
Appeal Decisions

Site visit made on 27 October 2020

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26th November 2020

Appeal A: APP/E2001/C/20/3256596

Appeal B: APP/E2001/C/20/3256597

Land North of Alder Carr House, York Road, Barmby Moor, East Riding of Yorkshire YO42 4HT

- 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 Mrs Victoria Pemberton (Appeal A) and Mr David Pemberton (Appeal B) against an enforcement notice issued by East Riding of Yorkshire Council.
- The enforcement notice was issued on 29 May 2020.
- The breach of planning control as alleged in the notice is, without planning permission, the creation of a new highway access at the Land on to the A1079 York Road.
- The requirements of the notice are (1) Permanently close off the vehicular access to the A1079 from the Land edged in red on the attached plan¹; (2) Cease the use of the area edged blue at points A to B (as indicated on the attached plan) for access by any vehicle; (3) Carry out preparatory works namely apply herbicide to a 1.5m deep strip along the site boundary between points A and B (as indicated on the attached plan); and (4) Fill between points A and B (as indicated on the attached plan) by planting 4-6 hedgerow plants (whips) per metre in a staggered double row. Use 45-60cm high whips and protect each plant against mammal grazing by fitting with a staked rabbit guard. Maintain a one metre weed free area around each plant until it is established.
- The periods for compliance with the requirements are (1) Within one month of the date the notice takes effect; (2) Immediately on the date the notice takes effect; (3) By 30 September 2020; and (4) By 31 March 2021.
- The appeals are proceeding on the grounds set out in section 174(2)(c) and (d) of the Town and Country Planning Act 1990 as amended (the 1990 Act).

Summary of decisions: The appeals are dismissed and the enforcement notice is upheld as varied in the terms set out below in the Formal Decisions.

Preliminary matter

1. Some evidence presented in the appeals on ground (c)² is more appropriately considered in the appeals on ground (d)³.

¹ References to "the attached plan" are to the plan dated 8 April 2020, numbered 100023383, attached to the enforcement notice.

² That those matters, (i.e. the matters stated in the notice which give rise to the alleged breach of planning control), if they occurred, did not constitute a breach of planning control.

³ That at the date the notice was issued no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters," (i.e. the matters alleged in the notice).

Reasons - the appeals on ground (c)

2. To succeed on this ground, the appellants must prove, on the balance of probability, that the creation of the new highway access does not constitute a breach of planning control.
3. The definition of development subject to planning control in section 55 of the 1990 Act includes engineering operations. Section 336(1) of the same Act confirms that engineering operations include the formation or laying out of a means of access to a highway. Permitted development rights⁴ allow the formation of highway accesses without requiring planning permission, but specifically exclude any access to a classified road. York Road is classified A1079 and therefore the formation of a means of access to it is development requiring planning permission. The Council has not granted planning permission for this development.
4. It has therefore not been demonstrated that the formation of an access to York Road - regardless of whether the appellants accept that has occurred - does not constitute a breach of planning control, either because it is not development or because it does not require planning permission.
5. For these reasons the appeals on ground (c) should not succeed.

Reasons – the appeals on ground (d)

6. The appeals on this ground would succeed if the appellants can demonstrate, on the balance of probability, that the access works were substantially completed on or before 29 May 2016, 4 years before the notice was issued.
7. A former owner states there was always a field access to York Road at the current point and that he used it many times in recent years. The land agent who handled the sale of the land to the appellants, and who managed its rental for the preceding 15 years, states that the entrance to the land was in the position of the current access and was in continued use during that time. The land agent and the Council refer to a cottage that once stood on the land and would have had access to York Road in a similar position.
8. Aerial images dating from 2003, 2005 and 2007 do not show an access, although it is evident from the same images that the field was farmed, indicating that tractors would have periodically made access and egress to and from York Road. I saw an example of a field access consistent with this, and which did not appear to have been formed through engineering works, in the adjacent field to the east.
9. An image taken in August 2011 indicates that access works had recently been carried out. These works comprised crushed stone, possibly broken roadstone, laid across the verge, with a section of lighter coloured material, most likely crushed limestone, laid behind, passing through a gap in the hedgerow and a short way into the land. Subsequent images from August 2014 and June 2016 show vegetation across the frontage, with glimpses of the crushed limestone visible beyond.
10. The access works visible at the time of my visit were different. There was no sign of the crushed limestone surface and the access appeared wider than that

⁴ Under Class B of Part 2 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended.

of the August 2011, August 2014 and June 2016 images, suggesting that part of the hedgerow had been removed. The access led onto a hardstanding within the site and both were covered in stone chippings. Comparison of aerial images dated 1 July 2017 and 22 June 2018 gives a similar impression. The crushed limestone is visible in the former and darker material, covering the hardstanding and the access, is visible in the latter, along with a wider break in the hedgerow.

11. Viewed collectively, this evidence indicates that the access comprising the alleged breach of planning control is materially different from what existed on 29 May 2016. This difference is a result of engineering works that could only have been carried out during the 4 years preceding the date on which the notice was issued.
12. For these reasons, it has not been demonstrated on the balance of probability that the access works were substantially completed on or before 29 May 2016 and so the appeals on ground (d) must fail.

Conclusions

13. I have found that the formation of an access to York Road is development requiring planning permission and that the engineering works the subject of the notice had not been substantially completed 4 years before it was issued.
14. I sought clarity on what would need to be done in order to comply with requirement 5 a), to permanently close off the vehicular access, above and beyond compliance with requirement 5 b), to cease the use of the area edged blue at points A to B for access by any vehicle. While actions to be undertaken to comply with requirement 5 a) have not been identified, the Council would not object to the variation of the notice by removing requirement 5 a) and the corresponding period for compliance with it in section 6 a). As these variations would reduce the notice's requirements overall, they can be made without causing injustice to the appellants.
15. However, as requirements 5 a) and 5 b) appear to have the same effect, it would also be necessary to extend the period in section 6 b) for compliance with requirement 5 b) to be consistent with the period in section 6 a) relating to requirement 5 a). If this variation were not made, deleting sections 5 a) and 6 a) would cause injustice to the appellants by shortening the overall time period for removing the access.
16. The period in section 6 c) for compliance with the preparatory works set out in requirement 5 c) lapsed during the appeal process. Having sought the views of the parties I am satisfied that it would be practicable for those works to be carried out shortly before the planting stipulated in requirement 5 d). This variation would not cause the appellants any injustice as it would allow more time to comply with the requirement. However, periods for compliance should not be stated by reference to end dates and the appropriate periods can be determined by subtracting the date the notice was intended to take effect from the dates in sections 6 c) and 6 d), rounded up to full weeks.
17. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the notice with variations.

Appeals A and B – Formal Decisions

18. It is directed that the enforcement notice be varied in section 5 by the deletion of 5 a).
19. It is further directed that the enforcement notice be varied in section 6 by:
- The deletion of 6 a);
 - The deletion of the words “immediately upon the date of this notice takes effect” and the substitution of the words “within one month of the date this notice takes effect” in 6 b);
 - The deletion of the words “by 30th September 2020” and the substitution of the words “within 35 weeks of the date this notice takes effect” in 6 c); and
 - The deletion of the words “by 31st March 2021” and the substitution of the words “within 36 weeks of the date this notice takes effect” in 6 d).
20. Subject to these variations the appeals are dismissed and the enforcement notice is upheld.

Mark Harbottle

INSPECTOR