



Appeal Decisions

Site visit made on 8 September 2020

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 September 2020

Appeal A: APP/P2114/C/19/3228559

Appeal B: APP/P2114/C/19/3234958

Appeal C: APP/P2114/C/19/3228561

Merrie Gardens, Newport Road, Lake, Sandown, Isle of Wight PO36 9PE

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Louis William Tudor Smith of WS Group Merrie Gardens Limited (Appeal A), Westover Park Estate Limited (Appeal B) and MK Assets Limited Mike King (Appeal C) against an enforcement notice issued by Isle of Wight Council.
 - The enforcement notice was issued on 15 April 2019.
 - The breach of planning control as alleged in the notice is: i Without planning permission and within the last four years the undertaking of engineering operations to include but not exclusive to the digging of the land, the changing of land levels, the laying of hard-standings, the laying of hardcore to form roads and the importation of waste materials. ii Without planning permission and within the last ten years the change of use of the land from agricultural to a mixed use of agricultural and storage to include the storage of building materials by the importation of waste materials to include but not exclusive to: concrete, blocks, bricks, tiles/ceramics and the storage of plastic piping, plastic, metal, wood and "heras" style fencing.
 - The requirements of the notice are: (i) To cease the use of the Land for storage and the importation of waste materials to include but not limited to concrete, blocks, bricks, tiles/ceramics, plastic piping, plastic, metal, wood and "heras" style fencing. (ii) To remove all hardcore from the Land in the approximate location hatched blue on the attached plan to the notice. (iii) To remove all building materials and waste shown in the approximate position shaded green on the attached plan to the notice to include but not exclusive to the removal of concrete, blocks, bricks, tiles/ceramics, plastic pipes, plastic, metal, wood and "heras" style fencing from the Land. (iv) To re-grade the land shaded green on the attached plan to its original levels prior to the unauthorised engineering operations referred to in paragraph 3(ii) being undertaken. (v) To re-seed the land shown edged red on the attached plan with grass seed, having reference to the previous state of the land shown in Google Earth satellite image attached as Appendix A to the notice.
 - The period for compliance with the requirements are: 1 Month in respect of requirement (i) and 3 Months in respect of requirements (ii), (iii), (iv) and (v).
 - The appeals are proceeding on the grounds set out in section 174(2)(b), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Summary of Decisions – Appeals A, B and C

1. The appeals are dismissed and the enforcement notice upheld.

Preliminary Matters

2. It is stated for the appellants that the enforcement notice is poorly drafted and incomplete, although this is not clarified further. It is also stated that it is unclear exactly what the Council complains of or requires. However, the notice clearly states the alleged breaches of planning control, the reasons for issuing the notice and requirements to remedy the alleged breaches.
3. The appellants then criticise the accuracy of the plan attached to the enforcement notice, but it is clear from the requirements that this is intended to show the approximate position of the matters referred to. It is however also scalable in the alternative.
4. The appellants also state that under Environmental law responsibility rests with the person who is said to have created a problem. Whilst that may or may not be the case, this appeal concerns planning enforcement as opposed other legislation and therefore responsibility rests with the landowners and those with a legal interest in the land.
5. An appeal on ground (a) was originally pleaded but has lapsed as the prescribed fee has not been paid. Therefore, the planning merits of the developments enforced against are not before me and so neither are matters including whether the site should be adopted in planning policy terms for future development, or, policy considerations arising from the National Planning Policy Framework, including sustainable development.

The ground (e) appeals

6. This ground of appeal concerns whether the enforcement notice was properly served on everyone with an interest in the land.
7. To this effect the appellant's state that ISG PLC, who are contractors for the nearby Morrisons superstore, have a licence to occupy a large piece of the land the subject of the notice.
8. The Council state that they served the notice on all parties shown on the requisite Land Registry documentation, and, also served to the site by means of the display of a laminated copy. This is not contested by the appellants. It is also asserted that the Council attended the office of ISG to advise of the service of the notice.
9. I am consequently satisfied on the balance of probabilities that the notice was properly served on everyone with an interest in the land as ISG would reasonably have been aware of the existence of the notice. Accordingly, they could have appealed as having an interest in the land, if that was the case. I therefore do not consider that ISG were substantially prejudiced in this regard and furthermore note that the licence granted to them related to a comparatively short period of time, which expired on 30 June 2019.
10. I conclude that consequently the appeals on ground (e) fail.

The ground (b) and (c) appeals

11. For the ground (b) appeals to succeed the onus is on the appellants to demonstrate, on the balance of probabilities, that the alleged breaches of planning control had not occurred as a matter of fact at the time the enforcement notice was issued. For the ground (c) appeals to succeed the onus

is on the appellants to demonstrate, on the balance of probabilities, that there has not been a breach of planning control. This could be because the matters alleged do not constitute development, planning permission has already been granted for the matters alleged in the enforcement notice or they are permitted development.

