



Appeal Decisions

Hearing Held on 17 January 2023

Site visit made on 17 January 2023

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 February 2023

Appeal A Ref: APP/N1025/C/21/3283424

Land at Field north of 200 Hopwell Road, Draycott, Derby DE72 3SD

- 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 Andrew Nightingale against an enforcement notice issued by Erewash Borough Council.
- The enforcement notice was issued on 24 August 2021.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the Land for agricultural use to non-agricultural use comprising of the erection of a building with no agricultural use established on the land, formation of access track, laying of hard surfaced turning area, siting of storage containers and storage of non-agricultural items.
- The requirements of the notice are: Cease the use of the Land for non-agricultural use and remove the building, access track, hard surfaced turning area, storage containers and all other non-agricultural stored items from the land and then restore the land to the condition it was in prior to the breach of planning control taking place.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) (c) and (f) 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 as amended.

Summary Decision: No further action is taken.

Appeal B Ref: APP/N1025/C/21/3283425

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- The appeal is made by Mr Andrew Nightingale against an enforcement notice issued by Erewash Borough Council.
- The enforcement notice was issued on 24 August 2021.
- The breach of planning control as alleged in the notice is: Without planning permission, operational development comprising of the erection of a building with no agricultural use established on the land, formation of access track, laying of hard surfaced turning area, siting of storage containers and storage of non-agricultural items.
- The requirements of the notice are: Remove the building, access track, hard surfaced turning area, storage containers and all other non-agricultural stored items from the land and then restore the land to the condition it was in prior to the breach of planning control taking place.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) (c) and (f) 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 as amended.

Summary Decision: The appeal is allowed, the notice is corrected and quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs was made by Mr Andrew Nightingale against Erewash Borough Council. This application is the subject of a separate Decision.

Procedural Matters

2. The appellant confirmed that his appeals on ground (b) had been made in relation to the access track, and in particular to the formation of a vehicular access onto Hopwell Road which he says he did not create. However, the notice does not allege the formation of a vehicular access, and the Council clarified at the Hearing that the operational development alleged related only to the formation of the access track and not the creation of a vehicular access onto Hopwell Road. On that basis the appellant confirmed that his ground (b) in both appeals was unnecessary and fell away. I have dealt with the appeals on that basis.

Appeal A – Material Change of Use

The Enforcement Notice

3. S173(1)(a) of the 1990 Act requires an enforcement notice to state the matters which appear to the local planning authority to constitute the breach of planning control. S173(2) of the Act states that a notice will comply with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are. An enforcement notice may therefore be null because the allegation is too unclear. The appropriate test is whether the notice is hopelessly ambiguous and uncertain, either as regards to the description of the alleged breach, or the necessary remedial steps.
4. The breach of planning control alleged in this case is: *"Without planning permission, the material change of use of the Land for agricultural use to non-agricultural use comprising of the erection of a building with no agricultural use established on the land, formation of access track, laying of hard surfaced turning area, siting of storage containers and storage of non-agricultural items."*
5. At the Hearing the Council accepted that the notice which alleges a breach of control comprising a material change of use should not include the building operations comprising the erection of a building, formation of an access track and laying of a hard surfaced turning area. Those building operations are the subject of their second notice, which alleged operational development (Appeal B).
6. Having regard to the totality of the Land the subject of the notice and its use, the Council confirmed at the Hearing that the Land comprises a single planning unit. Furthermore, considering the grazing land comprised in that unit, the Council suggested the allegation might be better described as: *"Without planning permission, the material change of use to a mixed use comprising of agriculture and non-agricultural use, including siting of storage containers and storage of non-agricultural items"*.

7. The appellant agreed that the notice should not include operational development, those matters are included in a separate notice and therefore amounts to duplication. In addition, although the appellant accepted that the notice could be corrected to remove the alleged operational development and confirmed that the Council's suggested correction to allege a mixed use, would not result in any injustice to him, he considered the allegation would remain unclear. In particular, apart from the storage containers which were temporary and have now been removed, the appellant remains unsure as to what he would need to do to comply with the requirements of the notice.
8. An enforcement notice must be drafted to tell the recipient fairly what he has done wrong and what he must do to remedy it. If I was to amend the wording of the allegation as suggested by the Council, it would still not clearly set out what the appellant has done wrong. It tells him what he has not done, i.e., he has not used the Land for agricultural storage. However, it does not tell him what he has done wrong. Consequently, the appellant does not know what he would need to do to comply with the requirements of the notice. On my questioning, the Council were unclear about what would amount to a non-agricultural use, or which items stored on the Land they considered to be non-agricultural. Indeed, the Council Officer advised that they were not agricultural experts, and thus did not know. They expressed concern about several vehicles they had seen on visits to the site, including a Mitsubishi pick-up. The appellant advised that this was his private vehicle which he used to tow his agricultural trailer and carry hay bales, fence posts, etc on his land. Consequently, given the lack of clarity over the allegation, it is difficult to see how the appellant would know what he would need to do to satisfy the requirement to cease the use of the Land for non-agricultural use and remove all non-agricultural stored items.

