



Appeal Decision

by Jean Russell MA MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 10 May 2021

Appeal ref: APP/X2220/C/18/3204618

Land on the south west side of Marshborough Road, Marshborough (Title Number: K621349)

- The **appeal is made** by Mr Jamie Wilson under section 174 of the Town and Country Planning Act 1990 against an enforcement notice (ref: ENF/WOO/17/00196) issued by Dover District Council on 23 May 2018.
 - The **breach of planning control as alleged in the enforcement notice** is:
Without planning permission the material change of use of the land to a caravan site, for the siting of one caravan for residential occupation and for facilitating operational development involving the construction of additional hardsurfacing and alterations to the vehicular access and installation of septic tank.
 - The **requirements of the notice** are to:
 1. Cease the use of the land as a caravan site and for the stationing of caravans for any use or purpose.
 2. Remove all caravans from the land and disconnect all services and remove all associated connecting apparatus from the land.
 3. Remove the additional hardsurfacing and septic tank from the land as indicated by the [plan attached to the notice].
 4. Reinstatement the vehicular access to its former condition and appearance and replant with indigenous hedgerow.
 5. Return the land to its former condition and appearance.
 - The **period for compliance with the requirement** is 12 months.
 - The **appeal is proceeding** on the grounds set out under section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under s177(5) of the Town and Country Planning Act 1990.
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FORMAL DECISION

1. The enforcement notice is quashed.

PROCEDURAL MATTERS

2. The appellant has also made an appeal (ref: APP/X2220/W/18/3204475) under s78 of the Town and Country Planning Act 1990 (the TCPA90) against the decision of the Council to refuse planning permission for development on the same site that is subject to the enforcement notice. I shall issue a separate decision letter (DL) for the 'planning appeal' after the parties have time to consider this one.
3. The appeals were originally to be determined via hearing procedure, and they were allocated to a different Inspector. On 6 December 2019, the '2019 Inspector' sent her 'first email' to the appellant, the Council and the Marshborough Action Group (MAG)¹ with comments and questions that included 'whether the enforcement notice correctly addresses the breach of planning control that has occurred'.

¹ A group of local residents formed to oppose the use of the land as a caravan site.

4. From their responses as well as the level of public interest, the 2019 Inspector sent a 'second email' on 16 December 2019 stating that the procedure would be changed to an inquiry. It was scheduled to take place in September 2020, but the 2019 Inspector was not then available and the appeals were transferred to me.
5. In June 2020, the Council submitted an amended statement of case to explain that they had reconsidered their position in relation to the matters raised by the 2019 Inspector. I sent a pre-inquiry note on 21 July 2020 which included questions on the Council's stance – and asked the parties for their views as to whether the inquiry ought to be postponed in the light of the Covid-19 pandemic and likely difficulties in holding the event 'physically' or 'virtually'.
6. The Council responded on 14 August to propose that, given their changed position, the appeals be determined without any oral event. On 9 October 2020, I changed the procedure to written representations and invited the parties to submit final comments. I wrote to the parties again on 19 November to explain that I intended to decide this enforcement appeal ahead of the planning appeal and without visiting the site at this stage. The parties did not object to this approach.
7. MAG expressed disappointment at the 'downgrade' of the procedure to written representations on the basis that the matters 'in play' include whether there is an ongoing breach of planning control. However, the first questions for me to address concern the enforcement notice: whether it properly describes what 'appears' to be the breach and, if not, whether it can be corrected without causing injustice. The validity of the notice is a different issue to the actuality of any breach.
8. Since I find that the notice is invalid, I make no determination on whether there is any ongoing breach or indeed any other matter, so there is no prejudice to any other proceedings. I am satisfied that no party to this appeal is disadvantaged by the change of procedure to written representations, and it was right to make that change in order to minimise the costs incurred by the parties.
9. MAG and appellant have both applied for an award of costs against the Council, but MAG's case relates to this enforcement appeal, while the appellant's concerns the planning appeal. I indicated in my last email that MAG's cost application would be decided with this appeal – but I now consider that would be wrong. The two costs applications raise similar issues and considering either at this stage could prejudice the planning appeal. I shall decide both costs applications in due course.

