



Appeal Decisions

Site visit made on 21 February 2023

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 April 2023

Appeal A Ref: APP/X1545/X/22/3292134

Gravel Pits, Land off Hall Road / Battle Rise, Heybridge, Maldon

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr J Purdy of J & R Construction Ltd against the decision of Maldon District Council.
- The application ref 21/01188/LDE, dated 11 November 2021, was refused by notice dated 18 January 2022.
- The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is works required for the maintenance and improvement to the surface of the existing private way.

Appeal B Ref: APP/X1545/W/21/3281240

Gravel Pits, Land off Hall Road / Battle Rise, Heybridge, Maldon

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr J Purdy against the decision of Maldon District Council.
- The application Ref FUL/MAL/21/00443, dated 21 April 2021, was refused by notice dated 21 July 2021.
- The development proposed is retention of replacement surface for the existing private way.

Decisions:

Appeal A

1. The appeal is dismissed.

Appeal B

2. The appeal is dismissed.

Appeal A

Main Issue

3. The main issue of the appeal is whether the Council's refusal to grant a LDC was well-founded.

Reasons

4. An application under section 191(1)(b) of the Act¹ seeks to establish whether any operations which have been carried out in, on, over or under land are lawful. Section 191(2) sets out that operations are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because

¹ Town and Country Planning Act 1990 (as amended)

the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

5. The appeal relates to a length of around 125m of private way which runs in a roughly north-south direction linking with Battle Rise at its northern end and is around 3.5m in width. It is not disputed that the works comprise development and, given the length of the track and volume of material used to create the surface, which would have required an element of pre-planning involved and would have been carried out using plant and machinery, I consider the works amount to an engineering operation within the meaning of development in section 55 of the Act.
6. The main thrust of the appellant's case is that the works which have been carried out are development which would be permitted by Part 9, Class E of Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(the GPDO). Class E permits the carrying out on land within the boundaries of an unadopted street or private way of works required for the maintenance or improvement of the street or way.
7. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC) which must be considered in the light of the facts and the law. In an application for a LDC, the onus is on the applicant to demonstrate on the balance of probabilities that the development would have been lawful at the date of the application.
8. The GPDO states that "Private way" means a highway not maintainable at the public expense and any other way other than a highway. The Council suggests the appellant's reference to the accessway being used by the general public for recreational purposes casts doubt on the status of the accessway as a private way. However, use by the general public would not change the status of the track as a private way and given the evidence before me, I consider the track is a private way for the purposes of Class E.
9. The track previously comprised compacted gravel and a hardcore sub-base which is stated to have been laid 'ad-hoc' over many years. From the evidence before me and from my inspection of the wider site, I consider a particular characteristic of the private way appears to have been its inconsistent width and gravel which has sunken into the soil, allowing the encroachment of grass, resulting in a track which appears semi-natural rather than an urban feature.

Whether maintenance or improvement

10. Whether the construction of a hard surface is an improvement is a matter of fact and degree. The ordinary meaning of improvements is limited to changes which do not alter the basic character of the thing which is improved. Works permitted by this part can only affect the surface and foundations of the way; they cannot widen it or alter its route.
11. The appellant has laid a membrane on the existing surface and placed scalplings over². The membrane sits entirely above the ground and the

² A by-product of road and path resurfacing, which can be repurposed for use on hardstandings such as footpaths, farm tracks and haul roads.

scalpings sit above the membrane. As a consequence, the scalpings do not sink into the soil and, given the dark colour of the scalpings, they appear a far more prominent feature than the gravel which had previously been laid and which is present elsewhere within the site.

12. The owners of the site state in a Statement of Truth, that the resurfacing work has not changed the alignment of the private way. The appellant has provided a survey of the site which shows the extent of the new surface which has been laid. From my inspection of the plan, it appears that the scalpings have been laid over vegetation in a number of locations, pointing towards the path having been widened.
13. Although I accept that vegetation may have encroached upon the track in some places, the private way has been built up over the years from gravel and brick rubble. The tracks within the site are described as having been 'patched and repaired over the years with whatever was available'. As a consequence, and from the photographic evidence before me, it seems highly likely that the path was laid with an inconsistent width to avoid features present at the time, such as vegetation. This appears to be what has been laid elsewhere within the site.
14. The appeal scheme, by contrast, is of a relatively consistent width and, due to its dark colour, is a far more prominent feature which appears an urban feature which is uncharacteristic of the wider site. As a matter of judgement, I consider the surface which has been laid has altered the basic character of the private way and so, on the balance of probabilities, I find it is not development which is permitted by Part 9, Class E of the GPDO.
15. Heybridge Lakes is known to be functionally linked to the adjacent Blackwater Estuary, which is subject to a number of designations, including Special Protection Area (SPA) and Ramsar site³. Article 3(1) of the GPDO states that subject to the provisions of this Order and regulations 73 to 76 of the Conservation of Habitats and Species Regulations 2010 (general development orders)(1), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.
16. Regulation 75 of the 2010 Regulations state that it is a condition of any planning permission granted by a general development order made on or after 30 November 2017, that development which (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of the site, must not be begun until the developer has received written notification of the approval of the local planning authority under regulation 77 (approval of local planning authority).
17. While there is no evidence that the requirements have been discharged, since I have found the works are not permitted development, it is not necessary for me to consider this matter further.

