The Planning Inspectorate

Appeal Decision

Hearing Held on 9 March and 21 April 2021
Site visit made on 11 March 2021

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18th May 2021

Appeal Ref: APP/X3540/C/19/3232207
Land at North Denes Caravan Park, The Ravine, Lowestoft, Suffolk

- 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 Gary Duthie, Tingdene (North Denes) Limited against an enforcement notice issued by East Suffolk Council.
- The enforcement notice was issued on 24 May 2019.
- The breach of planning control as alleged in the notice is operational development involving the laying of caravan bases, the construction of a roadway, the installation of a pumping station with settlement tank and the laying out of pipe works in the course of which waste materials have been excavated from the site and deposited upon the surface.
- The requirements of the notice are (1) Permanently remove from the land the waste soil piles, caravan bases, roadway, pumping station with settlement tank and pipe works; and (2) Permanently restore the land to the condition it was in before the unauthorised activity took place.
- The period for compliance with the requirements is within 3 months of the notice taking effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended (the Act).

Decision

1. The appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

Application for costs

2. At the Hearing an application for costs was made by East Suffolk Council against Mr Gary Duthie, Tingdene (North Denes) Limited. This application is the subject of a separate Decision.

Preliminary matter

3. An extension to the North Lowestoft Conservation Area (the CA) that would bring it closer to the appeal site has been proposed. It was agreed that this would only become relevant to the appeal on ground (a) as and when the CA boundary is altered, a matter yet to be decided.

The appeal on ground (e)

4. Section 172(2)(a) of the Act requires that copies of an enforcement notice shall be served on the owner and occupier of the land to which it relates, and any other person having an interest in the land, including mortgagees, tenants and sub-tenants, if they are materially affected. Section 176(5) of the Act allows that a failure to serve a copy of an enforcement notice on a person required to be served with a copy may be disregarded if neither they, nor the appellant, has been substantially prejudiced by it.

5. The appeal site was owned by the former Waveney District Council (WDC) and, following its abolition, the legal ownership will be transferred to Lowestoft Town Council. However, in the interim, East Suffolk Council (the Council) is the legal owner, as successor authority to WDC. The Council did not serve itself with a copy of the notice but has confirmed that it suffered no substantial prejudice because of this. It therefore remains to be considered whether the failure caused the appellant to suffer substantial prejudice.

6. The appellant refers to the Act's requirements for the service of notices in terms of transparency and due process. While I have considered this, there is no evidence that the publicity requirements of section 188[1] of the Act were not observed. The evidence indicates that, while the Council erred in terms of serving a copy on itself, it followed due process otherwise.

7. While the uncertainty over ownership following the abolition of WDC may have caused the appellant frustration and concern, the service of the notice is a separate matter. The failure did not constrain the appellant's ability to respond to the notice, including exercising his right of appeal. Consequently, it has not been demonstrated that it caused him to suffer substantial prejudice and it is therefore appropriate to exercise the discretion allowed by section 176(5).

8. For these reasons the appeal on ground (e) must fail.

The appeal on ground (c)

9. For the appeal to succeed on this ground the appellant needs to demonstrate that the operational development the subject of the notice (the works) is not in breach of planning control. This could either be because the works are not development, which is not claimed, or because they do not require planning permission.

10. The appellant contends the works are permitted, either by comprising part of a development with an extant planning permission or under the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (the Order).

11. The appeal site is the southernmost part of a larger area, extending north to Links Road, that was the subject of planning permissions granted in 1975[2] and 1984[3]. Both were granted by WDC in response to applications it had made to itself. The 1975 permission was for "camping site with roadworks and lighting etc." and the 1984 permission was for "use as seasonal tenting and touring

[1] Register of enforcement and stop notices and other enforcement action
[2] W3234, granted 24 November 1975
[3] W3234/7, granted 3 May 1984

caravan site (500 pitches)". An earlier planning permission[4] had initially formed part of the appellant's case but was not pursued after the first day of sitting.

The 1975 permission

12. The decision notice records that this permission was granted subject to the development being carried out "in accordance with the plan(s) and information contained in the application". The drawings on file show a distinctive loop road, which I could see when I visited the site. The loop is also depicted, in whole or in part, in aerial images from 1999, 2015, 2017 and 2019. This confirms that operational development comprised within the permission was carried out. It is therefore reasonable to conclude that the use it was intended to facilitate, also forming part of the development, was also instituted.