REASONS FOR THE DECISION

The Appeal Site and Planning History

10. The appeal site, or the land subject to the notice, is an irregularly-shaped 0.6ha plot bound by Marshborough Road to the north. On 7 May 2010, the Council approved a planning application (ref: DOV/10/00078) made by the appellant for a change of use of land to the keeping of horses and related works. I understand that the '2010 permission' relates to the appeal site or part thereof.
11. The appellant made a further planning application (ref: DOV/11/00484) which was refused by the Council but allowed on appeal (ref: APP/X2220/A/11/2166301) on 20 June 2012. The '2012 Inspector' clarified what was before him in paragraphs 3-9 of his DL; he described the development as: 'the material change of use of the land to a mixed use comprising use as a residential caravan site and the keeping of horses, the construction of a driveway and hardsurfacing, the erection of gates and the installation of a septic tank'. He approved all elements except the gates².

² The planning appeal before me is concerned with the same development that was approved in 2012.

12. In paragraph 7, the 2012 Inspector found that permission had been sought on a 'part retrospective' basis since the residential use had been begun and the gates and driveway were in place. He imposed 15 conditions on the 2012 permission, with 1) requiring that the development accord with an 'amended red-lined location plan submitted 2 May 2012 and site plan amended 23 June 2011'. I am satisfied that the 2012 permission relates to the same site as the notice and this appeal.
13. I have not been given details of any subsequent applications to discharge conditions but it is clear from evidence discussed below that some were made and approved. The appellant also made an application (ref: DOV/16/00542) to 'vary' conditions 7), 8) and 9) but the Council declined to determine that.
14. The 2012 permission is permanent in the sense that none of its conditions serve to limit the lifetime of the development. The use rights granted have not been lost via another material change of use or commencement of an inconsistent permission.

The Statutory Framework for Taking Enforcement Action

15. S172(1) of the TCPA90 provides that an enforcement notice may be issued where it appears to the local planning authority that there has been a breach of planning control. S171A(1) defines a breach of planning control as meaning (a) carrying out development without the required planning permission or (b) failing to comply with any condition or limitation subject to which planning permission has been granted. Thus, an enforcement notice may be issued under s171A(1)(a) or s171A(1)(b).
16. Where it appears that there has been a failure to comply with a condition, that can be enforced against under s171A(1)(a) because, depending on the wording of the condition and the nature or extent of non-compliance, the result may be that the whole development is deemed to be without planning permission. A failure to comply with a condition will be enforced against under s171A(1)(b)³ where the breach does not render the whole development unlawful.
17. I can correct any error, defect or misdescription in an enforcement notice so long as this would cause no injustice to the Council or appellant. In *Kensington and Chelsea RBC v Mia Carla Ltd* [1981] JPL 50, it was held that corrections could not be made to the effect of 'producing a totally different enforcement notice' – but that case predated the TCPA90; powers of correction were then limited to any 'informality, defect or error' that was 'not material'. The only test now is injustice; subject to that, any correction can be made under s176(1)(a), including so that the notice is issued under s171A(1)(b) instead of (a) or vice versa⁴.

The Alleged Material Change of Use

18. The appealed enforcement notice was issued under s171A(1)(a). However, the development alleged to have been carried out without planning permission – the material change of use of land...for the siting of one caravan for residential occupation and...the construction of additional hardsurfacing and alterations to the vehicular access and installation of septic tank – was in fact permitted in 2012.
19. The 2019 Inspector indicated in her second email that the 2012 permission is taken to have been 'implemented' because it was retrospective. I should clarify that statement because the word 'implementation' is not defined in statute or used consistently in practice. If it is taken as referring to the completion of development, one should not assume that a retrospective permission will be 'implemented' in accordance with every condition intended to control the development over its

³ Or a Breach of Condition Notice under s187A.

