



Appeal Decision

Site visit made on 15 February 2024

by David Jones BSc (Hons) MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 May 2024

Appeal Ref: APP/K0425/C/23/3328571

Land between A404 and Clubhouse Water Sports Club, Fieldhouse Lane, Marlow (registered by HM Land Registry under title: BM238686)

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Rob Marsh (Folbro Y Ltd) against an enforcement notice issued by Buckinghamshire Council.
 - The notice was issued on 27 July 2023.
 - The breach of planning control as alleged in the notice is a material change of use of the land to use for the parking of motor vehicles, and integral to that use, the undertaking of engineering operations to create a vehicular access, the erection of fencing and laying of hardstanding.
 - The requirements of the notice are:
 1. Cease the use of the land for the parking of motor vehicles;
 2. Remove all vehicles that have been brought onto the land in connection with the unauthorised use from the land;
 3. Remove the access and reinstate the land level (marked X on the attached plan) to its previous condition, prior to the unauthorised works taking place;
 4. Dismantle and remove the fencing (shown in the approximate position marked by a dotted line on the attached plan) from the land;
 5. Rip up and remove the hardstanding (shown in the approximate position marked hashed on the attached plan) from the land;
 6. Remove all debris and materials resulting from compliance with steps 1 to 5 of this notice from the land.
 - The period for compliance with the requirements is: Nine months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (e) 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.
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Decision

1. It is directed that the enforcement notice is corrected by:
 - In section 3 the deletion of the words "undertaking of engineering operations to create a vehicular access, the erection of fencing and".
 - In section 5 the deletion of requirements 3 and 4 in their entirety, in requirement 6 the deletion of the number "5" and substitute instead the number "3", and the re-numbering of requirements 5 and 6 as requirements 3 and 4 respectively.
2. Subject to the above corrections, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended.

Application for costs

3. An application for costs was made by Buckinghamshire Council against Folbro Y Ltd. This application is the subject of a separate decision.

Procedural Matters

4. A new version of the National Planning Policy Framework (the Framework) was published on 19 December 2023. The parts of the Framework most relevant to this appeal have not substantively changed from the previous iteration and, consequently, it has not been necessary for me to seek the further comments of the main parties in this respect. I have determined the appeal accordingly.

Ground (e)

5. An appeal on this ground is made on the basis that copies of the enforcement notice were not served as required by section 172 of the Town and Country Planning Act 1990 ("the Act"). Section 172(2)(a) of the Act requires that copies of an enforcement notice shall be served on the owner and occupier of the land to which it relates, and any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.
6. The appellant's case is made on two grounds. Firstly, it is claimed that the Council did not follow its own procedures correctly in deciding that it was expedient to issue the notice and, as a result, that the service of the notice did not comply with the requirements of section 172(1)(b) of the Act. In particular, the appellant considers that it was not expedient to issue the notice given that a retrospective planning application¹ had been submitted to the Council, albeit the application was subsequently withdrawn on the 13 April 2023 in advance of further 'pre-application' discussions taking place.
7. The power to serve an enforcement notice is discretionary and must be exercised with regard to any material considerations. The appellant contend that it was not expedient to serve the notice and refer to this as a requirement of subsection 172(1). However, this section only requires that it must appear expedient to the local planning authority to issue the notice. Section 1 of the notice clearly states this to be the case here.
8. The courts² have also held that any challenge to whether it was 'expedient' for the Council to issue the enforcement notice must be pursued by way of judicial review. Inspectors have no jurisdiction to determine whether the local planning authority complied with section 172 in this regard.
9. The second matter raised by the appellant is that the notice was not properly served on everyone with an interest in the land. The appellant's criticism is that the Council failed to serve the enforcement notice on the owner of the land, Folbro Y Limited. It appears that the Council served the notice at the address provided on Land Registry records, whereas the appellant states that Companies House records detail the correct address to serve the notice, and that this had been the company address since March 2013. The appellant therefore contends that the Council's failure to use the current address serves

¹ Council Ref: 22/08240/FUL

² Britannia Assets v SSCLG & Medway Council [2011] EWHC 1908 (Admin)

to negate proper service of the notice, as the notice was not received by the appellant until a copy was provided by the tenant of the site.