13. The Council suggests the road alignment deviates from the approved plans. However, close examination of the 2 drawings on file reveals that they depict slightly different road layouts. As such, and noting that the described deviation is relatively minor, it is not clear that a development significantly different from what had been permitted occurred.

14. Turning to the aerial images, one is dated 1 January 1999, although trees in leaf suggest it would have been taken in spring or summer. While there are no tents or caravans on the land, grass has been mown. This may have been to facilitate continued use as a camping site, or as permitted by the 1984 permission, but the evidence is inconclusive. An ablution block used in association with the camping site was demolished in 2015 or 2016, suggesting that the use may have continued until then. However, aerial images from 2015 onwards and my observations indicate that camping ceased some time ago.

15. While a member of the public suggested the 1975 permission had been abandoned, this was not corroborated by evidence, and the Council has not advanced that argument as part of its case. Furthermore, the appellant indicated that the drainage and electricity infrastructure of the 1975 permission had been utilised as part of the works, suggesting that it would be possible to reinstate camping, albeit without an ablution block. Accordingly, I do not consider the 1975 permission to be abandoned and it is appropriate to consider whether the works comprise part of it. If they are not found to form part of the 1975 permission, it will also be necessary to consider whether they are permitted development.

16. The operational development in the description of the 1975 permission is "roadworks and lighting etc." The appellant contends that 'etc.' can reasonably be construed to provide for any related development necessary to realise a camping site. The natural and ordinary meaning of 'etc.' confirms that the permission allowed more operational development than roads and lighting, but 'etc.' is ambiguous, so it is reasonable to also consider evidence extrinsic to the decision notice. The most probable extent of the operational development comprised in the 1975 permission is set out in drawing 40340 which, although not listed in the decision notice, is annotated with the application number and date stamped 6 October 1975, the date of the application.

17. It is therefore reasonable to conclude that 'etc.' meant the standpipes, waste water facilities, fire points, refuse containers and sewers marked on drawing

[4] N2797/22, granted 3 December 1971

40340. These do not include the caravan bases or the pumping station and settlement tank of the works. While the 1975 permission included roadways, none were shown within the part now forming the appeal site and the roadway of the works is therefore materially different. Furthermore, while the 1975 permission included pipe works, no comparison of those on drawing 40340 and those comprised in the works has been produced. Consequently, and on the balance of probability, it has not been demonstrated that the works comprise part of the 1975 permission.

18. Permitted development rights relating to caravan sites are set out in Schedule 2, Part 5, Paragraph B to the Order. This provides that the works are permitted development if they are required by the conditions of a site licence issued under the Caravan Sites and Control of Development Act 1960. However, there is no such licence covering the appeal site. While a site licence yet to be applied for or issued might require the works, it is an inescapable fact that they were not permitted development when the notice was issued.

The 1984 permission

19. This was a deemed permission for development by a local authority, granted under Regulation 4(5) of the Town and Country Planning General Regulations 1976 (the Regulations). Regulation 4(7) states that any such deemed permission "shall enure only for the benefit of the authority … and not for the benefit of the land".

20. The terms of the lease relating to the appeal site provide that the local authority will receive a share of any income from pitch fees. However, I am not persuaded that this is what Regulation 4(7) means by 'benefit'. Viewed in the context of the Regulations as a whole, that benefit is the right to carry out development deemed to be permitted under Regulation 4(5). Even if I were to accept that the local authority's share of income is a benefit within the meaning of Regulation 4(7), the deemed permission cannot be "only for the benefit of the authority" if the site operator also receives a share of income.

21. The appellant suggested a comparison may be made with travellers' sites permitted under the Regulations but operated by organisations other than the local authority concerned. However, no examples were identified, and the comparison has not been demonstrated.

22. Nothing in the decision notice indicates that the 1984 permission included any operational development. Accordingly, and regardless of how the permission enures, it has not been demonstrated that the works comprise part of it. Even if the permission did enure for the benefit of the land, permitted development rights for the works would only exist if they are required by a site licence covering the appeal site. As already noted, there is no such licence.

Conclusion on ground (c)

23. Thus, as a matter of fact and degree, it has not been demonstrated that the works comprise part of either the 1975 permission or the 1984 deemed permission. Even if they did form part of the latter, the nature of that permission is such that they could only have been lawfully carried out by the local authority, which they were not.

24. As no site licence exists for the appeal site, permitted development rights pertaining to a caravan site did not exist when the notice was issued.