³ The Blackwater Estuary is also designated as Blackwater Estuary National Nature Reserve, Blackwater Site of Special Scientific Interest (SSSI), Blackwater Estuary Special Area of Conservation (SAC) and Essex Estuaries Marine Conservation Zone (MCZ).

Appeal A Conclusion

18. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of works required for the maintenance and improvement to the surface of the existing private way was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Appeal B

Main Issues

19. The main issues of the appeal are:

- The effect of the appeal scheme on the character and appearance of the area, having regard to its location within the Chelmer and Blackwater Navigation Conservation Area (the CBNCA); and
- The effect on the biodiversity interests of the site, having regard to its location adjacent to the Blackwater Estuary.

Reasons

Character and appearance

20. The appeal site falls within the Chelmer and Blackwater Navigation Conservation Area (the CBNCA). The CBNCA covers an extensive area, of varied character, however, its significance appears to derive from the Navigation itself. Although the appeal scheme is located away from the Navigation, the appeal site occupies an area which is characterised by its openness and semi-natural character, marking a distinct contrast with the urban character of Battle Rise to the north.
21. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires me to pay special attention to the desirability of preserving or enhancing the character or appearance of the CBNCA. Furthermore, paragraph 199 of the National Planning Policy Framework ('the Framework')(2021) states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation.
22. Policy S1 of the Maldon District Approved Local Development Plan 2014-2029 (adopted July 2017)(the LDP) seeks to conserve and enhance the historic environment and policy S8 seeks to protect the countryside for its intrinsic character and beauty. Policy D1 of the LDP seeks to ensure that development respect and enhances the character and local context and makes a positive contribution in terms of the historic environment, particularly in relation to designated and non-designated heritage assets and policy D3 seeks to preserve or enhance the special character of heritage assets.
23. The use of compacted hardcore within the site, which allows grass to colonise those parts of the track which are little used, helps limit the visual impact of the private way within the wider site and helps to preserve the character and appearance of the CBNCA. The appeal scheme, by contrast, comprises a membrane to prevent the colonisation of grass and scalplings above, which, due to its dark colour and relatively consistent width, appears a prominent,

urbanising feature which diminishes the semi-natural character of the site, contrary to policies S1, S8, D1 and D3 of the LDP, the requirements of which are set out above.

24. Paragraph 189 of the Framework states that heritage assets are an irreplaceable resource, and should be conserved in a manner appropriate to their significance. Although the track is located away from the Navigation, it is clearly visible when viewed from Battle Rise and the adjacent footpath and fails to preserve the character and appearance of this part of the CBNCA. Given its limited size relative to the CBNCA as a whole, I consider the harm to be less than substantial harm to the significance of the CBNCA.
25. Paragraph 202 of the Framework goes on to advise that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including, where appropriate, securing its optimum viable use.
26. The appellant asserts that the private way serves as a vehicular access from Battle Rise for the landowner to access the wider area for maintenance purposes, for example bin collections and landscape management. The appellant states that for health and safety purposes and land management purposes, the site contains 6x waste bins, 6x dog waste bins and 7x life buoy rings and housing.
27. The appellant has provided a photograph alleged to be the appeal site, where the land appears boggy. Having visited the appeal site and having regard to the curvature of the track, the fact that the housing at Battle Rise is not visible and the presence of features, including a seat, I consider it highly unlikely that this photograph represents the appeal section of track prior to the works being carried out. Nevertheless, given the proximity of the site to the Estuary, I don't doubt it becomes inundated from time to time. Indeed, photographs taken elsewhere within the site show the path at a time of inundation.
28. An interested party has provided a photograph of the appeal site prior to the laying of the membrane and road scalping. A van is evidently parked on the path, which itself does not appear excessively boggy. Given the lack of foliage on trees in the background of the photo, I consider it highly likely that the photograph was taken in the winter months. Although there may be instances when the land is not accessible to cars due to inundation, I would expect maintenance vehicles accessing the site to be suitably designed to use hardcore tracks and access off-road sites. As such, I would expect that access would be available for the majority of the year.
29. The appellant suggests that the Council requested that bins be installed, however, one letter provided by the appellant simply points out the land owner's duty under the Environmental Protection Act 1990 to keep the site free of litter and the other relates to the use of the site for camping. The letter relating to the use of the site for camping was written by the Senior Specialist Environmental Health and points out the need for a camping site licence. It does not address whether planning permission is required for such an activity, nor does it specify that bins must be permanently located within the site.