⁴ It was held in *Simms v SSE & Broxtowe BC* [1998] JPL B98 that it is irrelevant whether corrections go to the substance of the matter.

lifetime. That health warning is apt here because the development was not completed in 2012 and the permission was only 'part retrospective'.

20. However, the 2019 Inspector was right insofar as retrospective permission is normally (and was here) sought and granted to regularise what is on the ground. For a planning permission to be extant and at least capable of implementation, it is only necessary for development to be 'begun' as described in s56(2) of the TCPA90 in accordance with the permission. The 2012 Inspector described the development that he permitted clearly and carefully. The plans subject to condition 1) assist in showing what was approved, albeit that other conditions required additional and revised plans as discussed below.
21. There is no evidence that the material change of use of the land to a mixed use comprising a residential caravan site and the keeping of horses did not take place in accordance with the 2012 permission (as granted after the fact) and condition 1). There is no evidence that the associated works (except the gates) were not started in accordance with the 2012 permission and condition 1). It follows that the 2012 permission was granted with retrospective effect for what had been begun (except the gates). The permission was 'implemented' in that sense and is extant⁵.
22. There has been a subsequent breach of planning control; the appellant admitted in his grounds of appeal that he failed to comply with condition 2) imposed on the 2012 permission. Condition 2) is lengthy but it essentially required the submission, approval and implementation of schemes for the provision of i) visibility splays at the site access, ii) landscaping, and iii) drainage and sewage disposal. Each scheme was to be submitted within three months of the 2012 DL and, if approved, implemented in accordance with an agreed timetable⁶.
23. When planning permission is granted *prospectively* for development subject to the later approval of further details, the condition which sets out that requirement will usually prohibit the commencement or occupation of the development before the approval is granted. Where permission is granted retrospectively for someone's home, it is not appropriate to prevent commencement or occupation. A different mechanism should ensure the submission and execution of the required scheme.
24. Condition 2) includes a sanction that the residential use should cease within three months of any failure to meet any of the requirements relating to the schemes. The sanction should not be interpreted as meaning that a breach of condition 2) would result in the 2012 permission ceasing to exist or the whole development not being in accordance with the permission. The effect of the sanction is that, if it comes to it, a benefit of the permission cannot be enjoyed. Indeed, condition 2) does not require, in the event of non-compliance, that the approved driveway, hardsurfacing or septic tank should be removed.
25. The Council and MAG suggest that the appellant has failed or is failing to comply with other conditions imposed on the 2012 permission, but condition 2) is the only one that includes any kind of sanction in the event of non-compliance⁷. None of the other conditions require the cessation of the residential use in any circumstances⁸.

⁵ It was held in *Pye v SSETR & North Cornwall DC* [1998] 3 PLR 72 that a planning permission cannot be implemented if the development is not begun on time – and, if the permission has lapsed, an application to 'vary' or remove conditions should be considered as a fresh application for permission and decided with regard to any changes in policy or circumstances. That case has no bearing on this appeal because the alleged change of use took place before it was permitted. *Pye* concerned an application made under s73 of the TCPA90 to develop land within compliance with conditions previously attached. It did not concern, as MAG suggested, an application made under s73A for planning permission for development already carried out.

⁶ Conditions 2), 5), 6), 7) and 8) are reproduced in Annex 1 to this DL for ease of reference.

⁷ That is not to say any breach of the conditions could not be enforced against.

⁸ Even if the appellant does not comply with condition 6), which limits occupation of the site to Gypsies and Travellers, the site could still be used and occupied by another person who is a Gypsy or Traveller.

Like 2), condition 8) requires the submission and approval of further details but it is worded in the 'prospective' way; a revised site layout plan is to be submitted and approved before the residential garden and parking/manoeuvring areas 'are provided beyond the extent to which they presently exist'.

26. Accordingly, and since there is no evidence that the development of the site was not begun as retrospectively approved, it follows that non-compliance with 2) and/or any other condition does not result in there having been a material change of use or operational development without planning permission as alleged. The notice is incorrect because – on the balance of probabilities – the alleged change of use and works were begun in accordance with the 2012 permission. I now turn to whether the notice can be corrected without causing injustice so that it is issued under s171A(1)(b) and alleges that there has been a breach of condition(s).

