



Appeal Decision

Site visit made on 19 July 2023

by D Hartley BA (Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28TH JULY 2023

Appeal Ref: APP/R1038/C/22/3302567

Land to north west of 21 Mansfield Road, Killamarsh S21 2BW

- 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 Act).
- The appeal is made by Mr Jeremy White against an enforcement notice issued by North East Derbyshire District Council.
- The enforcement notice, numbered 16/00100_OD, was issued on 31 May 2022.
- The breach of planning control as alleged in the notice is 1) without planning permission, material change of use of Land to a mixed use comprising the stabling, keeping and exercise of horses and a use for amenity and recreational fishing; 2) operational development carried out to facilitate the use described in 1) above, namely:
 - a) building operations comprising the erection of two stables buildings shown for the purposes of identification shaded black on the attached plan; b) engineering operations comprising the formation of an access track and hardstanding, shown shaded green on the attached plan; c) engineering operations comprising the excavation and re-profiling of the Land including the construction of three ponds and associated embankments in the area shaded blue on the attached plan.
- The requirements of the notice are a) cease the use of the Land for a mixed use comprising the stabling, keeping and exercise of horses and a use for amenity and recreational fishing; b) demolish the stables buildings shown hatched black on the attached plan, and take up any associated concrete and/or hardstanding, and remove all resultant materials from the Land; c) remove from the land all post and rail fencing erected to facilitate the use of the Land for the stabling, keeping and exercise of horses; d) remove from the Land all stone material, aggregate, brick/rubble and concrete used to engineer the access track and hardstanding shown shaded green on the attached plan, and restore the Land back to its condition and level prior to the engineering works taking place; e) remove from the Land all materials imported on to the Land for the purposes of engineering the ponds and profile the Land, including but not limited to, materials used for the construction of embankments and materials used for lining and landscaping the ponds; f) restore the Land which has been excavated and re-profiled to create the ponds, embankments and slopes in the area shown shaded blue on the attached plan, back to its original level prior to the engineering works taking place and profile such that the land conforms to the profile of adjacent land; g) the removal of materials off the Land as required by steps d) and e) above, shall only take place between the hours of 0900hrs to 1730hrs Monday to Friday and 0900hrs to 1300hrs on Saturday. There shall be no movement of material off the Land on Sunday and Public and Bank Holidays; h) reseed any areas of disturbed ground following compliance with steps a) – e) once these areas have been returned to their original profiles, above with an agricultural grass seed mix sown at a rate of 25g/m².
- The period for compliance with the respective requirements is a) 2 months; b) 2 months; c) 2 months; d) 3 months; e) 3 months; f) 4 months, g) 3 months as required by steps d) and e) above; and h) during the first seeding season after the completion of steps a) and b) above. A seeding season is between 1 February and 30 April or 1 October and 30 November each year during a period of no ground frost or areas of standing water.

- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended (the Act).
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Decision

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Reasons

Ground (a) appeal and the deemed planning application

Main issue

2. The appeal site falls within land designated as Green Belt. Therefore, the main issues are: -
 - whether or not the development is inappropriate development in the Green Belt including its effect on openness and the purposes of the Green Belt,
 - the effect of the development on the landscape character of the area,
 - whether the land is contaminated and, if so, its effect on human health,
 - the effect of the development on biodiversity,
 - whether intentional unauthorised development has taken place, and,
 - if the development is inappropriate in the Green Belt, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify development.

Background

3. Planning permission 16/00358/FL was approved on 13 March 2017 for a fishing pond, access driveway and car parking on the site. This planning permission has now lapsed and the appellant does not dispute the fact that conditions precedent Nos. 14, 15 and 16 relating to ground contamination were not discharged before works commenced on the site. The pond, car parking area and access driveway that were approved as part of this planning permission are, in any event, materially different to that which is the subject of this appeal. In fact, in relative terms the appeal development includes three ponds instead of the previously approved one, the keeping and stabling of horses including two wooden stable block buildings, significant land level changes that unlike the approved planning permission do not follow the natural contours of the site, and a wider/longer access track/hardstanding including the part use of concrete as a hard surface rather than the previously approved compacted hardcore.
4. I have considered planning permission 16/00358/FL as a material planning consideration as part of the determination of the ground (a) appeal below. For the reasons outlined above, there is, however, no longer any planning permission in place for this development on the site.

