



Appeal Decision

Site visit made on 12 April 2022

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06 May 2022

Appeal Ref: APP/A3655/C/21/3279487

Land at Kemishford Farm, Smarts Heath Lane, Woking

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Ms Christy Jackson against an enforcement notice issued by Woking Borough Council.
 - The enforcement notice was issued on 22 June 2021.
 - The breach of planning control as alleged in the notice is, without planning permission:
 - (a) The erection of two brick walls and pillars and iron gates measuring approximately 1.6m in height to the entrance of the land
 - (b) The erection of a closed boarded wooden fence measuring approximately 1.8m in height to the front of the land and extending for a length of approximately 24m fronting Smarts Heath Lane and Kemishford
 - (c) The construction of hardstanding located to the south of the yard area of the land.
 - The requirements of the notice are:
 - (i) Remove the brick walls and pillars and iron gates
 - (ii) Remove the closed boarded wooden fence
 - (iii) Remove the hardstanding
 - (iv) To remove from the Land all materials, rubble, debris and paraphernalia associated with and arising from compliance with requirements (i), (ii) and (iii).
 - The period for compliance with the requirements is two months.
 - The appeal is proceeding on the grounds set out in section 174(2) (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: the appeal succeeds in part but is otherwise dismissed and the enforcement appeal is upheld with variations

Applications for costs

1. An application for costs is made by the appellant against Woking Borough Council. This is the subject of a separate decision.

Procedural matters

2. The appellant considers that the notice is a nullity or is otherwise invalid. The questions of nullity and invalidity do not fall within any of the grounds set out in section 174(2) of the 1990 Act. It is therefore necessary to consider these as a separate matter.
3. A representation has been received from the occupier of a neighbouring residential property. The representation makes points about the planning merits of the development that has taken place and which therefore properly

fall to be considered under an appeal on ground (a)¹. Given that there is no appeal on ground (a) before me, I am not able to take the points made in that representation into account.

Nullity and invalidity

4. Before considering in detail the specific grounds on which the appellant claims the notice to be a nullity, it is helpful to set out the overarching requirement for an enforcement notice as set out in section 173 of the 1990 Act:

(1) An enforcement notice shall state— (a) the matters which appear to the local planning authority to constitute the breach of planning control; and (b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.

(2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes².

5. The modern approach of the courts is that the test in relation to nullity is best understood not as one of 'hopeless ambiguity' but rather as a failure to tell the recipient of an enforcement notice with 'reasonable certainty' what the breach of planning control is and what must be done to remedy it. The courts have indicated that a degree of uncertainty does not necessarily render a notice non-compliant with statute and that the notice should be read as a whole. Overall, the courts have indicated that the question of nullity should not be approached in a way which is unduly technical or formalistic. With that approach in mind, I turn now to the specific grounds on which the appellant claims the notice to be a nullity or invalid.
6. The appellant considers that the enforcement plan is both excessive in the area covered and not sufficiently accurate in identifying the area of hardstanding or the internal close board fence. I do not agree.
7. In drafting an enforcement notice, it is perfectly permissible for the Council to include all of the land that forms part of the wider planning unit (or what the Council considers to be the planning unit), or just part of it. Similarly, there is no requirement for the Council to identify the planning unit.
8. Although not dimensioned, the alleged area of hardstanding is clearly shown on the plan attached to the notice shaded in black. It is perfectly possible to tell from the plan the area of land involved by reference to features shown on that plan: for example, the existing building on the land. Comparison with the aerial photograph provided by the Council reveals the size and shape of the area hatched black on the plan to be a reasonable approximation of the hardstanding on the date the notice was issued.
9. Similarly, the position of the close boarded fence is clearly shown as a dotted line. For the reasons that I set out below, it matters not that the black dots do not give a clear indication of the fence line that exists on the ground, or go

¹ That, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted.

² Those purposes are set out in section 174(4) of the 1990 Act.

beyond the length of fence that exists. Neither does it matter that the fence on the plan is shown on the boundary, whereas there is an existing post and rail fence between the boundary and the close boarded fence enforced against.