12. The appellant's case is that a large part of the site is a former tip and that some of this has been cleared with remaining rubbish collected in a pile for disposal. It is also asserted that in around the year 2000 a new sewer was laid involving a large amount of groundworks and hardcore. Furthermore, it is asserted that works pursuant to an environmental survey emanating from a 2014 planning permission on adjoining land for a Premier Inn resulted in alterations to land levels and the laying of plastic on the appeal site. Other works are also said to have related to a planning permission for a Morrisons store extension. I will refer to these matters as historical works.
13. The Council has however provided photographs which provide evidence of recent earthworks and materials on the land. In my view this demonstrates on the balance of probabilities that the operations alleged in the notice do amount to development for the purposes of section 55 of the Act, given their quantum. These photos are in contrast to those provided by the appellant which show works that are considerably lesser in extent.
14. There is very little evidence before me, aside from assertions, to demonstrate the case of the appellants, on the balance of probabilities, namely that historical works account for what the Council has now enforced against. Accordingly, the appellants have not demonstrated on the balance of probabilities that the alleged breaches of planning control have not occurred as a matter of fact.
15. The appellants also state that they do not admit a change of use, except for a temporary use in implementing a planning permission, or if there was a change of use, it was not a material one. However, this assertion does not demonstrate on the balance of probabilities that there has not been a material change of use to the mixed use alleged and I consider from the written and photographic evidence before me that the character of the site had materially changed from that of agriculture, given the quantum of materials stored at the site. There is also evidence that the Environment Agency had issued a Waste Management Exemption Certificate which had resulted in materials being brought to the site.
16. The Council accepts that there is some scarring of the appeal site relating to the development of the Premier Inn. However, whilst an aerial photograph then provides evidences of this scarring, this would appear to be contained to only one part of the site. It has therefore not been demonstrated by the appellants on the balance of probabilities how either the engineering operations or change of use alleged reasonably relate to any planning permissions.
17. The appellants also state that planning permission is not required to clear undergrowth. Whilst that may be the case, the alleged breaches of planning control are not concerned simply with the clearance of scrub or undergrowth.
18. I conclude that consequently the appeals on grounds (b) and (c) both fail.

The ground (d) appeals

19. For the ground (d) appeals to succeed the onus is on the appellants to demonstrate, on the balance of probabilities, that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice. Immunity from enforcement action would consequently arise for the mixed use after a period of 10 years and 4 years for the engineering operations.
20. It is contended that all the engineering works at the site were done over 4 years ago, which relies upon the arguments I have first considered against the ground (b) and (c) appeals. I however do not accept those arguments for the reasons detailed. To simply state that all the engineering operations enforced against were carried out over 4 years ago is vague and ambiguous and does not provide cogent evidence to demonstrate on the balance of probabilities that this was case.
21. Indeed, the Council asserts that the importation of materials onto the site ties in with the Waste Management Exemption Certificate, which is said to have been issued in January 2019. This casts further considerable doubt in my mind that either the works or mixed use enforced against could have subsisted for the requisite periods.
22. It is also contended that the use of the site irretrievably changed over 10 years ago when the first planning permission was granted on the wider land at Merrie Gardens. However, this in itself does not demonstrate on the balance of probabilities that the mixed use now alleged has subsisted for this duration. Such a contention is again vague and ambiguous.
23. The appellant has therefore not discharged the necessary burden of proof to demonstrate on the balance of probabilities that at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice.
24. I conclude that consequently the appeals on ground (d) fail.

The ground (f) appeals

25. The purpose of the enforcement notice is to remedy the breaches of planning control. Therefore, for an appeal on ground (f) to succeed it would be necessary for the appellant to explain why the steps required by the notice to be taken exceed what is necessary to remedy the breaches of planning control and propose lesser alternatives.
26. The appeals have already failed on grounds (b), (c) and (d). The requirements of the enforcement notice consequently do nothing more than remedy the breaches of planning control and restore the site to prior to the breaches taking place.
27. The appellants also contend that the site has never been seeded with grass, as it was overgrown. The appellants have however not proposed a lesser or equivalent alternative in order to provide a remedy that they consider to be more representative of the prior condition of the site. In the absence of this I cannot consider varying the enforcement notice.

28. The appellants have therefore not provided lesser necessary alternatives to remedy the breaches of planning control.

29. I conclude that consequently the appeals on ground (f) fail.

The ground (g) appeals

30. The appellants contend that the time given to comply with the requirements of the enforcement notice are too short as they are unable to complete works until others working at the site under the licence have completed their works.

31. Notwithstanding this, the licence has now expired and so I can only reasonably presume that others supposedly working at the site are no longer an impediment to the appellants satisfying the requirements of the notice. Issues then relating to trespass are not a planning matter and which in any event do not convince me that more time would be required in which to comply.

32. The Council has highlighted the difficulties posed by the current pandemic. The timeframe associated with this is however unknown. In light of the evidence pertaining to this appeal, I do not consider it appropriate to extend the period for compliance, noting also that the Council has powers under section 173A(1)(b) of the Act, albeit that would be a subsequent matter and is entirely for them.

33. I conclude that consequently the appeals on ground (g) fail.

Overall Conclusion

34. For the reasons given above I conclude that the appeals should not succeed. I shall therefore uphold the enforcement notice and dismiss the appeals.

Formal Decisions – Appeals A, B and C

35. The appeals are dismissed and the enforcement notice is upheld.

Paul T Hocking

INSPECTOR