Whether inappropriate development in the Green Belt

5. In respect of development in the Green Belt the relevant policy in the adopted 2021 North East Derbyshire Local Plan 2014-2034 (LP) is policy SS10. While this policy does not refer to material changes of use, it is nonetheless consistent with policy in paragraphs 149 and 150 of the National Planning Policy Framework 2021 (the Framework). I therefore afford the policy significant weight in decision making terms although more weight is afforded to the Framework as a material planning consideration.
6. The material change of use of the land, as outlined in the breach of planning control, falls to be assessed against paragraph 150 (e) of the Framework which states that '*material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds)*' is not inappropriate development in the Green Belt '*provided it preserves its openness and does not conflict with the purposes of including land within it*'.
7. In respect of the buildings that are the subject of the enforcement notice (this would include the fencing on the basis that a structure is by definition a building having regard to s.336 of the Act), the evidence is that these have been constructed to facilitate the material change of use of the land, and, in this regard, this part of the development also falls to be considered against paragraph 149 (b) of the Framework which states that the provision of appropriate facilities in connection with a change of use for outdoor recreation is not inappropriate development in the Green Belt '*as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it*'. As can be seen above, whichever way you consider the deemed planning application development, it is necessary to consider its effect on openness and the purposes of the Green Belt.
8. The evidence, including aerial photography, is that prior to the material change of use taking place on the site, the land was predominantly open and undeveloped. In spatial terms, the breach of planning control comprises a form of development which has eroded the previously open and undeveloped characteristic of the land. The two stable buildings are significant in scale and are prominent in view when seen from surrounding higher ground. The fencing, including that around the access road, stable yard areas and ponds, is vast and this adds to the harm caused to the openness of the Green Belt.
9. The ponds, buildings, embankments, and land terraces are positioned at the bottom of the sloping site. They are prominent in view when seen from higher ground to the east. Longer distance views of the development are not readily apparent given boundary vegetation and intervening land topography. Nonetheless, the development can be seen from more localised views including from surrounding fields and from higher ground at public footpath No. 34 to the west. The harm to the openness of the Green Belt is compounded owing to the likely parking of vehicles, albeit that this would be an intermittent harm.
10. Overall, I find that the development has caused moderate harm to the openness of the Green Belt. While this conclusion differs from that of the appellant, even he accepts that there would be a '*negligible*' adverse impact. Even if one were to agree with the appellant, the breach of planning control still fails to meet the requirement in the Framework to '*preserve*' the openness of the Green Belt. The development as a whole has materially urbanised this countryside location, and, unlike the previous planning permission for the site,

has introduced significant built and engineered form in conflict with one of the purposes of the Green Belt, namely that of safeguarding the countryside from encroachment.

11. I therefore conclude that the breach of planning control constitutes inappropriate development in the Green Belt failing to accord with the Green Belt requirements of policy SS10 of the LP and paragraphs 149 and 150 of the Framework. The Framework makes it clear that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. As the breach of planning control constitutes inappropriate development in the Green Belt, and harm has been caused to it, this is a matter to which I afford substantial weight in the planning balance considering paragraph 148 of the Framework.