10. The foregoing are technicalities. The primary purpose of the plan attached to the enforcement is to inform the receipt in general terms where the alleged breach of planning control is. Furthermore, the plan must be read in conjunction with the written description of the alleged breach of planning control at paragraph 3 of the notice. In my view, when viewed in that context, the plan is sufficient to enable the recipient of the notice to understand what is alleged in the notice and where on the land it is.
11. The brick walls, pillars and iron gates are not identified on any plan attached to the notice. However, section 172 (2) of the 1990 Act requires that a copy of an enforcement notice shall be served on the owner and on the occupier of the land to which it relates, and on any other person having an interest in the land. It is reasonable to conclude that any persons within those categories would be familiar with the land and what stands on it. There are no other brick walls, pillars or iron gates on the land with which the recipient(s) of the notice could confuse or mistake the breach of planning control alleged in the notice. It is also evident that the appellant has understood the breach of planning control that is alleged, and has appealed against the notice on appropriate grounds. Therefore, whilst an indication of the position of the brick walls, pillars or iron gates on the plan attached on the notice would have been helpful, the absence of that does not render the notice a nullity.
12. The appellant contends that the reasons for issuing the notice set out in paragraph 4 do not relate to any of the alleged breaches of planning control set out in paragraph 3 of the notice. Again, I do not agree. The "unauthorised development" referred to in paragraph 4(b) of the notice can only logically be intended to refer to the breach of planning control alleged in paragraph 3 in its entirety. Furthermore, the brick wall, fencing and hardstanding are specifically referred to in paragraph 4(c), and the hardstanding again in paragraph 4(f).
13. I take the point that the reason in paragraph 4(e) specifically relates to highway safety associated with the vehicular access itself, and that the creation of a vehicular access is not part of the breach of planning control alleged in the notice. However, in my view the inclusion of that reason falls within the category of a 'degree of uncertainty' which, the courts have held, does not necessarily render a notice non-compliant with statute.
14. Paragraph 5 (iv) of the Notice requires "all materials, rubble" to be removed from the land. The appellant points out that land as identified in the notice is the whole of the area within the red line. The appellant maintains that much of this land has been covered in rubble for over 10 years, and in part, has the benefit of planning permission. The appellant claims to be confused by this requirement in the notice.
15. Two points arise. Firstly, the only planning permission to which I have been referred is that dated 11 August 2011 under reference PLAN/2011/0447. That permission did include the creation of a vehicular access but also included the erection of a post and rail fence along the western boundary, formation of hardstanding and the erection of 2 bay stable. It is not clear how that permission results in the land lawfully being covered in rubble.

16. In any event, the requirement at paragraph 5(iv) of the notice is very clear: it only requires (and could only require) the removal of materials, rubble, debris and paraphernalia *associated with and arising from* compliance with requirements (i), (ii) and (iii) of the notice (emphasis added). The corollary is the notice does not, and could not, require the removal of any materials, rubble, debris and paraphernalia arising from the lawful planning use of the land.
17. I am satisfied that, when read as a whole, the notice meets all the requirements set out in section 173 of the 1990 Act, insofar as it tells the recipient of the notice with reasonable certainty what the breach of planning control is and what must be done to remedy it. Accordingly, the notice is not a nullity and is not invalid.

The appeal on ground (c)

18. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control. An appeal on this ground is one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.
19. Class A, Part 2, Schedule 2, Article 3 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO) provides that the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is permitted development, subject to the limitations at Class A.1. One of the limitations at Class A.1 is that development is not permitted by Class A if the height of the gate, fence, wall or other means of enclosure erected or constructed adjacent to a highway would exceed one metre above ground level
20. There is no definition of 'adjacent' in the GPDO itself. The Oxford English Dictionary (OED) defines 'adjacent' as being near or next to something else. There is nothing in the GPDO or the OED definition to support the view that provided a fence is positioned a minimum distance for the highway, it would cease to be regarded as being 'adjacent' to that highway for the purposes of the GPDO. It is a matter of fact and degree in each particular case.
21. In this case, there is no dispute that both Smarts Heath Lane and Kemishford are highways used by vehicular traffic. There is also no dispute that the fence exceeds one metre in height. The close-boarded fence is not technically next to the highway: there is an intervening picket fence. The Council does not contend that the latter does not benefit from planning permission under the GPDO by reason of its height, or that it is otherwise not lawful in planning terms.
22. Nevertheless, the definition in the OED is in two parts: 'near' or 'next to'. Although not next to the highway, the close-boarded fence is between 3m and 7m metres from it. In my view, the lesser of those distances qualifies as being 'near to' the highway. It is a generally accepted principle that if one part of a development exceeds the limitations set out in the GPDO, then the development as a whole cannot constitute permitted development. For that reason, it is not necessary for me to consider whether the larger distance of 7 metres should be regarded as being 'near to' the highway for these purposes. Consequently, as a matter of fact and degree, I consider that the close-