Conclusion

9. For the reasons given above, I conclude that the notice is a nullity. In these circumstances, Appeal A on the grounds set out in section 174 (2) (a) (c) and (f) of the 1990 Act as amended and the application for planning permission deemed to have been made under section 177 (5) of the 1990 Act as amended do not fall to be considered.

Appeal B – Operational Development

The Enforcement Notice

10. The breach of planning control in the notice the subject of Appeal B alleges: *"Without planning permission, operational development comprising of the erection of a building with no agricultural use established on the land, formation of an access track, laying of hard surfaced turning area, siting of storage containers and storage of non-agricultural items."* The Council accept that the words *"with no agricultural use established on the land"* are unnecessary. In addition, they confirmed at the Hearing that the alleged siting of storage containers in this case and the storage of non-agricultural items, do not comprise operational development but would be a material change of use in the Land as they alleged in Appeal A. I shall therefore correct the notice to remove reference to those uses, and in doing so I am satisfied that there would be no injustice to either party.

Appeal B on ground (c)

11. The ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control. It is the appellant's case that the building constructed benefits from a grant of planning permission under Class A, Part 6, Schedule 2, Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended (GPDO). On 23 September 2019 the appellant made an application to the Council for prior notification of a general purpose storage building for agricultural use as required by the conditions attached at Class A.2 (2) of the GPDO. On 15 October 2019 the Council determined that the prior approval of the local planning authority was not required for the siting and appearance of that proposed development. The Council's decision confirmed that the development should be carried out in accordance with the details submitted with the application and within five years of 24 September 2019.¹
12. The appellant confirmed at the Hearing that the building had been completed by November 2020. The Council do not dispute that the building constructed has been built in accordance with the details submitted in relation to its siting, design and appearance. However, it is their view that the building erected is not reasonably necessary for the purposes of agriculture within the agricultural unit and does not therefore benefit from the permission granted under Part 6 of the GPDO as set out in the paragraph above. The Council states that when they first inspected the building on 28 April 2021 there was a helicopter fuselage within it. There were also two Mitsubishi pick-up trucks plus a range of tools, a trailer, mower, two dumper trucks, a digger, two balers, a tractor, drum mower, water butts, and wooden pallets. The Council consider that the presence of the helicopter fuselage and two vehicles in the building demonstrates that the building that had been erected is not reasonably necessary for the purposes of agriculture within the unit.
13. The appellant told the Hearing that he acquired the agricultural land in August 2018. He had previously lived on a farm and when the agricultural land came up for sale adjacent to his current home, he saw an opportunity to establish a small holding. He sold his business which was his former means of employment in March 2019. The small holding is a new business venture. He acquired a tractor, mower, baler, dumper truck and other equipment to support the agricultural enterprise, and the building and hard surface area constructed is required to store his machinery, vehicles, hay and silage. The land is utilised for grazing, he takes a hay crop from it and currently keeps a number of pigs. There are also some ponies grazing on the land. He would like to acquire some sheep, however, with the current uncertainty with the enforcement notices he has delayed any further financial outlay. He told the Hearing that he had bought the helicopter fuselage to restore as a simulator as a family project with his son. It has since been sold. The blue Mitsubishi belongs to himself and is used on the land, the silver pick-up belongs to his father-in-law who had been helping him at that time.
14. In support of their case the Council has sought advice from an agricultural consultant². The consultant did not visit the site but reviewed the documents and photographs the Council had supplied to him. It is his view that a holding of this size is only going to be used for small scale livestock or fodder/crop

¹ LPA Ref: ERE/0919/0043, dated 15 October 2019.

² Agricultural Report prepared by Christopher Powell, Symonds & Sampson, dated November 2022.

production. He confirms that the photographs show the land to be in a grass ley that would be used for hay, silage or haylage, and that any of those products warrant the need to store undercover. However, the photographs he had before him did not show any fodder stored within the barn.

