



Appeal Decision

Site visit made on 16 May 2022

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 July 2022

Appeal Ref: APP/C1435/C/20/3250601

Land at Browngate Cottage, Mayfield Road, Frant, 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 Jack Brann against an enforcement notice issued by Wealden District Council.
 - The enforcement notice was issued on 16 March 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission, the formation of a vehicular access ("the Access") in the approximate position shown edged green on the attached plan.
 - The requirements of the notice are to:
 - (i) Permanently stop up to vehicular use the vehicular crossover created by the Access on the grass verge by reinstating the grass verge previously located on the Land, to a depth from the highway of not less than 1.5 metres at any point and a width adjacent to the highway of 20 metres.
 - (ii) Cover with top soil and seed with grass seed the area where the grass verge has been reinstated, to marry in with the contours of the adjacent undisturbed land.
 - (iii) Remove from the Land all materials, rubble, rubbish, debris, tools and equipment arising from compliance with the above requirements.
 - The period for compliance with the requirements is 3 months after this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (c) and (d) of the Town and Country Planning Act 1990 as amended.
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Formal decision

1. The appeal is dismissed and the enforcement notice is upheld.

Background

2. The appeal property, Browngate Cottage, is set off the busy, classified, A267 Mayfield Road, and the facilitative vehicular access has been created at a point to the northern part of the site.

The Appeal on Ground (b)

3. An appeal on ground (b) is that the breach of planning control alleged in the notice had not occurred, as a matter of fact, at the time the notice was issued. The onus of proof falls on the appellant to show this, as the planning practice guidance confirms.
4. In the first instance this means, of course, that the alleged breach has to constitute development. Section 55 of the 1990 Act 'development' means the carrying out of building, engineering or other operations in, on, over or under land. S336(1) includes the formation and laying out of means of access to

highways within the definition of engineering works. The works must be more than merely driving onto land; something that amounts to the 'formation' or 'laying out' must take place as a matter of fact and degree.

5. East Sussex County Council (ESCS) has confirmed in correspondence that the grass verge here removed forms part of the highway, and is under its ownership. Accordingly, an individual cannot alter the grass verge as this is deemed to form part of the highway and the highway must not be obstructed.
6. The access here is deep and wide enough for a vehicle to access from and to the A267. Accordingly, the 'formation' of the access constitutes engineering works which requires the benefit of planning permission unless it is development otherwise permitted.
7. The enforcement notice was issued on 16 March 2020, and it is clear from the photographic evidence that the access created or, as the appellant suggests, its re-opening, existed at this date.
8. The appeal on ground (b) therefore fails.

The Appeal on Ground (c)

9. The ground (c) appeal is that matters alleged in the notice do not constitute a breach of planning control. Such a breach comprises the carrying out of development without the required planning permission. Under a ground (c) appeal the onus of proof is on the appellant to show that there has been no such breach; this being on the balance of probability.
10. Section 57(1) says that, subject to the provisions of the section, planning permission is required for the carrying out of any development of land, and s336, in defining a 'means of access', states that this "includes any means of access, whether private or public, for vehicles or for foot passengers.
11. Class B of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015, as amended, allows for the formation, laying out and construction of a means of access to a highway which is not a trunk road or a classified road. The reasoning for this relates to highway safety implications. Here, as the A267 is a classified road, it therefore follows that planning permission is required for the works undertaken.
12. In a letter dated 21 September 2020 from Johnstones Property and Development Consultants on behalf of Mr Brann, the appellant, a statement from Mr Brann says that he bought Browngate Cottage in February 2016. On taking possession he states:

"I immediately reopened the vehicle access serving the property which had obviously not been used for a number of years. During the excavations the old hardstanding forming the driveway from the public road was exposed."
13. Given the above requirement the appellant is relying on a previous planning permission, apparently granted in 1968, approving a hardstanding and access. When reliance is placed on an existing permission, it is necessary to show that the relevant permission has been commenced and not lapsed under the provisions of s91-93, or under s85(2). However, I have not been presented with relevant documents relating to this permission to this effect and which would have convincingly shown the exact point of access.