- boarded fence does not accord with the limitations at Class A.1 and does not constitute permitted development.
23. The appellant indicates that, should the appeal not succeed, she would simply erect a similar fence but set further back into the land. That is akin to a 'fallback' position in relation to an appeal on ground (a). My consideration under ground (c) can only relate to whether or not the alleged breach of planning control itself constitutes a breach of planning control.
24. The same principles apply to the brick walls, pillars and iron gates. There is again no dispute that these exceed one metre in height. Although listed in the notice in distinct elements (comprising two brick walls and pillars and iron gates), the development should more properly be considered as a single entity. In the case of this development, there are no intervening structures between it and the highway. The development is some 2 metres from the highway at its closest point. Consequently, as a matter of fact and degree, I consider that the development comprising of the brick walls/pillars/iron gates does not accord with the limitations at Class A.1 and does not constitute permitted development.
25. Class B, Part 6, Schedule 2, Article 3 of the GPDO provides that certain forms of development are permitted on agricultural land comprised in an agricultural unit of not less than 0.4 hectares but less than 5 hectares in area. This includes the provision of hardstanding. The appellant contends that the hardstanding alleged in paragraph 3(c) is permitted by Class 6 of the GPDO.
26. There is no dispute that the area of the land is between 0.4 hectares and 5 hectares, but there is some dispute that the lawful planning use of the land is for agriculture. That is not a matter before me and I take no view on it. In any event, Class B is subject to the caveat that the development permitted is reasonably necessary for the purposes of agriculture within the unit. Even if the lawful use is for agriculture, the appellant explains that the hard surface is used for siting the water troughs so the land is not turned to mud when the livestock are grazing and need to drink. I am, however, not persuaded on the evidence before me that the amount of hardstanding constructed on the land is reasonably necessary for the purposes of agriculture within the unit. The appellant's evidence indicates that the hardstanding was not specifically laid for that purpose (or for that matter, as I understand, not put down by the appellant herself) and no explanation is given as to why a smaller area of hard surface would not be sufficient to provide a base for a water trough(s) or why access to that water trough(s) by the horses would unduly disrupt the area of land available for grazing.
27. Development permitted by Class B is also limited by the limitations set out in Class B.1. These limitations include, at B.1.(b), that the external appearance of the premises would be materially affected. Having visited the site, and comparing the appearance of the site at present with the appearance of the land as shown in photographs provided in the Council's evidence, I consider that the laying the hard surface has materially affected external appearance of the premises. For that reason alone, the hard surface cannot constitute development permitted by Class B.
28. I conclude that, on the balance of probability, that the matters alleged in the notice do constitute a breach of planning control. Accordingly, the appeal on ground (c) fails.

The appeal on ground (d)

29. The appeal on this ground is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters. In order to succeed on this ground, the appellant must show that the development has been substantially complete for a period of four years beginning with the date of the breach. The test in this regard is the balance of probability and the burden of proof is on the appellant. The appeal on this ground is made only in relation the close-boarded fence and the hardstanding: the appellant acknowledges that the brick walls, pillars and iron gates have been in situ for less than four years and consequently are not immune from enforcement action.
30. The appellant's evidence in this respect largely takes the form of three signed statements purporting to be Statutory Declarations. However, these statements were not signed in the presence of a solicitor and do not include the specific form of words set out in the Schedule to the Statutory Declarations Act 1835³. I have therefore treated these statements as signed statements to which no sanctions apply and accordingly carry less weight.
31. In her signed statement, the appellant explains that she purchased the appeal site in April 2016. She confirms that the close boarded fence was constructed in April 2017 by Mr Aaron Jones of AJ Contractors. She also confirms that the hardcore extended beyond the field fence at the time the land was purchased.
32. The above is corroborated in the signed statements made by Kate Eleanor Jackson and by Aaron Jones of A Jones Contractors. I take the latter to be the same company referred to as AJ Contractors in the appellant's own evidence.
33. In addition, I have been provided with a photograph taken in March 2017 showing two horses at the stable block. In that photograph, the surface of the land beyond is just visible behind the one of the horses. The surface appears to be, or at least to contain, hardcore. Although only a very limited part of the site is visible in that photograph, this photograph does tend to support the signed statements to that extent.
34. Against this, the only evidence provided by the Council are two photographs dating to 2012 – 2013. The first is an aerial photograph which clearly shows the land to the south to be grassed and with no hard surface evident. The second photograph is taken at ground level and again shows the area as being grassed. The latter photograph does not show the close-boarded fence, but that is consistent with the appellant's own evidence that this fence was erected in April 2017, and therefore after this photograph was taken.
35. This is a situation where the local planning authority has no evidence of its own to contradict that of the appellant or make her version of events less than probable. Indeed, I find that the appellant's evidence is sufficiently precise and unambiguous on its own to show, on the balance of probability, that the close boarded fence was substantially complete in excess of four years before the notice was issued. There is no evidence before me to show exactly when the hardstanding was put down but on the balance of probability I am satisfied on the evidence available that the hardstanding has been present to the extent alleged in the notice for at least four years prior the issue being issued. The

