



Appeal Decision

Site visit made on 19 October 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19th November 2021

Appeal Ref: APP/W1715/C/21/3276013

**Land to the south of Brigadier Gerard Public House, Botley Road,
Horton Heath, Hampshire SO50 7DQ**

- 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 James Barney against an enforcement notice issued by Eastleigh Borough Council.
- The enforcement notice was issued on 5 May 2021.
- The breach of planning control as alleged in the notice is without planning permission, engineering works, namely unauthorised excavation works, resulting from unauthorised tree works on trees covered by Woodland Tree Preservation Order 839, the importation of waste on to the site to aid the burning of the waste, removal of hedgerows [and] creating an access on to the highway from the land.
- The requirements of the notice are: 5.1. Cease all site preparation works; including, inter alia, engineering works, the felling of protected trees, ground works, importation of waste, removal of hedgerows and access to the highway. 5.2. No further engineering works that would require consent from the Local Planning Authority to be carried out if consent has not been given. 5.3. Remove the tree waste that is stored in the large pile to the eastern side of the site. 5.4. Restore the land to its previous levels and to a condition which will enable the woodland soils to recover. 5.5. No further tree works or engineering operations to be carried out without the consent of the Local Planning Authority.
- The period for compliance with the requirements is ten months.
- The appeal is proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

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

Application for Costs

1. An application for costs was made by Mr James Barney against Eastleigh Borough Council. This application is the subject of a separate Decision.

Preliminary Matters

2. The appeal site forms part of a larger area of woodland the subject of a Tree Preservation Order (TPO)¹. On the same date the enforcement notice was issued, the Council also issued a Tree Replacement Notice (TRN) requiring the planting of several hundred trees at the site. An appeal against the TRN has

¹ Council Ref: TPO No 839.

also been made². The outcome in the enforcement appeal will have little bearing in relation to the matter the subject of the TRN appeal. Therefore, I am satisfied that the enforcement appeal can be dealt with separately without prejudice to the respective cases of the parties in the TRN appeal.

3. In the absence of a deemed planning application arising from an appeal made under ground (a), the planning merits of the matters alleged in the notice are not before me.
4. Turning now to the appellant's claim that defects in the notice render it a nullity. If that were the case, the notice would not exist in law. The leading authority on whether an enforcement notice is a nullity is Upjohn LJ in *Miller Mead v MHLG* [1963] 2 WLR 225: "...does the notice tell [the person on whom it is served] fairly what he has done wrong and what he must do to remedy it". If the notice is ..."*hopelessly ambiguous or uncertain so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or ...that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches [it] would be bad on its face and a nullity...*".
5. At s173, the Act sets out the matters that an enforcement notice must contain. These include at subsection (1)(a), the matters which appear to constitute the breach of planning control and at subsection (3), the steps required to be taken or the activities required to cease. At s173(2), it states that a notice complies with subsection (1)(a) if it enables any person on whom it is served to know what the matters which appear to constitute the breach of planning control are.
6. The notice alleges the undertaking of "...*engineering works, namely unauthorised excavation works...*". The description then goes on to set out in greater detail those actions that the Council considers has resulted in unauthorised excavation works. It is therefore clear from the notice what the Council considers that the appellant has done wrong.
7. An enforcement notice should be read in a straightforward and common-sense fashion. When examined fairly, there is little ambiguity or uncertainty in respect of the description of the alleged breach and it does not offend the *Miller Mead* principles. The appellant can therefore be left with little real doubt about what the Council consider has occurred as reflected in the matters the notice alleges. Whether the matters described in the allegation have occurred and if so, whether they constitute a breach of planning control are properly dealt with under grounds (b) and (c).
8. Regarding step 5.3 of the notice, there is only one large pile of uprooted trees, located towards the eastern boundary of the site. This pile is shown clearly in photographs supplied by both main parties. As a result, there is little by way of uncertainty in relation to what the notice requires to be removed. Whilst the approximate position of the pile could have been identified on the notice plan, the absence of any such identification makes the requirement no less clear.
9. The notice steps 5.2 and 5.5, require, respectively, that no further engineering works needing consent are carried out and that no further tree works or engineering operations are undertaken without consent. Whether any engineering works or engineering operations fall within the definition of

² Appeal Ref: APP/TRN/W1715/8570.

development in s55(1) of the Act can be a matter of fact and degree, taking into account matters including the scale and magnitude of the works and their physical effects. An element of judgment is therefore usually required. There is no indication within the notice as to what works or operations might require the Council's consent. As a result, the appellant is unable to tell with reasonable certainty what he can or cannot do to comply with these steps. The steps lack sufficient clarity and certainty.