Correcting the Notice

27. The appellant claims that condition 2) was breached in one respect: the visibility splay scheme was 'implemented' later than as set out in the scheme timetable – in September 2016 rather than by the end of October 2013⁹. The appellant maintains that condition 2) is complied with now. The Council accepts in their 8 October 2020 email that 'the visibility splays accord with those approved under condition 2'.
28. MAG is still of the view that condition 2) has not been complied with¹⁰. I have said that I will not address that question – but it is important for this DL that the Council considers there to be no ongoing breach of that condition for two reasons:
- It is the Council's notice. It would cause injustice to the Council as well as the appellant if I was to correct the allegation to something that the Council does not wish to enforce against. I also note, then, that the Council does not seek to enforce against any breach of conditions 5), 6) or 7) either.
 - Condition 2) is, as noted above, the only one imposed on the 2012 permission which required the use to cease in the event of non-compliance. It was the suspected breach of condition 2) which led the Council to erroneously enforce against development 'without planning permission' in the first place¹¹.
29. The Council and MAG suggest that there is a continued breach of condition 8). It appears that the appellant did submit a revised layout plan as required¹² but he has not always sited his caravan in the approved position¹³ and he may not have reduced the hardsurfacing on the land. In their final comments, then, the Council suggested that the notice should be corrected to allege a breach of condition 8).
30. However, correcting the notice so that it alleges a breach of any condition on the 2012 permission would have profound implications for the grounds of appeal. The appellant might wish to withdraw grounds (c) or (a) – and/or introduce grounds (b) or (d). Looking at ground (c), the appellant has made a case as to why he considers that the alleged use and works are not in breach of planning control. He would need to provide different evidence if he wished to argue that condition 2), 5), 6), 7) and/or 8) has actually been complied with or is not a valid condition.
31. The appeal on ground (a) has been played out so far on the basis that the principle as well as impacts of a residential use 'without planning permission' are at stake.

⁹ The Council also stated in paragraph 4.5 of its original statement of case that 'in effect, the appellant had not provided the visibility sightline within time'.

¹⁰ In relation to the required landscaping as well as visibility splay schemes.

¹¹ Paragraph 6.4 of the Council's original statement of case

¹² Paragraph 6.5 of the Council's original statement of case.

¹³ The caravan has also been taken off the site at times.

As the 2019 Inspector noted in her first email, if the notice was corrected to allege a breach of condition, the planning issues would be narrowed to whether the condition(s) ought to be discharged. It would cause injustice to the appellant and prejudice the interests of MAG to correct the notice so as to pull the rug from under them at this late stage in relation to the legal and planning grounds.

32. It is also necessary to consider what the implications of correcting the allegation would be for the requirements of the notice. If notice was corrected to allege a breach of condition 2), it could in theory require that the use must cease, meaning that the outcome could be the same as if the notice is upheld in its current form. But that would be excessive when all that was or is necessary to remedy such a breach would be a requirement that the appellant implements the approved schemes – which the Council accepts has been done.
33. If the notice was corrected to require compliance with condition 8), that would plainly be less onerous than having to cease the use. However, it would cause injustice to require the appellant to seek approval for a site layout when I am told that he has already done so. It would cause injustice – if not make the notice a nullity – to require implementation of the approved plan because I have been given no details of it or proper description of the works¹⁴. A requirement to 'reduce the hardsurfacing' would be too imprecise.
34. In any event, and in line with my findings above, correcting the requirements would upend the appellant's case on ground (f). Condition 8) does not set out any period for compliance but the notice would have to do just that¹⁵ and it is almost certain that the appellant would seek to introduce an appeal on ground (g) if not amend his legal grounds. The ramifications of correcting the notice would be profound for all parties and above all cause injustice to the appellant.