³ The wording in the signed statements includes a paraphrase of the wording of the 1835 Act but that is not sufficient for them to be classed as Statutory Declarations.

appellant has therefore discharged the burden that falls upon her in both those respects and the appeal on this ground succeeds.

The appeal on ground (f)

36. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the Town and Country Planning Act 1990 sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place or (b) remedying any injury to amenity which has been caused by the breach.
37. In view of my findings in relation to ground (d) above, this ground of appeal now only relates to the brick walls, pillars and iron gates. In that respect, the requirements of notice are to remove the brick walls, pillars and iron gates. The purpose of the notice must therefore be to remedy the breach of planning control that has occurred.
38. The appellant's case on this ground of appeal, as set out in her signed statement, is that the brick walls, pillars and iron gates will be rebuilt, using the same materials, to the limits within the GPDO. As the appellant points out, 'fallback' is a material consideration and I have no reason to doubt the appellant's intentions in this regard. I therefore fully accept that this would be a realistic prospect and a course of action open to the appellant once the notice was fully complied with.
39. However, altering the brick walls, pillars and iron gates to a height not exceeding 1 metre in would not achieve the purpose of the notice. Indeed, nothing short of removing the brick walls, pillars and gates in their entirety would restore the land to its condition before the breach took place. The requirements of the notice therefore do not exceed what is necessary to achieve the purpose of the notice, and the accordingly appeal on this ground must fail.

The appeal on ground (g)

40. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is two months. In view of my findings in relation to ground (d) above, this ground of appeal also now only relates to the brick walls, pillars and iron gates.
41. The appellant's case on this ground of appeal, insofar as still relevant, is that compliance with notice will cause massive disruption, and the horses will need to be temporarily rehomed. The appellant indicates that livery spaces are not easily found around this area. The appellant's initial investigations show that most if not all the local builders are contracted up for several months and that tipper lorries are in short supply to remove the demolished material. A period of 6 months is requested.
42. Further to my findings above, the only remaining requirements are removing the brick walls, pillars and gates and then to remove all materials, rubble, debris and paraphernalia associated with and arising from that. The appellant does not argue that physically undertaking that work could not be achieved

within the two months period of compliance stated in the notice. The appellant's case revolves around the preparations necessary before that work can take place.

43. The welfare of the horses is a material consideration and I am prepared to accept at face value the appellant's undisputed evidence that the horses would need to be relocated for a temporary period of two months or less whilst the works are carried out. However, there is no evidence to support the appellant's contention that livery spaces are in short supply, particularly given the relatively short period of time involved.
44. The period of compliance relates only to the removal of brick wall, pillars and iron gates: any subsequent rebuilding of a wall in accordance with GPDO limitations could only take place once the notice is fully complied with and consequently cannot form any reason for extending that period of compliance. As the Council points out, removing the brick wall, pillars and iron gates is not a particularly complex or difficult task requiring any specific expertise. I am therefore not convinced that a suitable contractor could not be found to accomplish that relatively simple task within the two months stated in the notice. Similarly, I am not persuaded that arranging for the removal of the limited amount of demolished material that would result could not be achieved within two months using, for example, hired skips.
45. For the reasons stated above, I am satisfied that the period for compliance specified in the notice is reasonable and a proportionate response to the breach of planning control that has occurred. Accordingly, the appeal on ground (g) fails.

Conclusion

46. For the reasons given above, I conclude that the appeal should succeed only insofar as it relates to the close-boarded fence and hardstanding, but otherwise should be dismissed. I shall uphold the enforcement with variations to that effect.

Formal Decision

47. It is directed that the enforcement notice is varied by:
- Deleting the requirement at paragraph 5(ii) in its entirety
 - Deleting the requirement at paragraph 5(iii) in its entirety
 - In paragraph 5(iv), deleting reference to requirements (ii) and (iii).
48. Subject to the variations, the appeal is dismissed and the enforcement notice is upheld.

Paul Freer
INSPECTOR