10. Step 5.4, which requires restoration of the site to a condition which will enable the woodland soils to recover, is similarly unclear in terms of what the appellant has to do to comply, there being no indication as to how the restoration might be achieved or whether that would be a reflection of the previous condition of the soil prior to the breach. Whilst the Council elaborated on the reasoning behind step 5.4 in their statement of case, from the notice it is uncertain what the appellant needs to do.
11. Reference was made to *Payne v NAW & Caerphilly CBC* [2006] EWHC 597 (Admin), in which the Court held that a requirement for a restoration scheme to be submitted for the Council's approval failed to comply with s173(3) and made the notice a nullity. Be that as it may, in the more recent case of *Oates v SSCLG & Canterbury CC* [2018] EWCA Civ 2229 the Court of Appeal adopted a less strict approach than *Payne*, holding that some degree of uncertainty or other defect in the relevant section of the notice does not mean that there is non-compliance with the statutory requirements in s173. Whether a defect renders the notice a nullity must be viewed in context: the importance or otherwise of that part of the notice; whether the defect is bound up with the remainder of that section; and whether the notice would be valid in the absence of the defect. I drew the attention of the main parties to the latter case and have taken their comments into account.
12. Having regard to the principles set out in *Oates*, I have considered the effect on the validity of the notice if it were to be varied to delete steps 5.2 and 5.5. Similarly, I have considered whether step 5.4 could be substituted by a step requiring restoration of the site to its condition before the breach took place. Step 5.1 already requires the activities described in the allegation to cease, whilst s181 of the Act provides that an enforcement notice has a continuing effect against subsequent works that reinstate or restore works which were removed to comply with that notice. As the purpose of an enforcement notice is remedial, steps 5.2 and 5.5 cannot relate to works which have not yet taken place. Steps 5.2 and 5.5 are therefore clearly unnecessary in order to require the alleged breach to cease. A step requiring the alleged breach to cease would still be in place. It follows that the notice would meet the statutory requirements of s173(3) if steps 5.2 and 5.5 were deleted. In terms of step 5.4, the substitute step described above would be no more onerous than that in the notice as issued and it would be sufficiently clear and precise, the appellant being in the best position to know the condition of the site prior to the breach taking place.
13. Moreover, steps 5.2 and 5.5 differ significantly from the circumstances in *Payne*. The steps in question purport to prohibit works. They do not require the submission of any schemes for the Council's approval to remedy the matters attacked by the notice. The appellant does not have to do anything to comply with these steps. Only if the appellant proposed to undertake further

works would the steps be relevant. Therefore, I am not persuaded that *Payne* is applicable to the circumstances in this appeal in any event.

14. There are other defects in the notice. Reference to the breach having occurred within the last ten years is erroneous, as the relevant time limit for taking enforcement action in respect of operational development is four years from the date of substantial completion. Also, the notice does not state the relevant Development Plan policies, as required by The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002. However, the planning objections to the matters in the allegation are clear in the reason for issuing the notice. Furthermore, as the felling of TPO trees is prohibited by the Town and Country Planning (Tree Preservation)(England) Regulations 2012, the requirement in step 5.1 to cease felling protected trees is unnecessary. The time limit reference can be corrected to four years, whilst correcting the notice to refer to the policies of the Development Plan is not necessary. Step 5.1 can be varied to delete the reference to felling protected trees.
15. Therefore, taken as a whole the defects do not render the notice a nullity. Whilst invalid, the notice is capable of being corrected and varied. I am satisfied that the corrections and variations set out above can be made without causing injustice and I shall do so accordingly.

Ground (b) appeal

16. The ground of appeal is that the matters alleged in the notice have not occurred as a matter of fact. It is for the appellant to show why their appeal on grounds (b) and (c) should succeed, the relevant test of the evidence being on the balance of probability.
17. When I visited the site, some vegetation had grown up since the Council issued the notice. However, I was able to see that the ground surface was pockmarked with shallow depressions of differing extent and depth. Some piles of soil were also present. I am given to understand that the works to remove trees partly involved pushing them over and uprooting them using an item of mechanical plant. The position of most if not all of the depressions and soil piles are likely to correspond with the approximate positions of the root boles of substantial trees which have been removed. The result has been the hollowing out, digging or unearthing of land, i.e. what would commonly be understood as excavation works. In practice, whether an excavation has been created by works involving digging out the soil or removing the root bole of a tree makes little difference to the outcome in terms of the changes in ground levels. Even if backfilling of some of the depressions with sawdust and soil took place subsequently, appreciable changes in ground levels at the site occurred. There is no firm evidence to indicate that the works took place on a smaller area than that outlined in red on the plan attached to the notice.
18. The Council supplied photographs showing debris from vehicle tyres in the stored pile of uprooted trees. The reference in the notice to "*the importation of waste on to the site to aid the burning of waste*" clearly refers to the bringing of such material to the site. The material did not originate at the site. The imported material can reasonably be understood as being waste, having no obvious utility other than to assist in burning the uprooted trees.
19. The evidence of interested local residents indicates that rows of bushes corresponding to what would commonly be understood as hedgerows were

present along the site frontage, as well as parallel to the adjacent public footpath to the south, prior to the works being carried out. Remaining timber along those boundaries also suggests that hedgerows existed prior to the works.

