
Appeal Decisions

Site visit made on 9 September 2021

by **R J Perrins MA**

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

Decision date: 10 November 2021

Appeal Refs: APP/U1430/C/21/3269636/37/38

Land to the rear of Fir Tree Cottage, Netherfield Hill, Battle, East Sussex

- 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 Billy Smith, Ms Sherri McCallister and Mrs S Smith against an enforcement notice issued by Rother District Council.
 - The enforcement notice was issued on 17 February 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the carrying out of engineering operations to create a hard surfaced area within the Land in the approximate position shown coloured blue on the attached plan.
 - The requirements of the notice are:
 - i) Break up and remove the Unauthorised Development from the Land including the removal of all imported materials including but not limited to hardcore, bricks, rubble and membrane used to create the Unauthorised Development.
 - ii) Cover with topsoil the areas from where the Unauthorised Development has been removed to marry in with the contours of adjacent undisturbed ground.
 - iii) Remove from the land all other materials, rubble, rubbish, debris, tools and equipment arising from compliance with steps i) and ii) above.
 - The period for compliance with the requirements is 12 months.
 - The appeals are proceeding on the grounds set out in section 174(2)(b) and (d) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decision

1. The appeals are dismissed, and the enforcement notice upheld.

Preliminary Matters

2. The site is subject to three other s174 appeals,¹ made by the same appellants, against an enforcement notice issued by Rother District Council alleging *without planning permission, the material change of use of the land from agricultural use to a mixed use of agriculture and the stationing of caravans for residential purposes*. I have determined the change of use appeals separately, as have the parties.
3. Following the site visit for the change of use appeals it became clear that these appeals concerning operational development should have been linked with the change of use appeals. During my visit I was able to view the alleged operational development subject of the appeals and the parties agreed that my

¹ APP/U1430/C/20/3261419/20 & 21

visit on the 9 September 2021, for the change of use appeals, was sufficient to determine the operational development appeals. Another visit was not required, and I am satisfied I saw all that I needed such that no prejudice would occur.

4. A large number of comments from interested parties have been submitted in respect of the operational development, how it came to be and its effect upon the surrounds. They include, as do the cases of the main parties, the effect on the Area of Outstanding Natural Beauty, Ancient Woodland and highway safety, amongst other things. However, the grounds of appeal put forward are legal grounds to be considered on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the development can form no part of my deliberations. Furthermore, the request to reduce the time for compliance is also not a matter for my consideration.

The appeal on ground (b)

5. Ground (b) is that the breach of planning control alleged in the enforcement notice has not occurred as a matter of fact. To that end the appellants maintain that no development has occurred as the track has simply been repaired and replaced. That is evidenced, in their view, by two aerial photographs dated 2015 and 2018.
6. The Council's case is that the works were a separate operation involving engineering works as defined in Section 55(1) of the Town & Country Planning Act². The courts have held that engineering operations involve works with some element of preplanning, which would generally be supervised by a person with engineering knowledge. Although, it is not necessary for the operations to actually be so supervised, meaning that the person who carried out the work does not have to be an engineer. Furthermore S336(1) of the Act includes the formation and laying out of means of access to highways within the definition of engineering works.
7. The works need not be substantial, but more must be done than merely driving onto land; something that amounts to the 'formation' or 'laying out' must take place as a matter of fact and degree. The onus is upon the appellants in these cases and care must be taken to submit sufficient evidence to meet the balance of probabilities and to satisfy the burden of proof.
8. I recognise the 2015 and 2018 aerial photographs show a track leading to a stable block and that was used to access and leave the site. However, no corroborated evidence has been submitted to establish what the track consisted of on those dates or how it was constructed. Furthermore, the appellants' assertion that the existing track was simply repaired with a new top layer and that levels have not changed, is not supported by any evidence. These assertions must therefore carry little, if any, weight.
9. The evidence of the Council and that of interested parties that it was a track on bare earth, whilst also untested, goes unchallenged. Therefore, without evidence to the contrary, there is some inevitability that I rely on the evidence submitted by the Council. That sets out (in brief) that an enforcement officer visited the site in January 2021 and spoke to the owner who was using a mini

² (1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

digger to scrape back topsoil, lay a membrane, brick and rubble hardcore which was to be finished with imported gravel or road planings.

10. That is supported by aerial images and photographs taken on site. In addition, representations from interested parties set out that works undertaken, post February 2020 when the land was sold, were substantial in nature and involved mechanical diggers and the importation of hardcore onto the land.
11. It seems to me therefore, that any reasonable viewer would be of the opinion that what exists now could not be a repaired version of what existed before. Moreover, as a matter of fact and degree, that the works carried out were of such a scale and nature to be classed as engineering works as described above.
12. I say that given the appellants have not submitted any evidence as to fact regarding how the access track came to be and have not disputed the evidence submitted by the other parties. For these reasons, and as a matter of fact and degree, I must find, on the evidence before me, that what has been constructed does not benefit from planning permission and the appeals on ground (b) fail.

The appeals on ground (d)

13. The Planning Practice Guidance (the Guidance) sets out that appellants are responsible for providing sufficient information to support an application for a Lawful Development Certificate, which is also the equivalent of ground (d) in an enforcement appeal. The Guidance says: "In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability".
14. Those sentiments apply equally to an Inspector at appeal stage and the tests relate in substance to the operational development at issue in this appeal. Therefore, in this case, the onus is upon the appellants to demonstrate, on the balance of probabilities, that the hard surfaced area was substantially completed more than 4 years before the date of the enforcement notice i.e. on or before 17 February 2017.
15. To that end the appellants seek to rely on the aerial photograph dated 2015 showing a track in place. That track has always been in place to access the stable block on site, in association with the agricultural use of the land. The Council's case is that operational development took place in January 2021 as evidenced by the Enforcement Report, satellite images and site visit photographs.
16. I accept and there is no dispute that there has been access onto the land for many years. However, as I have found under the ground (b) appeals, what existed at the time the enforcement notice was served was substantially different to that which would, on the evidence, have existed in 2015. My deliberations therefore must focus on whether the hard surfaced area was constructed prior to the salient date.
17. The appellants submit no evidence regarding the construction of the hard surface and do not dispute the Council's evidence. That is to say, as set out in the ground (b) appeals, at the time the enforcement officer visited the site, in

January 2021, the hard surface was being constructed. There is simply nothing before me from the appellant to counter that argument. Moreover, undisputed representations from several interested parties point to the land, prior to it being sold in February 2020, having an access consisting of compacted earth. Those assertions are also supported with photographic evidence.

18. Thus, on the evidence before me, there is some inevitability that I find as a matter of fact and degree, and on the balance of probabilities, that the operational development was not substantially complete on or before the salient date and the appeals on ground (d) fail.

Conclusion

19. For the reasons given above I consider that the appeals should not succeed.

Richard Perrins

Inspector