14. It may be that these documents can no longer be retrieved but, in their absence, there appears to be some confusion as to the appeal site's planning position in this regard. Indeed, I have seen two separate ref nos for the said permission (both T/68/690 and WD/1968/228T/F), which only adds to the uncertainty.
15. To illustrate the above I refer to a letter from Mrs SM Marshall of Marshall Ibid LLP, dated 18 May 2016, provided by the appellant which, in referring to the works undertaken by the appellant subsequent to the property's purchase to create or reinstate the access, states:

"Hardstanding was found to the north of the site, and it was assumed that this was the original access....However, the access and garage appear not to have been built in the position indicated."
16. Reference is also made in the appellant's bundle of documents to a 1955 legal agreement between ESCC and Mrs Lusted, a previous owner, and it has been said that the hardstanding found was as a result of the demolition of a former mission room.
17. I now turn to correspondence between ESCC and Mr Roddie Johnstone. Here, in a letter of response, dated 1 May 2018, ESCC states:

"I note that there is an existing hardstanding that could historically have been used as a parking area, but this area was bricked in (access to it closed by a brick wall) for some time, and in any event the 1968 planning permission (for an access amongst other works) did not allow for an access in its current position (proposed), but at a more southerly point. It appears that the more southerly access was never implemented as a vehicular access but as a pedestrian access only."
18. It is not therefore clear from the various evidence whether the access permitted in 1968 was implemented or was in the same position as that which has now been enforced against. If not, and an access to the site had been created in an identifiably different location, the 1968 permission is an irrelevance. I shall return to this point under my analysis of the ground (d) appeal.
19. It may be that the permitted vehicular access was implemented in full, and used accordingly, but it has not been demonstrated, precisely and unambiguously, that this was the case.
20. Taking all factors into account I am not convinced from the evidence before me that the matters alleged in the enforcement notice do not constitute a breach of planning control.
21. The appeal on ground (c) therefore fails.

The Appeal on Ground (d)

22. The ground (d) appeal is that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters stated in the notice (ie it was too late for the Council to take enforcement action).
23. I have concluded that the matters alleged in the enforcement notice do constitute a breach of control, and s171B(1) of the 1990 Act says that where

- there has been a breach of planning control consisting in the carrying out of building or engineering operations no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
24. S191(2) goes on to say that uses and operations are lawful at any time if (a) no enforcement action may then be taken in respect of them because the time for enforcement action has expired, and they do not constitute a contravention of any of the requirements of an enforcement notice then in force.
 25. The works, in this instance, constitute operational development. The immunity period for such covers any operational development which has not been challenged by enforcement action for the preceding period of at least four years.
 26. If the 1968 planning permission was not properly implemented; in other words, an access was created but in a different position, and not in accordance with the approved plans, should reliance be placed on the then unauthorised access being immune from enforcement action, the appellant would need to show that the breach was in effect for a sufficient period of time to acquire immunity. However, I have not seen any compelling evidence as to the existence of the previous access, nor its duration over time, nor, if it did exist, when it fell into disuse and became overgrown.
 27. Turning then to the current breach, as the notice was issued on 16 March 2020, it is necessary for the appellant to demonstrate, on the balance of probability, that the works had been substantially completed on or before the date four years immediately prior to this ie 16 March 2016 (known as the material date). The onus of proof in this regard is on the appellant.
 28. I have been provided with a series of 'Streetview' images which, in those dated November 2008, October 2011, May 2014, October 2014 and May 2015, show the grass verge, where the access has since been created, intact. A break in the hedge is evident, between which spans a low brick wall and beyond which there appears to be residential garden.
 29. A Streetview image dated May 2019, also provided, is the first which shows the creation of the access with the grass verge and wall removed. Vehicles can be seen parked within the cottage's curtilage and it seems clear that the access is now in use.
 30. A 'Statement of Truth', dated 16 April 2020, has been produced by John Joseph Mulcahy. He confirms that the appellant purchased the property in February 2016, and says that he was instructed to start clearing the undergrowth within the garden from what he mentions was the previous access to the property, and hardcore was uncovered. He says these works commenced in early March 2016.
 31. In the above connection I have been provided with a previous appeal decision, from 2016, whereby the Council's decision to refuse planning permission for the said vehicular access was upheld due to highway safety concerns. The Inspector, in his decision letter, confirms that he carried out the site visit on 15 December 2016 and he says that, at the time, the development had been "largely completed". This would seem to be at odds with the appellant's point that he "immediately reopened the access."

32. Given that the Inspector's site visit observations, some nine months after the works are said to have commenced, differ from the appellant's evidence, I find that this evidence is neither precise nor unambiguous. I am not therefore satisfied that the appellant has discharged the burden of proof.

33. In the circumstances the appeal on ground (d) does not succeed.

Overall Conclusion

34. The appeal is not successful, and the enforcement notice is therefore upheld in its entirety.

Timothy C King

INSPECTOR