20. The Act does not define "*engineering operations*" at s336(1), except insofar as expressly including "*the formation or laying out of means of access to highways*". Reference in the definition to "*formation*" and "*laying out*" implies that some physical engineering operations have to be carried out, rather than merely removing a hedge, or a removable fence, in order to obtain access to land. The appellant explained that no engineering operations had been undertaken which might form an access to the highway such as a dropped kerb, a hardstanding or an alteration to ground levels. No operations similar to those described above or other operations that might correspond to the formation of an access from the highway were evident when I visited the site, nor were any shown in the photographs supplied. Although the appellant was able to drive vehicles onto the site following removal of a hedgerow, as a matter of fact and degree in the absence of any works to form or lay out an access being carried out, for planning purposes no access has been created.
21. Therefore, whilst on the balance of probability the appellant has failed to show that the alleged breach described in the notice did not occur insofar as the works, importation of waste and removal of hedgerows are concerned, they have shown that there has in fact been no creation of an access to the highway. The ground (b) appeal succeeds to that extent. I shall correct the notice to delete reference in the allegation to creating an access to the highway and vary the requirements accordingly.

Ground (c) appeal

22. The ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control.
23. The definition of development in s55(1) includes "...*engineering, mining or other operations in, on, over or under land...*". The works involved appreciable changes to the ground levels of the site compared to the pre-existing situation, even though as noted above some of the depressions might have been backfilled subsequently. The changes are more than *de minimis*. Comparison with the existing ground levels at the site with those of adjacent areas of woodland reinforce my views in this regard. There was no dispute that the changes in ground levels have largely arisen due to using mechanical plant at the site.
24. The Courts have held that engineering operations involve works with some element of pre-planning, which would normally but not necessarily be supervised by a person with engineering knowledge³. Submission of a pre-application enquiry to the Council for proposed development around the same time is indicative of a close link with the works and hence some forethought and pre-planning; otherwise, why were the works undertaken? The appellant offered no convincing explanation in this respect. Photographs taken immediately following the works show spray paint markings applied to the site surface to denote the position of an underground oil pipeline. This also indicates some element of pre-planning prior to the works being carried out, as

³ *Ewen Developments Ltd v SSE & North Norfolk DC* [1980] JPL 404; *Fayrewood Fish Farms v SSE* [1984] JPL 587.

well as suggesting that some level of supervision might have been required in their undertaking.

25. Consequently, as a matter of fact and degree the works share significant similarities in terms of their characteristics and the physical effects on the site with what might ordinarily be regarded as engineering operations. It follows that it would not be unreasonable to regard the works as falling within that description. Even if I were to be wrong in this regard, it is highly probable that due to the physical effects on the ground levels of the site the works could otherwise reasonably be regarded as 'other operations', thus still falling within the definition of development.
26. Planning permission is required for the development of land, having regard to s57(1) of the Act. No grant of planning permission in respect of the engineering operations, for example an express grant of permission following the submission of a planning application, or otherwise any permission granted by Article 3, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) was drawn to my attention and to my knowledge there is none. Development carried out without the required planning permission comprises a breach of planning control⁴.
27. Therefore, on the balance of probability the appellant has been unable to show that the works do not constitute a breach of planning control and the ground (c) appeal also fails.

Conclusion

28. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and variations.

Formal Decision

29. It is directed that the enforcement notice be corrected by:

- At paragraph 3, deleting the words "*creating an access onto the highway*".
- At paragraph 4, the substitution of "*10 years*" by "*4 years*".

And varied by:

- At paragraph 5, in step 5.1 deleting the words "*the felling of protected trees*" together with the words "*and access to the highway (Botley Road-B3354)*".
- At paragraph 5, deleting steps 5.2 and 5.5 and renumbering step 5.3 to step 5.2.
- At paragraph 5, substituting step 5.4 with a new step 5.3 as follows:
"*Restore the land to its condition before the breach took place*".

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

Stephen Hawkins INSPECTOR

⁴ S171a(1)(A) of the Act.