25. On the balance of probability, the works do not have planning permission and do not constitute permitted development. Accordingly, they are not immune from enforcement action and the appeal on ground (c) must fail.

The appeal on ground (a)

26. The main issues in this appeal are the effect of the works on:

- Open space, public recreation, and biodiversity.
- The character and appearance of the area, including the CA.
- Flood risk.
- The Coastal Change Management Area (CCMA).
- The living conditions of nearby occupiers.

Reasons

Open space, public recreation, and biodiversity

27. The appeal site lies within an area designated as open space by the Waveney Local Plan (the WLP). Policy 8.23 of the WLP only permits development on open space in 3 exceptional circumstances corresponding to those set out in paragraph 97 of the National Planning Policy Framework (the Framework).

28. The first exception is for development ancillary to the open nature of the area and which enhances local character and amenity and is of greater community or wildlife benefit. No evidence that the operational development is ancillary to the open nature of the area has been produced. However, the appellant considers the temporary works of the site security fencing and earth mounds have the greatest impact on openness. While removing those elements would reduce the impact overall, the caravan bases, roadway, pumping station and settlement tank and other infrastructure all contribute to a reduction in the perception of openness. It follows that the works cannot reasonably be said to be ancillary to the open nature of the area, or to enhance local character and amenity, which are inseparable from it.

29. The works are not claimed to be of greater benefit to wildlife than the previous condition of the land and they can only reduce the site's attractiveness to wildlife. However, mitigation for this impact has been identified in the form of a financial contribution. This would also address WLP policy 8.34, which requires development to maintain, restore or enhance the biodiversity and geodiversity of green infrastructure. However, the contribution is calculated on a 'per dwelling' formula and the sum relates to use of the land for stationing 32 static caravans. As the deemed planning application is limited to the works, it was agreed that I should not take the planning obligation into consideration.

30. The second exceptional circumstance applies if it has been demonstrated that the site is surplus to requirements, including its ability to be used as alternative types of open space. The designated open space forms part of a continuous area comprising The Ness, Bellevue Park, Sparrow's Nest Gardens, Denes Oval and Gunton Warren. The appeal site is a relatively small part of this wider area and the appellant contends that WDC's decision to enter a lease with his company indicates that the site is surplus to open space requirements. However, the policy requires this exception to be demonstrated by an open

space assessment and one has not been carried out. Therefore, appropriate evidence that the appeal site is surplus to open space requirements has not been provided.

31. The final exception is if the loss resulting from the development will be replaced by equivalent or better provision in an area that is equally or more accessible to the community. However, no replacement is proposed.

32. Accordingly, the works cause harmful loss of open space that is not justified by appropriate assessment, enhancement, increased benefit, or replacement, and their adverse effect on wildlife would not be mitigated. They are therefore contrary to WLP policies 8.23 and 8.34 and Parts 8 and 15 of the Framework.

Character and appearance

33. Apart from the existing caravan park, the coastal strip between The Ness and Gunton Warren is largely open. The network of green spaces within this strip is a significant component of the character of the local area, in which built development and uses of land that reduce the open character of the area are limited. Within this network, the section including the appeal site contrasts with and complements the built development that overlooks from North Parade and Gunton Cliff.

34. While the Council identifies a failure to comply with WLP policy 8.29 in terms of the design of the development, this is largely expressed in terms of static caravans, which do not form part of the works. Conflict with the policy has therefore not been demonstrated.

35. North Parade and Gunton Cliff are within the CA and their relationship with the predominantly open coastal strip they overlook, including the appeal site, contributes to the setting of the CA. However, the text of WLP policy 8.39 is only concerned with development within conservation areas, so the effect of the works on the CA may only be considered in the context of the Framework. By reducing the perception of openness, the works have an adverse effect on the setting of the CA and thereby cause less than substantial harm to the significance of the heritage asset.

36. This harm must be weighed against the public benefits of the proposal, which the appellant identifies as tourism growth and its contribution to the local economy. The WLP recognises the economic importance of tourism and provides support for its growth, including self-catering holiday accommodation. While the appellant intends to place such accommodation on the site, it does not form part of the works, which therefore cannot enhance the area's tourism offer. Accordingly, there are no public benefits to be weighed against the less than substantial harm caused to the significance of the CA. The works are therefore contrary to Part 16 of the Framework.

