



Appeal Decision

Site Visit made on 1 September 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 October 2021

Appeal Ref: APP/A1530/C/21/3276777

1 London Road, Marks Tey, Colchester CO6 1DZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended ('the Act'). The appeal is made by Mr Sam Pilgrim against an enforcement notice issued by Colchester Borough Council.
 - The notice was issued on 14 May 2021.
 - The breach of planning control as alleged in the notice is without the benefit of planning permission, the material change of use of part residential garden land to a mixed use for (1) mountain bike purposes and (2) use for motorised sport and practicing for such, including engineering operations/excavation, and the creation of tracks, jumps, ramps and scaffolding towers. ("the Activity")
 - The requirements of the notice are to:
 - (i) Cease using the land for the purposes of mountain biking, motorised sports and the practicing for such activities.
 - (ii) Dismantle the scaffolding towers.
 - (iii) Remove from the land the mounds, ramps and jumps created to form the mountain bike/motorised sport tracks, by means of reinstating the land back to its natural ground level, ensuring the ground is not disturbed at a depth deeper than 100mm below natural ground level.
 - (iv) Reseed the affected areas to grass.
 - (v) Leave the land in a clean and tidy condition.
 - The period for compliance with the requirements is: 28 days.
 - The appeal is proceeding on the grounds set out in section 174(2)(c), (f) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is corrected and varied by:
 - In section 3 of the notice, after the words '*the material change of use of part residential garden land to a mixed use for*' insert the words '*residential use, and*'
 - In section 5 of the notice, delete the following words from requirement (iii) '*means of reinstating the land back to its natural ground level, ensuring the ground is not disturbed at a depth deeper than 100mm below natural ground level*' and insert '*and reinstate the land to its condition before the development took place*' so that requirement (iii) reads '*Remove from the land the mounds, ramps and jumps created to form the mountain bike/motorised sport tracks, and reinstate the land to its condition before the development took place*'.
 - In section 5 of the notice, delete requirement (iv) which states '*Reseed the affected areas to grass.*'
 - In section 5 of the notice, delete requirement (v) which states '*Leave the land in a clean and tidy condition.*'

2. Subject to the correction and variations above, the appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The site visit was arranged on the basis that I would be accompanied by the appellant and a representative of the Council. However, the Council's representative was not there at the appointed time. In order to avoid delaying the site visit, and in the absence of a representative of the Council, the appellant gave me access to the appeal site. While the appellant showed me the motorised bikes he uses, the majority of the site visit was unaccompanied.

Matters concerning the notice

4. I have a duty to get the notice in order. The appeal site comprises a detached dwelling set in generous grounds. The enforcement notice alleges the material change of use of part residential garden land to a mixed use for (1) mountain bike purposes and (2) use for motorised sport and practicing for such, including engineering operations/excavation, and the creation of tracks, jumps, ramps and scaffolding towers.
5. The land affected by the notice includes the dwelling, as well as the garden. It is evident from the submissions and my visit that the property and garden continue to be used for residential purposes. Where the planning unit is put to two or more activities and it is not possible to say that one is incidental to another it is in mixed use. Where an enforcement notice alleges a mixed use, the allegation should refer to all components of the mixed use, even if only one is required to cease.
6. The Council describes the site as residential within its statement of case. Where a lawful activity is referred to in the allegation, the enforcement notice cannot require it to cease and so section 173(11) of the Act¹ has no bearing on it. I therefore consider there would be no injustice in correcting the notice to refer to the residential use as part of the mixed use.

Ground (c)

7. In order to succeed on ground (c), the appellant must show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control. The main thrust of the appellant's case is that a material change of use has not occurred and that the use of the site is incidental to the enjoyment of the dwellinghouse.
8. Development, for the purposes of the Act, comprises two limbs: The carrying out of building, engineering, mining or other operations in, on, over or under land; and the making of any material change in the use of any buildings or other land.
9. Although the breach alleges a material change of use, it also alleges 'engineering operations/excavation, and the creation of tracks, jumps, ramps and scaffolding towers'. I shall therefore consider whether operational development has occurred.

¹ Section 173(11) grants planning permission by virtue of section 73A for any buildings, works or activity that the notice could have required to be removed or cease but does not do so.

Operational development

10. Number 1 London Road comprises a substantial detached dwelling set in spacious grounds. The appellant has erected a number of ramps, some of which are constructed of timber and some of soil, a scaffolding tower, and has placed mats and sheeting, to create what appears to be a circuit within the back garden of the property. A substantial amount of soil has been used to create the mounds and a depression, which was filled with water at the time of my visit, has been created.
11. The earthworks that have been carried out are substantial and are likely to have been carried out using machinery. The mounds have been shaped to create ramps and have been located within the site to form part of a circuit. This would have involved an element of pre-planning. Therefore, as a matter of fact and degree, I consider they constitute an engineering operation and are therefore development for the purposes of the Act.
12. The scaffolding tower that has been erected is a significant structure which, in my view, would have taken some time to construct on site. The poles appear fixed into the ground and given its construction, it is unlikely to be possible to move it without disassembling it. It therefore has a degree of permanence and, as a matter of fact and degree, is a building. The construction of the scaffolding tower thus constitutes a building operation and is development for the purposes of the Act.
13. The ramps constructed of timber, although substantial structures, appear to rest on the ground under their own weight and appear relatively easy to move. As a matter of fact and degree, I do not consider these constitute buildings.