Effect on landscape character

12. The appeal site falls within a landscape character area that is undulating, where there is sporadic built form and where the land is mainly undeveloped, open and of pastoral character with dense tree planting in some parts. It falls within the Nottinghamshire and Derbyshire Coalfield Landscape Character Area and within Wooden Farmlands Landscape Character type.
13. It is clear from viewing the Council's aerial photographs that the site previously included significant tree planting and vegetation. The evidence indicates that such trees and vegetation have been removed to facilitate the unauthorised development. This has caused some harm to the landscape character of the area which is said to include '*prominent tree cover with dense watercourse trees and scattered hedgerow trees*' and '*species-rich hedgerows and trees associated with older boundaries*' as key characteristics.
14. While I accept that the Council has previously approved some development on the site, this was based on the access driveway following more natural land contours, a relatively tight and contained car park, one fishing pond and much more limited engineering and land re-profiling works. The breach of planning control includes significantly more development than previously approved, including the provision of two buildings (the larger one being more imposing owing to its isolated location within the site) and a much more engineered site. In turn, that has resulted in adverse harm being caused to the otherwise more open, rural and undeveloped landscape character of this part of the countryside.
15. The above harm is exacerbated given the introduction of significant fencing and gates and the use of concrete for part of the access driveway. The latter is harsh and urbanising. The yard areas associated with the two stable buildings are vast and intrusive when viewed in the landscape setting. The embankments and re-profiling of the land to create terraced areas represent a material departure from the natural land contours that previously existed on the site (and approved by the local planning authority under the earlier albeit lapsed planning permission) and this harm is particularly noticeable given that there are three ponds all within proximity to each other.
16. I accept that the harm caused to landscape character is not noticeable from many public receptors, or from very long-distance views. The development is, however, noticeable from surrounding fields and from public footpath No. 34 to the west. I find that the harm caused to the landscape character of the area is

significant. I therefore conclude that the breach of planning control does not accord with the landscape character requirements of policies SS1 and SDC3 of the LP.

Contaminated Land

17. The evidence indicates that when planning permission was approved for a fishing pond, access driveway and car parking area on the site, it was subject to the imposition of pre-commencement conditions to ensure that visitors of the site would not be at risk from contaminated land. At this time, the consultation response from the Council's Environmental Health Protection service indicated the site had previously been used as a garden centre and nursery *'which is considered a potentially contaminative land use'* and *'historical mapping would indicate there is also a legacy of mining and quarrying in the vicinity of the site with a former mineral tramway crossing the site, hence there is the potential for made ground which can be a source of contamination'*.
18. In addition to the above, the appellant has not disputed the claim made by the local planning authority that material has been imported onto the site in association with the breach of planning control. In the absence of detailed information from the appellant about this matter, there also remains the potential for land contamination arising from the importation of material onto the site.
19. Given the above, and, in the absence of detailed contaminated land information and evidence from the appellant, there is a risk of the development causing harm to human health. Indeed, if fish are caught from possible contaminated ponds, and subsequently eaten, there is a potential risk to human health. As the ground (a) appeal development has already taken place, this is not a matter that can be addressed by means of the imposition of a planning condition. Certainty about this matter goes to the heart of the acceptability of the ground (a) appeal development.
20. On the evidence before me, I cannot conclude that there is not contaminated land on the site and hence there is potential for risk to human health. In this regard, the development does not accord with the pollution and contaminated land requirements of policies SDC13 and SDC14 of the LP and paragraph 183 of the Framework.

Biodiversity

21. Much of the appeal site is within Local Wildlife Site 'NE194 High Moor' (LWS) and is a non-statutory site of wildlife importance. The LWS is noted for its habitat mosaic having a semi-improved acid/neutral grassland with substantial areas of hawthorn and gorse scrub capable of providing a wide range of habitats. The breach of planning control has led to the loss of scrub, trees and vegetation with no assessment provided by the appellant in terms of what impact this has had on wildlife.
22. In the absence of an assessment, I do not consider that this is a matter that can be reasonably dealt with by planning condition. It is important to understand what, if any, harm has been caused to biodiversity and then to establish whether, if necessary, there is a need for biodiversity mitigation and enhancement on and/or off the site and whether this could reasonably be

secured. In the absence of further biodiversity information and assessment details from the appellant, I cannot conclude that the development would be capable of according with the biodiversity requirements of paragraph 174 of the Framework and policy SDC4 of the LP, including whether it would be capable of achieving bio-diversity net gain. This is a further matter that weighs against allowing the ground (a) appeal.

