
Appeal Decision

Site visit made on 4 January 2022

by P N Jarratt BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 February 2022

Appeal Ref: APP/X1118/C/21/3282288

Land on the South Side of Shirwell Road, Shirwell, Barnstaple, Devon, EX31 4JH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Alistair Curd against an enforcement notice issued by North Devon District Council.
 - The enforcement notice, numbered 12309, was issued on 28 July 2021.
 - The breach of planning control as alleged in the notice is within the last four years unauthorised operational development consisting of the creation of an access onto a classified road.
 - The requirements of the notice are
 - 1 Reinstatement an earth bank to a height and width equivalent to that found either side of the access as to permanently close the access. The approximate position is shown hatched in blue in the red edged location plan attached to the notice;
 - 2 Seed the earth bank with an appropriate grass/wildflower mix such as Emorsgate EH1 Hedgerow Mixture; and
 - 3 Plant and maintain a native mixed species hedgerow on top of the bank in accordance with the enclosed Native Mixed Species Hedgerow Planting and Maintenance Specification.
 - The periods for compliance with the requirements are, for step 1, within 3 months; and for steps 2 and 3, within 4 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (c) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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This decision is issued in accordance with Section 56(2) of the Planning and Compulsory Purchase Act 2004 (as amended) and supersedes the decision issued on 18 January 2022.

Decision

1. It is directed that the enforcement notice be varied by
 - i) the deletion of Steps 1, 2 and 3 in their entirety and their replacement with the words "Restore the land to its condition before the development took place through the reinstatement of the earth bank to its previous dimensions together with its seeding with an appropriate seed mix and the planting of a native mixed species hedgerow on top of the bank";
 - and
 - ii) the deletion of the periods for compliance in its entirety and its replacement with the words "The period for compliance with the requirements is four months".

Subject to the variations the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act, as amended.

Preliminary Matters

2. In his submissions the appellant has made reference to a previous field access gate in the same or similar location to the present one. Although the appeal has only been made on ground (a), I am required to have regard to any 'hidden' grounds of appeal, which in this case includes a ground (c) appeal, which I consider below, having invited the comments of the parties.

The Notice

3. I have a duty to get the notice in order. The requirements should specify the steps necessary to remedy the breach of planning control. They should not be vague or uncertain but on the other hand cannot require a recipient to 'comply or seek compliance', since that would introduce uncertainty. Whilst Step 2 does not require use of a particular grass/wildflower mix but only suggests Emorsgate hedgerow mixture, Step 3 requires the planting and maintenance of a native species hedgerow in accordance with a specification. No reference is made of the removal of the earth bank in the allegation, only the creation of an access onto a classified road, although it is implicit that removal of the earth bank forms part of the operational development. Accordingly, the requirements of the notice should be simplified to "Restore the land to its condition before the development took place through the reinstatement of the earth bank to its previous dimensions together with its seeding with an appropriate seed mix and the planting of a native mixed species hedgerow on top of the bank." I shall vary the requirements of the notice accordingly and vary the compliance period as a consequence. I am satisfied that neither party would suffer any injustice as a result of this action.

The site and relevant planning history

4. The appeal site is on the A39, a Class 1 road which is subject to the national speed limit, and consists of a field that slopes steeply to the roadside. The access subject to the notice is located in the corner of the site opposite a dwelling known as Carousel which is on the other side and at a lower level to the road.
5. The unauthorised field access gate is set back from the highway, sufficient for a two vehicles to be clear of the highway. The access is ramped and appears to consist of stone and earth, which the appellant states is hardcore. No drainage is evident. To the east of the access a visibility splay has been created by the removal of a hedgerow but to the west, visibility is restricted by the adjacent property which is outside the appeal site.
6. Retrospective planning permission was refused in May 2021 (73107) on the grounds of highway safety through the restricted visibility in one direction allowing run-off to enter the road and the neighbouring property.