15. The consultant also confirmed that machinery, which is expensive, should where possible be stored undercover or inside and the barn should have ease of access for loading and unloading. Nonetheless, the consultant believes the building to be excessive in size and does not consider that the production of fodder and livestock on this scale would be commercially viable. In his view the building does not therefore benefit from permitted development rights.
16. To benefit from permitted development rights for the construction of an agricultural building, the building must, amongst other criteria, be on agricultural land and reasonably necessary for the purposes of agriculture within that unit. For the purposes of Class A, Part 6 (GPDO), "*agricultural land*" means land which, before development permitted by this Part is carried out, is land in use for agriculture and which is so used for the purposes of trade or business. The courts have held that profitability is not the test of whether an agricultural use was a trade or business, thus the consultant's view that the enterprise is not commercially viable is not relevant in this regard.
17. From the evidence before me, including what I heard at the Hearing, the Council do not appear to dispute that the building was constructed on agricultural land, nor that the land is in use for trade and business. Their concern is that when they visited the site there was a helicopter fuselage in the building as well as two private vehicles. They consider the size of the building to be too large for the agricultural unit it serves. It is therefore not reasonably necessary for the purposes of agriculture within that unit, particularly as they have evidence that it has been used to accommodate a helicopter fuselage and pick-up trucks.
18. The building is a purpose-built steel frame three bay building which has full height roller shutter doors and the Council's consultant agrees that it is designed and suitable for use as a general purpose agricultural building to store hay, silage and machinery. It has been constructed on agricultural land in use for trade or business. The appellant does not dispute that he stored a helicopter fuselage in the building for some time. However, from the evidence before me, the building since construction has also been in use for the storage of the appellant's agricultural machinery, and for use on the land. Prior to the construction of the building the machinery had been stored outside.
19. Although the building was not in use for the storage of hay or silage when the Council visited and took the photographs it supplied to their consultant, it is clearly the appellant's intention for it to be used for that purpose as well as for the storage of machinery for use within the agricultural unit. The consultant acknowledged that the building was designed and suited for such use. It is not to my mind unreasonable for the landowner's vehicle to be stored in the building, particularly when it is used on the land. It is also not unreasonable or uncommon for a farmer to store other vehicles, domestic tools or equipment that might not be directly for use on the land in his agricultural buildings, provided the extent to which he does so does not result in a material change in the agricultural use of the building.

20. I conclude on the evidence now available and on the balance of probabilities, that the building constructed does not represent a breach of planning control by reason of a grant of planning permission under the provisions of Class A, Part 6, Schedule 2, Article 3 of the GPDO. The appeal succeeds on ground (c) to that extent and the notice is corrected to remove the building from the alleged breach.

Appeal B on ground (a), deemed planning application

Main Issues

21. The main issues in this case are:

- Whether the development is inappropriate development in the Green Belt having regard to the National Planning Policy Framework (the Framework) and any other relevant development plan policies;
- The effect on the character and appearance of the area; and
- Is the harm by reason of inappropriateness, and any other harm, clearly outweighed by other considerations so as to amount to the very special circumstances required to justify the development.

Reasons

Access track

Preliminary Matter and Green Belt

22. The formation of the access track is an engineering operation which has been developed in an area of open countryside within the Nottingham-Derby Green Belt. The Council confirmed at the Hearing that they are satisfied that the access track would preserve the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. The formation of the access track is not therefore inappropriate development in the Green Belt.

23. In the Council's reasons for issuing the enforcement notice they stated that the access is served by an inadequate level of visibility and leads to unacceptable harm to highway safety which is contrary to paragraphs 108 & 109 of the Framework. However, the creation of a vehicular access is not alleged in the enforcement notice and thus not a consideration in this appeal. I noted on my site visit that there was an existing farm gate in a gap in the hedgerow at the point where the unauthorised track meets Hopwell Road, but there was no dropped kerb and an access had not been formed. Highway safety is not therefore a matter for my consideration in this appeal.

Character and appearance

24. A three metre wide earth vehicular track has been created within the appeal site. The track is approximately 250m in length. It runs in a northerly direction from the new agricultural building for some 100m before turning in a westerly direction to run adjacent to a timber ranch style fence and meet a field gate at the site's boundary with Hopwell Road. It is proposed that the track, which is currently unfinished, would be surfaced with crushed stone.

25. The land within the appeal site rises gently in a northerly direction. The access track has therefore been formed on land which is naturally higher than the land to the south where the agricultural building is situated. However, it is not a steep slope. The formation of the track has not required any substantial earthworks, nor is it visually conspicuous from Hopwell Road. The mature hedgerow along the boundary of the site screens the track from views along Hopwell Road and there are no public footpaths within or close to the site. Moreover, a single track formed out of crushed stone and generally following field boundaries does not to my mind appear incongruous in an agricultural landscape which is characterised by farmsteads served by similar tracks. The track has not resulted in the loss of any hedgerows or other landscape features, and subject to the imposition of a condition to ensure that it is finished in a suitably coloured crushed stone, it would not have a harmful effect on the character or appearance of the area.
26. I conclude that the access track does not have a harmful effect on the character and appearance of the area. There is no conflict with the development plan, including Policy 10 Erewash Core Strategy, 2014 (CS) which requires all new development outside settlements to protect, conserve and where appropriate, enhance landscape character.