Whether intentional unauthorised development

23. The Department for Communities and Local Government policy statement, dated 31 August 2015, introduced planning policy to make intentional unauthorised development a material consideration that would be weighed in the determination of planning applications and appeals from 31 August 2015.
24. In this case, the local planning authority comment that the appellant would have known that planning permission was needed for the breach of planning control '*having sought consent from the Council for other development in the district*'. I have little information before me to substantiate this point and the appellant does not address this matter in his statement of case. I cannot be certain if the appellant was in fact aware of the need for planning permission in respect of the breach of planning control. Therefore, on the evidence that is before me I have not afforded intentional unauthorised development any material adverse weight in considering the deemed planning application.

Other considerations

25. Use of the land for recreational purposes is a benefit for those members of the public that want to engage in the keeping and exercise of horses and fishing. This is a positive matter to weigh in the overall planning balance.

Planning balance and conclusion

26. The breach of planning control constitutes inappropriate development in the Green Belt. Moderate harm has been caused to the openness of the Green Belt and there is conflict with one of its purposes. Furthermore, significant harm has been caused to the landscape character of the area, there is a risk to human health from possible contaminated land, and I cannot conclude with sufficient certainty that the development would be capable of achieving bio-diversity net gain. I have not afforded any material adverse weight to intentional unauthorised development for the reasons outlined above.
27. In this case, I conclude that the harm to the Green Belt by reason of inappropriateness, and the other identified harm, is not clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify development. Therefore, the ground (a) appeal fails.

Ground (f) appeal

28. An appeal on ground (f) makes the claim that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
29. The appellant claims that paragraph 5(c) of the notice which requires the removal '*from the land all post and rail fencing erected to facilitate the use of the Land for the stabling, keeping an exercise of horses*' is excessive as owing

to its height it is permitted development considering Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

30. The notice is partly directed at the material change of use of the Land to a mixed use comprising the stabling, keeping and exercise of horses and use for amenity and recreational fishing. The evidence is that the fencing on the land has been erected to facilitate the unauthorised use of the land. The evidence is that it is integral to, or part and parcel of, the material change of use of the Land.
31. The Courts¹ have held that that a material change of use enforcement notice can require the removal of facilitating operational development even if such elements would not, in themselves, be the subject of planning control. In this case, I find, as a matter of fact and degree, that the fencing is of a nature and scale that does not exceed that which is truly integral to the material change of use of the land.
32. For the above reason, I conclude that the steps required by the notice to be taken do not exceed what is necessary to remedy the breach of planning control. Therefore, the ground (f) appeal fails.

Ground (g) appeal

33. An appeal on ground (g) makes the claim that the period specified in the notice in accordance with s173(9) of the Act falls short of what should reasonably be allowed.
34. The appellant makes the claim that the land is occupied by a tenant and that a tenancy agreement requires that he give a two month notice period to vacate the stables. Furthermore, he states that a longer period is needed to comply with the steps in the notice as it would be difficult to source a contractor to undertake the required works. The appellant has indicated that the period for compliance with all the steps in the notice should be twelve months.
35. The appellant has not provided me with a tenancy agreement to support the claim above. However, in this instance the notice gives two months to cease the use of the land for the mixed use and hence there need not be any conflict with the terms of any alleged tenancy agreement.
36. There is no reasonable evidence before me to indicate that the appellant would not be able to source a contractor to undertake the required works, and, furthermore, it is in any event noteworthy that the local planning authority has made reference to s.173A(1)(b) of the Act which states that they can *'waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9)'*.
37. For the above reasons, I conclude that the ground (g) appeal fails.

¹ Murfitt v SSE & East Cambridgeshire DC (1980) and Kestrel Hydro v SSCLG & Spelthorne Borough Council (2016)

Conclusion

38. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

D Hartley

INSPECTOR