The appeal on ground (c)

7. This ground of appeal is that there has not been a breach of planning control.

8. The appellant's reference to a previous field access gate in the same or similar location to the present one is confirmed in letters of support to this effect. These are from Mr Williams, from whom the appellant acquired the field and who refers to an overgrown derelict gate, and from A&B Contractors (Devon) Ltd who state that they used the gate to gain access to the field with farm machinery.
9. The Council has carried out an extensive investigation but could find no evidence of an access gate. The Council's submitted aerial images dating back to 1999 and photographs dating from the 1990s submitted by the occupants of Carousel do not show the presence of a field gate access. Other local residents confirm that historically no field gate existed.
10. The onus of proof rests with the appellant where legal grounds are concerned and the level of proof is on the balance of probability. Although the evidence from the previous owner and from the contractor indicate that there was a gate no specific details have been made available and the evidence has not been provided by way of a Statutory Declaration. Consequently the weight I attach to the appellant's evidence is limited, particularly in view of the existence of an earlier field gate being contradicted by the Council and local residents. The existence of an earlier field gate has not therefore been demonstrated on the balance of probability.
11. The appeal on this ground fails.

The appeal on ground (a)

12. An appeal on ground (a) is that planning permission should be granted and the main issue is the effect of the unlawful access on highway safety.
13. The appeal site (and the adjoining farmer's land) can also be accessed by vehicles from a track that runs to the rear of residential properties in a small settlement known as BurrIDGE. This provides vehicular access to a private garage at the west end of the track and a number of occupants of the dwellings have pedestrian gates onto the track. The track also provides vehicular access to the adjoining farmland. Visibility in both directions from the access track onto the A39, which is 30mph restricted, is satisfactory.
14. It is apparent from a number of representations received that the appellant's farming practices associated with his herd of Dexter cattle and the agricultural traffic using the lane, together with surface water run-off from the field, has led to complaints by some of the residents, including the involvement of Environmental Health and the Environment Agency.
15. In order to avoid further disputes with his neighbours, and to provide a wider access for vehicles to access the field, the appellant initially investigated the opportunity to create an access about halfway along the roadside boundary and subsequently through the reinstatement of a claimed previous access. The appellant acknowledges that rainwater run-off and mud caused by the unauthorised access has created problems, although he points out that this appears to be an issue for the neighbours opposite the appeal site that pre-dates the construction of the new access. Notwithstanding this he has created a bund to prevent any run-off washing directly onto the road and he states that he would be prepared to work with the highway authority to integrate other measures that would assist.

16. The limited visibility splay of 8 metres to the west of the access is unsatisfactory for this class of road and the speed of traffic. The highway authority advises that the relatively straight section of the A39 in this location allows overtaking manoeuvres of vehicles which requires 150 metre splays in both directions. The appellant's submitted plans shows that a visibility splay of 120 metres can be constructed to the east and that this would require the removal of the entire hedge, which would be more extensive than at present. This would further harm the character and appearance of this part of the open countryside. In addition the access is not a hard surface and there is inadequate drainage of surface water run-off leading to a highway safety issue.
17. The appellant has advised that the highway authority has indicated that if it can be established that the access is historical then this would effectively lift any highway objections regarding the substandard visibility. However, in view of my conclusion on the ground (c) appeal, this is not relevant.
18. I note also that whilst there would be less disruption to the residents of Burrage if the access subject to this appeal were to be approved, the existing authorised access would still remain and be capable of use. Additionally, I note that the appellant has some local support for the unauthorised access. Notwithstanding this and also the appellant's offer to improve drainage, or introduce a left turn only out of the field, these would not outweigh the adverse effect that the access has on highway safety.
19. The development fails to accord with Policies DM01 of the North Devon and Torridge Local Plan regarding amenity considerations, DM05 regarding highway safety and DM14 in respect of landscape quality in the local economy. It also conflicts with paragraphs 110 and 111 of the National Planning Policy Framework in respect of highway safety.
20. The appeal on this ground fails.

Conclusion

21. For the reasons given above I consider that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the application deemed to have been made under s177(5) of the 1990 Act as amended.

P N Jarratt

INSPECTOR