Flood risk

37. The appeal site is within Flood Zone 3, the area with the highest probability of flooding, but a flood risk assessment has not been carried out. While the works involve limited development above ground level and do not, of themselves, introduce a use vulnerable to flooding, I was told that the site had flooded in recent years. The appellant has not searched for reasonably available and suitable sites appropriate to the development in areas with a lower risk of flooding and has not identified any sustainability benefits that might outweigh

flood risk. Accordingly, it has not been demonstrated that flood risk would be adequately managed, contrary to the requirements of WLP policy 8.24 and Part 14 of the Framework.

The CCMA

38. WLP policy 8.25 and paragraph 168 of the Framework limit development within CCMAs. The Council suggests conflict with the former because static caravans are excluded from the categories of development to be permitted within parts of the CCMA expected to be at risk from change within a 20-year time horizon. However, the works do not include static caravans and while the site is adjacent to the CCMA, it is not within it. Furthermore, evidence that the adjacent part of the CCMA is at risk of change within 20 years has not been presented and the appellant advised that the Environment Agency (the EA) considers the adjacent sea wall will prevent such change until 2105.

39. The appeal site is within 30m of the CCMA but a Coastal Erosion Vulnerability Assessment (VA) has not been carried out. Policy 8.25 indicates this should be done because all development within the CCMA will be time-limited according to the risk identified in the VA. However, the wording of the policy and the equivalent provision in paragraph 169 of the Framework only restrict development within the CCMA, and not on adjoining land, as in this case. Therefore, while it has not been demonstrated that an increased risk to life or property does not arise from the works, there is no policy provision to prevent the works on the appeal site for that reason.

Living conditions

40. The site is on, or close to, a historic landfill site and there is a risk that contamination may be released by the works. While analytical testing of soil samples has been carried out, there is some uncertainty regarding the methodology. However, such concerns could be overcome by way of condition if I were minded to allow the appeal on ground (a). This would allow effective management of any potential risk to the living conditions of nearby occupiers.

Conclusion on ground (a)

41. For the reasons given, the development is unacceptable in terms of its effect on open space, biodiversity, the significance of the CA, and the management of flood risk. This is contrary to WLP policies 8.23, 8.24 and 8.34 and Parts 8, 14, 15 and 16 of the Framework and the appeal on ground (a) should not succeed.

The appeal on ground (f)

42. For the appeal to succeed on this ground, it must be demonstrated that the steps required to comply with the notice are excessive and that lesser steps could overcome the breach of planning control. The purpose of the notice is to remedy the breach of planning control, meaning the works, not to remedy any injury to amenity they cause.

43. The appellant has suggested the lesser steps of removing surplus materials, temporary fencing and plant left on site. However, these are matters that would be achieved on completion of the development and while they would mitigate its current effect, they would not resolve the breach of planning control.

44. For these reasons the appeal on ground (f) should not succeed.

The appeal on ground (g)

45. The Council contends that 3 months would be a reasonable period for compliance having regard to the nature of the works and the effort required to remove them. However, the appellant considers that more time may be required if land contamination issues need to be addressed and suggests 6 months would be a reasonable period.

46. The Council identified contamination as a concern in its reasons for issuing the notice and has criticised the appellant's evidence on the matter. It is therefore possible that contamination exposed by the works may require additional effort, which could affect the appellant's ability to comply with the notice. However, the appellant is confident that very little, if any, harmful contamination exists and has a specialist contractor that could deal with any that might arise. While the contractor's availability cannot be guaranteed in advance, it has not been demonstrated that they would not be able to carry out any necessary action within the 3-month period.

47. Nevertheless, should the appellant identify contamination that cannot be dealt with during the period specified in the notice, section 173A(1)(b) of the Act may be of assistance. This affords a local planning authority discretion to waive or relax any requirement of an enforcement notice, including extending the compliance period. However, that would be entirely a matter for the Council.

48. Thus, the appeal on ground (g) also fails.

Conclusion

49. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the Act.

Mark Harbottle

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Gary Duthie	Planning Lawyer, Tingdene (North Denes) Limited
Michael Rudd of Counsel	
Margaret Shelley	Senior Planning Officer, Lanpro Services
Paul Spriggins	Director, Tingdene (North Denes) Limited

FOR THE LOCAL PLANNING AUTHORITY:

Liz Beighton	Planning Manager (Development Management), East Suffolk Council
Cate Buck	Senior Enforcement Officer, East Suffolk Council
Josef Cannon of Counsel	
Elizabeth Martin	Senior Conservation Officer, East Suffolk Council

INTERESTED PERSONS:

Shona Bendix	Town Clerk, Lowestoft Town Council
Peter Eyres	