
Appeal Decisions

Inquiry Held on 17, 18 and 25 February 2021

Site visit made on 26 February 2021

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 May 2021

Appeal A Ref: APP/A1720/C/19/3235825

Land at The Tithe Barn, Mill Lane, Titchfield, Fareham PO15 5RB

- 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 Kevin Fraser against an enforcement notice issued by Fareham Borough Council.
- The enforcement notice was issued on 23 July 2019.
- The breach of planning control as alleged in the notice is without planning permission, the surfacing with tarmac surfacing material of the car parking area to the east and west of The Tithe Barn, shown hatched black on the attached plan.
- The requirements of the notice are:
 - (i) Remove the tarmac surfacing material from the parking area shown hatched black on the attached plan;
 - (ii) Reinstate the previous informal unmade surface to the car park; and
 - (iii) Remove from the land any resulting waste materials.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) and that appeal is exempt from payment of a fee, an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

Appeal B Ref: APP/A1720/W/19/3235531

The Tithe Barn, Mill Lane, Titchfield, Fareham PO15 5RB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr K Fraser of Titchfield Festival Theatre against the decision of Fareham Borough Council.
- The application Ref P/19/0316/FP, dated 25 March 2019, was refused by notice dated 22 July 2019.
- The development proposed is the re-surfacing of the car park area.

Summary Decision: The appeal is dismissed

Preliminary Matters

1. The planning application subject of appeal B related to the development referred to in the enforcement notice subject of appeal A. I shall consider it alongside appeal A under ground (a) and the deemed planning application.

2. A subsequent planning application was refused for the laying of a top surface to the existing tarmac surface consisting of a top layer of a thin coat of bitumen rolled with 6mm grit and that is subject of a separate appeal¹.

Application for costs

3. Following the Inquiry an application for costs was made by Mr K Fraser of Titchfield Festival Theatre against Fareham Borough Council. This application is the subject of a separate Decision.

Appeal A on Ground (b)

4. An appeal on this ground is that the matters described in the notice have not occurred. The burden of proof for this ground is on the appellant, with the relevant test of the evidence being on the balance of probability.
5. The breach refers to the surfacing with tarmac surfacing material of the car park. It is suggested by the appellant that the surface of the car park was previously constructed in tarmac, albeit that had degraded, such that the works were not surfacing as described in the notice but were re-surfacing. Whether that re-surfacing comprises repair or would be "de minimis" is better considered under ground (c).
6. The occupier of Fern Hill Farmhouse, the neighbouring property, presented evidence to the Inquiry. He has owned his property since 1972, although didn't live there until 1977. He has lived there ever since. The access to his property is at the end of the car park and there is a clear view over the car park to the Tithe Barn from his access drive. At the Inquiry, he stated that the car park had not been surfaced with bitumen prior to 2019. He referred to other works including removing a building attached to the Tithe Barn in 1979 and the creation of the access drive, following the grant of planning permission in 1979. However, he had no recollection of the car park having been surfaced with tarmac in or around that time or at any point before 2019. Given his period of occupation, his evidence was based on direct personal knowledge of the site during the relevant periods. It must, therefore, carry significant weight.
7. The expert evidence presented by the appellant is that tarmac had been laid probably around 1979 and that this had, over time, degraded. That assumed that the car park was laid in tarmac when the new access drive to the barn was created. Had it been constructed of planings he suggested that it would not have compacted down over time to create the surface that was replaced. He suggested that planings are temporary, would disintegrate over time and are not a malleable material. I note that the previous surface required regular repair and filling of potholes, which would be common with a surface of either degraded tarmac or road planings. His evidence mostly comprised speculation as the expert concerned was not involved in laying tarmac on the site prior to 2019. In my view, his evidence was plausible. However, I consider it less likely to be correct than the evidence of the occupier of Fern Hill Farmhouse.
8. The photographs and other evidence to which my attention has been drawn are not decisive. In the photographs, the surface does not appear to be consolidated and could be either degraded tarmac or road planings. Most references in reports refer to the gravel in the evaporation trenches around the building, related to the access drive rather than car park, or referred to

¹ Appeal Reference APP/A1720/W/21/3268531

hardstanding or hard surface that are imprecise terms that could include any form of hard surfacing such as tarmac or road planings.