Material change of use

14. Section 55(2)(d) states that the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such shall not be taken to involve development of the land. Whether or not a use incidental for the purposes of S55(2)(d) must be considered with regard to the primary residential use and the type and size of the dwellinghouse and its curtilage, as well as the scale and nature of the claimed incidental activity. Case law has established the functional relationship between a primary use and incidental use should be one that is normally found and not based on the personal choice of the user.
15. I accept that it is not unusual for an occupant of a dwelling to choose to ride a mountain bike or motorised bike within the curtilage of a dwellinghouse. Indeed, an individual wishing to use a bicycle or motorbike on a road will usually start their journey from a residential property. However, when considering whether the use is incidental to the enjoyment of the dwellinghouse, it is necessary to consider the precise nature of the activities that are being carried out at the appeal site.
16. The area that is used for the activity comprises a substantial part of the rear garden of No 1 London Road. As set out above, engineering works have been carried out and various structures are located within the site to create a circuit. I saw that, despite the intervening vegetation, one of the wooden ramps is clearly visible from London Road. Although I was not able to see the scaffolding tower from London Road, given its height, I consider it highly likely that it

would also be visible from London Road in the winter months, when leaf cover is less.

17. The appellant states that the motorbike referred to is a small cc bike which is no more powerful than a ride on lawnmower and which would be unlikely to cause disturbance to neighbouring properties. Whilst letters submitted by the occupants of No 3 and No 7 London Road state the activities do not cause noise and disturbance to them, this is not determinative of whether or not a change of use has occurred.
18. I was able to see two of the motorised bikes the appellant uses within the site, a Sur-Ron bike, which was inaudible over the sound of traffic from London Road and a Honda CRF110F, which in my view is likely to be audible from outside the site. An image provided by an interested party shows what appears to be dust arising from the use of a motorised vehicle within the site.
19. I consider it highly likely that activities within the site would generate noise and dust which would be perceptible from outside the site, particularly during the summer months when the ground is likely to be dry. I note concerns raised by the appellant regarding the motivation of certain interested parties, however, I have drawn my conclusion in this respect on both the evidence before me and my inspection of the site.
20. The provision of what is, in effect, a training facility, whether for personal use or not, in my view goes beyond the functional relationship that is normally found between a residential dwelling and an incidental use. Given the substantial size of the circuit and the structures, the activities cannot reasonably be considered incidental to the enjoyment of the dwellinghouse. Consequently, as a matter of fact and degree, I find that the use is not incidental to the enjoyment of the dwellinghouse and has changed the character of the garden such that a material change of use has occurred.

Whether permitted development

21. The appellant suggests that the earth mounds and timber structures are permitted development as they do not exceed 3m in height or occupy more than 50% of the land around the dwelling. Although advanced under the ground (f) appeal, this is essentially an argument that planning permission has already been granted by virtue of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(GPDO) and should be considered under ground (c).
22. As set out above, I have found that a material change of use has occurred. Consequently, the appeal site does not benefit from permitted development rights under Schedule 2, Part 1 of the GPDO. Furthermore, even if I had found a material change of use had not occurred, the scaffolding greatly exceeds the limitations set out in Class E of Part 1 and Part 1 of the GPDO does not grant planning permission for the engineering works which have been carried out.
23. Thus, for the reasons given above, I conclude, on the balance of probability, that the matters alleged in the notice are development for which planning permission is required. Consequently, the appeal on ground (c) must fail.

Ground (f)

24. An appeal under ground (f) is made on the basis 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. It is clear from the requirements that the purpose of the notice is to remedy the breach.
25. The appellant has raised a number of matters regarding the planning merits of the appeal scheme, such as overlooking, heritage assets, archaeology and landscape character. However, since the appellant has not appealed under ground (a), I cannot consider the planning merits of the appeal scheme.
26. I accept that riding a bike can be incidental to the enjoyment of the dwellinghouse. However, as set out above, I have found that the activities within the appeal site are not incidental and constitute a material change of use. Case law has established that there is no need to insert a saving for that which must be obvious. A householder can ride their bike at home if it is an obvious incidental or ancillary use.
27. Requirement (iii) requires the recipient of the notice to remove from the land the mounds, ramps and jumps created to form the mountain bike/motorised sport tracks, by means of reinstating the land back to its natural ground level, ensuring the ground is not disturbed at a depth deeper than 100mm below natural ground level.
28. As set out above, I have found that the matters stated in the notice constitute a breach of planning control. Allowing the mounds, ramps or jumps to remain would not remedy the breach. However, the requirement to ensure that land is not disturbed at a depth deeper than 100mm below natural ground level is, in my view, unnecessary. Furthermore, given the excavation works that have been carried out within the site, I consider it is unlikely to be possible to ensure that the ground is not disturbed at a depth deeper than 100mm below natural ground level. The remedy to the breach would be achieved by the removal of the mounds, ramps and jumps and reinstating the land to its condition before the development took place. I shall vary the wording of the requirement accordingly.
29. Requirement (iv) requires the recipient of the notice to reseed the affected areas to grass. It is not clear what is meant by 'affected areas'. Although a significant part of the garden comprises grass, I saw that part of the garden affected by the activities is laid with concrete. Clearly it would not be possible to reseed the concreted part of the site to grass. Consequently, I consider the requirement to 'reseed the affected areas to grass' to be ambiguous and to exceed what is necessary to remedy the breach. The breach would be remedied by requirement (iii) which, as corrected requires the reinstatement of the land to its condition before the development took place. I shall therefore delete requirement (iv).
30. Requirements should not be based on potentially subjective judgements. Requirement (v), to leave the land in a clean and tidy condition is open to interpretation and shall therefore be deleted.

Conclusion

31. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall uphold the

enforcement notice with a correction and variations. The appeal on ground (f) succeeds to that extent.

M Savage

INSPECTOR