Hardstanding

Green Belt

27. The hard surfaced turning area that has been constructed is situated in the Green Belt. Paragraph 150 of the Framework advises that certain forms of development, including engineering operations, are not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. It is the Council's view that the spatial aspects of openness would be harmed by vehicles and other items stored on the hard surfaced area.
28. The area of hard surfacing has been created close to the agricultural building. At the time of my visit hay bales were being stored on it and I understand that it is also used to park and turn vehicles and to store machinery and other items used on the agricultural holding. Whilst I appreciate that those stored items have a spatial dimension, the storage of agricultural goods and machinery on agricultural land is not development. Furthermore, maintaining an agricultural use of the land would not conflict with the purposes of the Green Belt. The hard surfacing has been formed on an existing level area and considering its use, it does not affect the openness of the Green Belt.
29. I conclude that the hard surfaced area is not inappropriate development in the Green Belt. There is no conflict with Saved Policy GB1 of the Erewash Local Plan or Policy 3 of Erewash CS which are consistent with National Green Belt Policy set out in the Framework.

Character and appearance

30. The Council stated at the Hearing that the hard surfaced area did not in itself have a harmful effect on the character and appearance of the area. However, they maintained that "stuff" stored on it, would be visually harmful.
31. The hardstanding is well related both physically and visually to the agricultural building and to the cluster of properties situated at neighbouring Woodlands

Park. It has been formed on an existing level area and is currently surfaced in crushed stone. In this location it is not visually conspicuous or incongruous taking into account the surrounding land uses. The storage of vehicles, machinery, hay and silage is not uncharacteristic in the countryside and does not therefore have a harmful effect on its visual qualities or character.

32. The appellant proposes to install cell pave on the hardstanding which would then be overlaid with earth and seeded. This would create a more solid base for agricultural vehicles and would have a less stark appearance than the existing crushed stone. Considering Policy 10 of the CS which requires development to conserve and where possible enhance landscape character, it would not be unreasonable to include this proposal as a condition of a grant of planning permission.
33. I conclude that the hard surfacing does not have a harmful effect on the character and appearance of the area and there is no conflict with Policy OC10 of the CS which seeks to conserve and protect the character of the landscape outside of settlements.

Conditions

34. Considering advice in the Framework and Planning Practice Guidance, in the interest of conserving and enhancing the landscape it is reasonable and necessary to impose a condition to secure a scheme for the surfacing of the access track and hard surfaced turning area and to require the proposed surfacing scheme to be implemented and maintained.
35. The purpose of condition 1 below is to require the Appellant to comply with a strict timetable for dealing with the finished surfacing which needs to be addressed to make the development acceptable. The condition is drafted in this form because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matter. The condition therefore provides for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority ("LPA") or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the condition not be met in line with the strict timetable, then the development would have to be removed.

Other Matters

36. I have had regard to third party representations expressing concern about the visual appearance of the building and its intended use. However, for the reasons set out above, I have found that the development carried out is in use for agriculture, it is not inappropriate in the Green Belt and it does not have a harmful effect on the character or appearance of the area.

Conclusion

37. For the reasons given above, I conclude that Appeal B succeeds on ground (a). I shall grant planning permission for the development as described in the notice as corrected. The appeal on ground (f) does not therefore fall to be considered.

Formal Decisions

Appeal A

38. Since the notice is found to be a nullity no further action will be taken in connection with this appeal. In the light of this finding the Local Planning Authority should consider reviewing the register kept under section 188 of the Town and Country Planning Act, 1990 (the Act) as amended.

Appeal B

39. It is directed that the enforcement notice be corrected:

- by the deletion of the words in paragraph 3 and substitution with the following words, "Without planning permission, operational development comprising of the formation of access track and laying of hard surfaced turning area."; and
- by the deletion of the words in paragraph 5 and substitution with the following words, "Remove the access track and hard surfaced turning area from the land and then restore the land to the condition it was in prior to the breach of planning control taking place."

40. Subject to these corrections the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the formation of access track and laying of hard surfaced turning area on the land subject to the following condition:

- 1) The access track and hard surfaced turning area hereby permitted shall be removed and the land shall be restored to its former condition within 2 months of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i) Within 1 month of the date of this decision a scheme for surfacing the access track and turning area shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
 - ii) If within 3 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
 - iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be maintained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

Elizabeth Pleasant

INSPECTOR

APPEARANCES

FOR THE APPELLANT

Mr Marc Willis	Planning Consultant
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Mr Andrew Nightingale	The Appellant
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Mr Ian Rainbow	Third Party
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FOR THE LOCAL PLANNING AUTHORITY

Mr Richard Snow	Development Manager
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Mr James Grundy	Senior Planning Officer
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