9. I note reference to an asphalted area around the north, east and west sides of the barn in the description of the site within the Heritage Statement prepared by Wessex Archaeology dated December 2015. However, the Historic Building Condition Survey by the Historic Building Advisory Service dated June 2007 refers to the same surface being comprised of road planings, gravel or similar. Both reports were prepared to analyse the condition of the building or support proposed alterations to it and the car parking area was mentioned to set context rather than being a focus of the reports. It has not been suggested that there were any substantive changes to the surface between 2007 and 2015, so the apparent inconsistency with the description of the surface means that this evidence is inconclusive.
10. I note that the footpath through the car park is maintained at public expense and there has not been a highway agreement to change the surface. No such agreement has been made and I understand there has not been any request for such an agreement from the responsible authority. However, this does not affect my conclusions.
11. As set out above, the relevant test of evidence is on the balance of probability. On that basis, I conclude that the surface of the car park was previously made of road planings and had not been constructed in tarmac prior to the works carried out in 2019.
12. Taking account of all the above, the development comprised surfacing of the car park with tarmac surfacing material such that the matters described in the notice have occurred.
13. For these reasons, I conclude that the appeal under ground (b) should fail.

Appeal A on Ground (c)

14. An appeal on this ground 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 appellant, with the relevant test of the evidence being on the balance of probability.
15. As I have concluded above that the works alleged in the notice have taken place, the re-surfacing of the car park constitutes development within the meaning of Section 55 of the Act for which planning permission is required. No planning permission has been granted by the Council for the re-surfacing of the car park.
16. The appellant suggests that the works of re-surfacing comprise repair or would be works that are of too small a scale for them to be considered material, commonly referred to as "de minimis". The decision as to whether works are "de minimis" must be considered on the basis of fact and degree.
17. In this case, the works carried out comprised removing the previous surface of the car park prior to laying the new surface using specialised heavy machinery. The evidence showed that approximately 280 tonnes of material was imported to construct the surface over an area of approximately 1,100 square metres. That is a very significant process to form a new surface that cannot be

considered small scale. Consequently, as a matter of fact and degree it is more than can be considered "de minimis".

18. My attention has been drawn to a previous appeal decision² against the service of an enforcement notice relating to an access track. That suggests those works were on a defined route and the Inspector suggested that it was on difficult terrain. I consider the cases are not directly comparable as this car park comprises an expansive area rather than a defined route and is not on difficult terrain.
19. Nevertheless, in the context of that case the Inspector stated that "de minimis" was where the works had not materially changed the extent, style or character of the access track. I accept that the extent of the car park has not altered and the character has not changed. I have already concluded, on the balance of probability, that the previous surface was comprised road planings. Given that these were not consolidated, they had a more informal appearance reflective of the historic agricultural use of the barn and landscape character of the surrounding rural area. Consequently, these are of a different style to the tarmac that has now been laid, such that they would not fall within the definition of "de minimis" set out within that appeal decision.
20. As an alternative, the appellant suggests that the works benefit from the planning permission granted by Class E, Part 9, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). Part 9 deals with development related to roads. Class E enables the maintenance or improvement of unadopted streets or private ways. Neither an unadopted street nor a private way could be maintainable at public expense. The requirements of the GPDO need to be construed in a "broad and common-sense manner", as set out in the judgement of *Cowen v Secretary of State for the Environment* [1999] 3 PLR 108, [2000] 79 P & C 457.
21. The primary issue in this case is whether the car park is an unadopted street or a private way. A "way" would normally comprise a route from one point to another with defined boundaries. In this case, the car park is an open area outside the barn, used by the occupiers of and visitors to the barn, and users of the nearby fishing lakes as a car park and part of the route to the lakes. It forms a large area over which users may travel, but there is nothing to prescribe a route over the car park for either users of the barn or those travelling to the fishing lakes, such that there are no defined boundaries to their route over this area. This contrasts with the access route between the road and the car park that does have defined boundaries to the side of the route. Consequently, I consider the car park cannot be considered as a "way".
22. My attention has been drawn to the definition of street provided in the New Roads and Street Works Act 1991 that includes squares, courts and any land laid as a way whether it is for the time being formed as a way or not. I have already concluded the car park is not a way and no evidence was adduced by either side as to how it may be a square or court. In including squares and courts, the definition implies that the boundary of the street may not be as constrained as a way and could be a larger area. The previous edges of the surface were not all clearly defined as parts had grassed over, and it does not appear as a typical square or court that are generally enclosed by buildings. In addition, it does not function other than as a car park and a through route,

² Appeal decision reference T/APP/C/93/K1100/627144

whereas squares and courts normally have wider functions. On the balance of probability, I consider that the car park is not a square or court and, as a result, is not a street.