Conclusion

35. The appellant's present case on ground (c) is that 'retrospective planning permission was granted for the development enforced against, namely: change of use of the land to use as a residential caravan site...'
36. It follows from my reasoning above that I agree with the appellant and go further. I conclude that there has not been a breach of planning control as alleged and the notice could not be corrected to allege a different breach without causing injustice. The notice is invalid and will be quashed. In these circumstances, the grounds of appeal set out in s174(2)(c), (a) and (f) of the TCPA90 do not fall to be considered.
37. For completeness and the avoidance of doubt, I have had regard to the letters and emails from nearby residents – but their representations (of support as well as objection) mainly go to the planning merits of the alleged use and cannot alter my finding that the notice is fatally flawed.

Jean Russell

INSPECTOR

¹⁴ The site layout plan provided as Appendix H to the statement made by Mr Sanders on behalf of MAG was that submitted with the application (ref: DOV/16/00542) to vary conditions 7), 8) and 9) – not to discharge conditions.

¹⁵ S173(9) provides that an enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased...

ANNEX 1: THE 2012 PERMISSION (APPEAL REF: APP/X2220/A/11/2166301)

The material change of use of the land to a mixed use comprising use as a residential caravan site and the keeping of horses, the construction of a driveway and hardsurfacing, and the installation of a septic tank – at Hollyoak, Marshborough Road, Marshborough, Ash, Canterbury, Kent, CT13 0PF.

2) The residential use of the site hereby permitted shall cease within 3 months of the date of failure to meet any one of the requirements set out in (i) to (vi) below.

- (i) Within 3 months of this decision, full details of a scheme for the provision of visibility splays on either side of the vehicular access, together with a timetable for implementation, shall have been submitted for the written approval of the local planning authority. The said splays shall be 2.4m in depth from the edge of the public highway as measured at the centre of the access and shall extend from that point for 43m to the west as measured along the nearside edge of the vehicular carriageway and 36m to the east as measured to a point 1 metre from the nearside edge of the vehicular carriageway.
- (ii) Within 3 months of the date of this decision, full details of a scheme of hard and soft landscaping shall have been submitted for the written approval of the local planning authority. These shall include details of...the replacement of the existing gates and close-boarded fencing boundary fencing adjacent to the site access and Marshborough Road, an alternative means of closure of the original site access to Marshborough Road and a timetable for implementation.
- (iii) Within 3 months of the date of this decision, details of arrangements for surface water drainage and...foul sewage disposal, together with a timetable for implementation, shall be submitted for the written approval of the local planning authority.
- (iv) Within 11 months of the date of this decision, the details submitted pursuant to (i), (ii) and (iii) above shall have been approved by the local planning authority or, if the local planning authority refuses to approve the scheme or fails to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
- (v) If an appeal is made in pursuance of (iv) above, that appeal shall have been finally determined and the submitted details shall have been approved by the Secretary of State.
- (vi) The details shall have been fully implemented in the manner approved pursuant to (i), (ii) and (iii) above in accordance with the approved timetables.

5) No obstruction exceeding 1.05 metres in height above the level of the vehicular carriageway of the public highway shall be provided at any time within the visibility splays approved pursuant to condition 2) above.

6) The site shall not be occupied by any persons other than gypsies and travellers as defined in Annex 1 of CLG publication Planning policy for traveller sites (March 2012) or in any subsequent Government policy or guidance re-enacting that definition with or without modification.

7) No more than one static caravan and one touring caravan, being caravans as defined in the Caravan Sites and Control of Development Act 1960 and the Caravan Sites Act 1968 shall be stationed on the site at any one time. Only one caravan on the site shall be occupied residentially at any one time. Details of the design and appearance of any static caravan shall be submitted to and approved in writing by the

local planning authority prior to its installation and provision shall be in accordance with the approved details.

8) Notwithstanding the layout shown on the site plan amended on 23 June 2011, the location of the static caravan and extent of the residential garden and parking/manoeuvring areas indicated therein are not hereby approved. Full details of a layout providing for an alternative position for the static caravan and reduced residential garden and parking/manoeuvring areas shall be submitted to and approved in writing by the local planning authority before any of those facilities are provided beyond the extent to which they presently exist on site. Provision shall be in accordance with the approved details.