30. In my experience, the provision of so many bins, including dog waste bins, on private land is highly unusual and is more akin to the level of provision one might expect in an urban area. Furthermore, the dog bins and waste bins are located beyond the appeal section of track and so any vehicle accessing the site would still need to use the hardcore track which remains to the rest of the site. I therefore afford this matter very limited weight.
31. The appellant asserts it has proven impossible to prevent trespassing on to his land, and over the course of time, permissive public access has been allowed. Consequently, the lakes are used by many people for recreational purposes. Indeed, the appellant states that the 'repaired private way' encourages local recreational activity and enables access to the lakes.
32. However, planning permission has not been granted for the use of the lakes for recreation purposes and whilst the appellant states that over the course of time permission access has been allowed, I have no substantive evidence to show that a recreational use of the land would be lawful. Significantly, the use of the lakes for informal recreational fishing purposes was dismissed on appeal. This does not therefore weigh in support of the appeal scheme.
33. I recognise that there is public benefit in siting buoys next to bodies of water which members of the public may access, whether lawfully or otherwise. However, while one of the buoys is located along the appeal track the remainder are located elsewhere within the site, necessitating use of hardcore tracks by vehicles wishing to access the buoys elsewhere. Similarly emergency vehicles accessing the site would, depending on the location of an emergency, be likely to need to use the hardcore tracks within the wider site.
34. As a consequence, there would be very minimal benefit in granting planning permission for such a limited section of track. Although the appellant may choose to submit a planning application to resurface the existing tracks within the wider site, I have no information before me and so do not know the acceptability of such a scheme. I therefore afford these matters very limited weight.
35. In my view, the benefits of the appeal scheme do not outweigh the harm I have identified to the CBNCA, the conservation of which I attribute great weight to.

Nature conservation

36. The appeal site comprises part of Heybridge Lakes, which is known to be functionally linked to the adjacent Blackwater Estuary Site of Special Scientific Interest (SSSI), Special Protect Area (SPA) and Ramsar Site, which supports nationally important numbers of breeding and wintering bird species. The Blackwater Estuary is also designated as Blackwater Estuary National Nature Reserve, Blackwater Site of Special Scientific Interest (SSSI), Blackwater Estuary Special Area of Conservation (SAC) and Essex Estuaries Marine Conservation Zone (MCZ).
37. The Council advise that the application site is listed as a Local Wildlife Site (Heybridge Gravel Pit)(Ma57) which forms extensive open water habitat of particular value to roosting and bathing coastal birds, including species of the adjacent SPA. Although Natural England (NE) did not object to the application, it advised that the Council will need to satisfy itself as to the need for the

surfaced track and that it does not facilitate activities across the wider site. It also advised that Plans or projects that are likely to have a significant effect to the SPA/Ramsar site and functionally linked land that its interest features rely upon, must be tested via Appropriate Assessment to ensure the integrity of the site will not be adversely affected.

38. Policy S1 seeks to conserve and enhance the natural environment and policy S8 sets out that the countryside will be protected for its ecological value, amongst other things. Policy D1 seeks to ensure that development makes a positive contribution in terms of the natural environment, particularly in relation to designated and non-designated sites of biodiversity value and Policy N2 of the LDP states that where any potential adverse effects to the conservation value or biodiversity value of designated sites are identified, the proposal will not normally be permitted.
39. The appellant states that the land is used by a considerable number of residents and visitors to the area for informal walking, recreation and dogs are not restricted. During the winter months, the access is stated to have become unusable due to wet conditions, to the detriment to those using the site for recreational and maintenance purposes. The appellant asserts that the use of scalpings has improved the surface of the private way that has encouraged recreational activities around the lakes.
40. Although the appeal track is limited in extent, and therefore the extent to which it facilitates access to the wider site is therefore likely to be limited, from the appellant's own submission, the track is intended to facilitate access to the site by vehicles. I consider any increase in the use of the track by vehicles is likely to cause disturbance to breeding birds, particularly during the winter months when use of the track by vehicles is likely to have been limited to maintenance vehicles due to ground conditions. The increased use of the site by vehicles could have a likely significant effect on the European sites.
41. I am intending to dismiss the appeal due to the effect of the appeal scheme on the character and appearance of the area, including the CBNCA. Consequently, I do not need to undertake an Appropriate Assessment. Nevertheless, on the basis of the information before me, I find that it has not been demonstrated that the appeal scheme does not harm the interest features of the adjacent protected sites, contrary to policies N2, S1, S8 and D1, the requirements of which are set out above.

Other Matters

42. The officer report advises that it is proposed that the first 6m of the accessway as measured from Battle Rise would be surfaced with a bound material following concerns having been raised by Highways to the scalpings used. While it would be possible to address such matters via condition, the absence of harm to highway safety is a neutral factor in my consideration of the appeal scheme.

Appeal B Conclusion

43. For the reasons given above, I conclude that the appeal scheme would harm the character and appearance of the CBNCA and the interest features of the adjacent Blackwater Estuary and so would conflict with the development plan

as a whole. There are no material considerations which indicate that the decision should be taken otherwise in accordance with the development plan.

M Savage

INSPECTOR