23. For those reasons, I conclude that the car park is not a private way or an unadopted street. As such, the re-surfacing works cannot benefit from the planning permission granted by Class E, Part 9, Schedule 2 of the GPDO.
24. Since no planning permission has been granted for the development it thereby constitutes a breach of planning control.
25. For these reasons, I conclude that the appeal under ground (c) should fail.

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

Appeal B

Main issue

26. The Tithe Barn is a Grade I listed building within Titchfield Abbey Conservation Area. At the centre of the Conservation Area is the scheduled ancient monument of Titchfield Abbey. Neighbouring the Tithe Barn is Fern Hill Farmhouse, a grade II listed building, which is also within the Conservation Area. Consequently, the main issues in this appeal are whether the proposed works and development would preserve the listed buildings and scheduled ancient monument or their settings or any features of special architectural or historic interest (or significance) which they possess and whether the character or appearance of the conservation area would be preserved or enhanced.

Reasons

27. Titchfield Abbey was a Premonstratensian monastery founded in the 13th century and set within a substantial estate. The building is set toward the bottom of a wide valley surrounded by fields and limited development that reflects this rural location. It was subsequently converted to a mansion in the 16th century but was largely demolished in the 18th century. The remains of the abbey include the cloister, later the courtyard of the mansion, and the nave of the church that became the gatehouse, with four towers. It is the rural setting reflecting the character and appearance of the associated estate that comprises the significance of the scheduled ancient monument insofar as it relates to the re-surfacing of the car park.
28. The Conservation Area extends over a large rural area around the former monastery. The Abbey is located on the valley floor and can be appreciated from a wide area within the Conservation Area. It is the valley landscape, rural nature and focus on the historic Abbey, and associated rural buildings such as the Tithe Barn, that comprise the significance of the Conservation Area.
29. The Tithe Barn comprises a 15th century medieval abbey barn that would have been constructed to serve the agricultural needs of the abbey estate. Although the remains of the Abbey and the Tithe Barn are some distance apart with a garden centre comprising substantial low buildings and associated parking separating them, there is some intervisibility between them such that they can be appreciated together. Consequently, the Tithe Barn is located within the setting of Titchfield Abbey.

30. The Tithe Barn has, in recent years, been used as a theatre by Titchfield Festival Theatre. Although there have been insertions to the building to enable it to function as a theatre, the building has been preserved such that its appearance, internally and externally, can be appreciated and continues to reflect its historic use as an agricultural barn. The significance of the Tithe Barn is its historic appearance that reflects its original function as a barn and links to the wider abbey estate that remain legible within the surrounding rural landscape.
31. Fern Hill Farmhouse is located a short distance further up the track past the garden centre that runs alongside the edge of the Tithe Barn car park. It dates from the 17th century with later extensions and was built as a farmhouse associated with the Tithe Barn and surrounding agricultural land, such that they can be appreciated together. The significance of the farmhouse in this case is its relationship with the Tithe Barn as a historic farmstead.
32. As set out above, the previous surface of the car park was unconsolidated and comprised road planings. Parts of the car park, particularly around the edges, had greened over time with vegetation spreading into the car park area, reducing the definition of the edges of the car park and softening its appearance somewhat. The car park was rutted and damaged. All these elements meant that the surface appeared solid but informal, reflecting the original agricultural use of the barn. However, there are very limited views of the car park from the surrounding area, particularly from Titchfield Abbey given the distance and intervening development.
33. Nevertheless, the surface of the car park reflected the significance of the Tithe Barn and did not detract from its contribution toward the historic significance of Titchfield Abbey, the Conservation Area and Fern Hill Farmhouse.
34. The tarmac surface, by contrast, is a consolidated surface and presently is a very dark colour that is reflective when wet. It does not extend beyond the extent of the previous road planings surface and has not affected the level of the ground around the building, including retaining and repairing the limestone base layer. It is a surface commonly used for car parks particularly in urban areas but results in a flat and consistent surface with a formal character and appearance. This does not reflect the historic agricultural appearance of the immediate surroundings.
35. Over time, the tarmac surface will weather, including the colour wearing such that it will dull and not be so reflective when wet. It is possible that the edges will also soften as some planting may establish, but not in the same way or to the same extent as happened previously with the unconsolidated road planings surface. Consequently, whilst the effects of the development would diminish over time, they would remain to a significant extent.
36. As a solid surface, the tarmac is impermeable. This means that it acts to reduce the ability of water to penetrate the surface or escape from the sub-surface. As the tarmac has been laid up to the building around the timber thresholds of the doors in the projecting entrance bays, this affects the ability of water to evaporate from the ground. Evaporation trenches have been provided around much of the rest of the building but laying the tarmac adjacent to the building is likely to restrict the ability of the permeable materials in the threshold to breathe. Therefore, groundwater could result in damp within these materials that would, over time, mean the fabric of the

