of the lighting and any alternative is likely to require separate planning permission. As a result, no conditions are necessary in this case.

The Appeal on Ground (f)

47. An appeal on this ground is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. In this case, the requirements seek removal of the iron gates, brick pillars, bollards, kerb lighting and the shingle and tarmac hardstanding with grey cobbled retaining strips, in order to restore the land to its condition before the breach took place. Clearly, therefore, the purpose of the notice requirements is to remedy the breach of planning control.
48. The appellants suggest that the Council should have required the reinstatement of grey shingle, gates and piers to reflect what was previously located on the site. However, this ground of appeal is whether the steps required by the notice are excessive and, taking into account that the requirements are less than the appellants suggest, they are not excessive.
49. I understand that the tarmac may have replaced a previous tarmac crossover from the highway and may assist in reducing the possibility of wear on the

edge of the highway. However, the replacement of tarmac is more than can be considered maintenance or improvement. As such, the requirements of the notice are not excessive in terms of restoring the land to its condition before the breach took place.

50. For these reasons I will issue a split decision which grants planning permission on the deemed application for part of the as-built development (the brick piers and gates now on the site). The requirement in the enforcement notice to demolish will remain, however the effect of s180 of the Act is that the requirement now only relates to the part of the development already demolished that does not benefit from the planning permission granted on the deemed application.
51. With regard to the remainder of the development, however I conclude that the requirements of the notice do not exceed what is necessary in order to remedy the breach of planning control. As such, the appeal fails on ground (f).
52. For these reasons, I conclude that the appeal under ground (f) should fail.

Formal Decision

Appeal A

53. The appeal is allowed insofar as it relates to the land edged in red on the plan at Land at Northend House, Polecats, Heyshott, Midhurst, West Sussex GU29 0DD and the erection of brick piers and gates and planning permission is granted on the application deemed to have been made under s177(5) of the 1990 Act as amended, for the iron gates and brick pillars as shown on drawing number 18258 P110 D at Land at Northend House, Polecats, Heyshott, Midhurst, West Sussex GU29 0DD.
54. The appeals are dismissed and the enforcement notice is upheld insofar as it relates to the land edged in red on the plan at Land at Northend House, Polecats, Heyshott, Midhurst, West Sussex GU29 0DD and planning permission is refused in respect of the erection of iron gates, brick pillars, bollards and kerb lighting and the laying of a shingle and tarmac hardstanding with grey cobbled retaining strips in the approximate positions marked on the plan at Land at Northend House, Polecats, Heyshott, Midhurst, West Sussex GU29 0DD on the application deemed to have been made under s177(5) of the 1990 Act as amended.

Appeal B

55. The appeal is dismissed and the enforcement notice is upheld.

Appeals C and D

56. The appeals are dismissed.

AJ Steen

INSPECTOR