building would deteriorate such that the works do not preserve the listed building. However, given the slope of the land away from the building, water on the surface flows away from the building so surface water does not affect its fabric.

37. I note that it may be possible to include a condition requiring a French drain adjacent to the threshold of the building on any planning permission that may overcome the effect of groundwater under the tarmac surface on the fabric of the Tithe Barn. A drawing showing how a French drain may be constructed has been submitted. However, even if I accepted such a condition was appropriate, it would not overcome the harm relating to the setting of the scheduled ancient monument, listed buildings or conservation area.
38. My attention has been drawn to surfacing around other listed buildings such as at the Grade II* listed barn at Hartley Wintney, Hampshire and Grade II* listed barn at Headstone Manor, London Borough of Harrow. I have limited details of those cases, in particular relating to the history of this surfacing and the effect of the tarmac surfacing on the setting of those listed buildings. In any event, I need to consider this case on its individual merits.
39. For these reasons, I conclude that the tarmac surface does not preserve the listed building of Titchfield Barn and harms the setting of Titchfield Barn and Fern Hill Farmhouse. As a result, it also harms the historic setting of Titchfield Abbey and the character and appearance of the Conservation Area. Given my conclusions, the works have resulted in harm to the significance of these heritage assets. Consequently, the development is contrary to Policy CS17 of the Fareham Local Development Framework Core Strategy (CS), Policy DSP5 of the Local Plan Part 2: Development Sites and Policies and paragraphs 189-196 of the National Planning Policy Framework (the Framework). These seek high quality design that responds positively to and is respectful of the key characteristics of the area including heritage assets, in particular to protect heritage assets from harm or loss.
40. The Framework advises at Paragraph 193 that, when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Accordingly, while less than the 'substantial harm' referred to in Paragraph 195 of the Framework, the harm to the scheduled ancient monument, listed buildings and conservation area is nevertheless a matter of considerable importance in this case.
41. Paragraph 196 of the Framework establishes that, where a development proposal would lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use. The public benefits in this instance are that the surface may assist safe and easy access by all members of the community, including wheelchair and elderly visitors; makes the whole car park more usable by removing potentially dangerous potholes and areas of vegetation inaccessible for vehicles; assists in supporting the use of the building for community events; and is a surface that is easier and cheaper to maintain by the charity running the building. These reflect concerns raised by users of the barn. However, I understand that a properly

maintained surface of road planings is not significantly less accessible than a tarmac surface for those with reduced mobility. Overall, therefore, those benefits are modest and cannot outweigh the identified harm to the scheduled ancient monument, listed buildings and conservation area.

42. Policy CS17 of the CS also includes seeking development that is safe and easily accessible by all members of the community. I accept that the re-surfacing has ensured the Tithe Barn is easily accessed by all members of the community, which is a basic requirement for all development in order to comply with the policy. The policy subsequently lists a number of criteria that it requires development to also meet. In this case, although it complies with other criteria, it does not meet that relating to heritage assets. On that basis, I conclude that conflict means the development is in conflict with the policy as a whole.

Conclusion

43. For the reasons set out above, I conclude that on balance the development does not accord with the development plan. Appeal A on ground (a) and the deemed planning application therefore fail and appeal B is dismissed.

Appeal A on Ground (f)

44. 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 to remove the tarmac surfacing material from the land and reinstate the previous informal unmade surface to the car park 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.
45. The description of the breach of planning control refers to the surfacing with tarmac surfacing material of the car parking area and the requirements of the notice refer to the removal of that tarmac surfacing material. The appellant is concerned that this relates to the excavation of the whole surface, including the limestone base layer. The Council suggested amendments to the notice that would have clarified that the limestone base layer could be retained.
46. However, the notice as it was served solely relates to the tarmac surfacing material. There is no reference to the construction of the surface below the tarmac, such that there is no requirement to remove the limestone base layer, or any remaining road planings beneath the tarmac. Consequently, the requirements are not excessive in this regard and I consider that the suggested amendments by the Council are unnecessary.
47. The second requirement states that the previous informal unmade surface to the car park should be reinstated. There was some suggestion that would not be possible as previous potholes could not be recreated and the vegetation on the previous surface would not reappear quickly. I accept that any new surface, including of road planings, would initially have a new appearance and would be largely flat. However, such a surface comprised of unbound material would have an informal appearance that would reflect the rural surroundings. Over a short period of time, vegetation would establish on the less used parts of the car park and it would wear in a similar way to the previous surface. On that

basis, the requirements are the minimum required to restore the land to its condition before the breach took place.

48. My attention has been drawn to the judgement in *Oates v SSCLG and Canterbury CC* [2017] EWHC 2716 (Admin), [2018] EWCA Civ 2229; [2019] JPL 251. In that case, the Inspector concluded a step in that notice that specified to “make good the land underneath the 3 former buildings” was vague and subjective but that it could be deleted without causing injustice. The requirement in the present case is not comparable given that it requires the reinstatement of the land to its previous condition. That would be known to the appellant, contractor and other members of Titchfield Festival Theatre, and is neither vague nor subjective. I note that the Council have suggested the notice could be amended to refer specifically to road planings, which would be more precise but, as a result, would go further than the original requirements so may cause injustice to the appellant.
49. My attention has been drawn to a suggestion of rolling grit into the existing tarmac surface. This would form an alternative scheme for development and I need to consider this in light of *Tapecrow Ltd v First Secretary of State and another* [2006] EWCA Civ 1744. However, it includes further works such that it does not constitute part of the development subject of the appeal. Given that it is subject of a separate appeal, referred to in my preliminary matters, I consider it is more appropriate that it is dealt with under that appeal. I will return to this under the ground (g) appeal.
50. As a result, 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).

Appeal A on Ground (g)

51. An appeal on this ground is that the period specified in the notice for compliance falls short of what should reasonably be allowed.
52. I have noted under the preliminary matters that there is a current appeal relating to the rolling of grit onto the existing tarmac surface, that is being considered separately. I do not know what the result of that appeal will be but consider it is reasonable to allow a period of time for that to be determined and, were it allowed, for the appellant to carry out those works. I note there have been considerable delays to appeals taking account of the Covid-19 pandemic and have taken that into account. The appellant suggests a period of 9 months would be appropriate. I consider that is excessive in the circumstances and a period of 7 months would be more reasonable.
53. For these reasons, I conclude that the appeal under ground (g) should succeed.

Formal Decisions

Appeal A

54. For the reasons given above, I conclude that the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to that extent.
55. It is directed that the enforcement notice is varied by:

the deletion of two months and the substitution of 7 months as the period for compliance.

56. Subject to the variation, the enforcement notice is upheld.

Appeal B

57. The appeal is dismissed.

AJ Steen

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Poonam Pattni of Counsel instructed by Thrings Solicitors, who called
Ian Donohue
Bob Edwards
Kevin Fraser
Colin Knott

FOR THE LOCAL PLANNING AUTHORITY:

Emma Dring of Counsel instructed by Fareham Borough Council, who called
Stephen Jupp
Carole Fry

INTERESTED PARTIES:

Commander Jeremy Cobban Neighbour

DOCUMENTS SUBMITTED AT THE INQUIRY:

Document 1: Opening Note: on behalf of the Appellant
Document 2: Opening Statement on behalf of the LPA
Document 3: Closing Statement on behalf of the Appellant
Document 4: Closing Submissions on behalf of the LPA