10. The requirements relating to the service of an enforcement notice in S172(2) of the Act provide that an enforcement notice shall be served on the owner and occupier of the land to which it relates and on any other person having an interest in the land, being an interest which in the opinion of the authority is materially affected by the notice. Furthermore, S176(5) of the Act states that if a person who was required to be served was not served, that fact may be disregarded if neither the appellant nor the person required to be served has been substantially prejudiced by the failure to serve.
11. Although the evidence before me shows that the enforcement notice was sent to the incorrect address, the owners of the land have clearly received and are aware of the notice. Furthermore, the actions of the Council have not prevented the appellant from appealing and presenting their case in full. Indeed, there is no indication in the appellant's own statement that the Council's actions have caused injustice. Therefore, no prejudice has been demonstrated.
12. For these reasons, I find that the notice was issued and served as required by section 172. As a result, the appeal on ground (e) fails.

Ground (b)

13. 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 have not occurred. 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 have not occurred.
14. In essence, the enforcement notice states two matters: (i) a material change of use of the land to the parking of motor vehicles, and (ii) operational development comprising the creation of a new vehicular access, erection of fencing, and laying of hardstanding. It is convenient to consider these matters in turn, starting with the alleged material change in the use of the land.
15. The appellant claims that the site has not been used for the parking of vehicles but has instead been used for access to Marlow Water Ski Club which is to the north of the appeal site. The appellant states that the site was previously occupied and used by Network Rail as a '*compound area accommodating contractor's vehicle parking, accommodation and welfare facilities including storage of materials, plant, equipment, vehicles, machines, tools and goods*'. A copy of a licence agreement between the appellant and Network Rail is provided which stipulates a licence period of between 19 October 2020 and 18 December 2020.
16. I observed at my site visit that the appeal site had no vehicles parked upon it and had its access gate locked. However, for the purpose of clarification, ground (b) is worded in the past tense, and the question is whether the breach had occurred by the date of issue of the enforcement notice.
17. The Council have provided a photograph purported to have been taken on the 24 March 2022 which clearly shows the appeal site being used for the parking of motor vehicles. The appellant has not provided any comment in relation to this photograph. Although I acknowledge that the photograph represents a

snapshot in time and does not detail why the vehicles were parked on site, it nevertheless sufficiently demonstrates that the land had been used for the parking of motor vehicles prior to the issue of the notice. Even if this use has since ceased, the breach will have occurred as a matter of fact. I therefore conclude from the evidence before me and on the balance of probability that the material change of use of the land as alleged in the notice has occurred as a matter of fact.

18. In relation to the operational development alleged, there is no dispute between the parties that the laying of hardstanding has occurred. This was also clear from my site visit. The appellant contends though that the erection of fencing and creation of a vehicular access have not occurred.
19. The enforcement notice plan includes a dotted line around the perimeter of the appeal site which is said to show the approximate position of the fencing erected. There was however no evidence of this fencing on the site at the time of my visit. Given the absence of any evidence that demonstrates that fencing had been erected on site prior to the issue of the notice, I find on the balance of probability that the alleged breach of planning control comprising the erection of fencing had not occurred.
20. The notice also alleges the undertaking of engineering operations to create a new vehicular access. It is clear though from the evidence that there was an existing vehicular access onto the appeal site prior to the unauthorised development taking place. This includes Google Street View images provided by the Council dated 2008 and 2018 that show an existing vehicular access to the site through a timber gate. This is further supported by Google Earth images, including those dated 2004 and 2010 contained within the appellant's Preliminary Ecological Appraisal, which show the appeal site prior to the unauthorised development taking place. In these images a worn track is clearly evident from the vehicular access across the site to the Water Ski Club.
21. The evidence shows that there is an existing vehicular access and, moreover, that the works that have been undertaken recently specifically in relation to the access have not, in my judgment, facilitated any material change of use of the site to the parking of motor vehicles. As a result, I find that the creation of a vehicular access as alleged in the notice did not occur.
22. Accordingly, the appeal on ground (b) succeeds insofar as it relates to the erection of fencing and creation of a vehicular access. I will correct the notice to remove those elements of the allegation along with the associated requirements.

Ground (a) and the deemed planning application

23. This ground now falls to be considered on the basis of the allegation as corrected pursuant to ground (b). The deemed planning application is for a material change of use of the land for the parking of motor vehicles, and integral to that use, the laying of hardstanding. Despite the corrected description, the Council's reasons for issuing the notice all remain relevant.

Main Issues

24. Consequently, the main issues are:

- whether the development is inappropriate development in the Green Belt for the purposes of the Framework and any relevant development plan policies;
- the effect of the development on the character and appearance of the area;
- the effect of the development on Little Marlow Lakes Country Park;
- the effect of the development upon biodiversity and protected species;
- the effect of the development on existing trees; and
- if the development is inappropriate development, 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 it.

Reasons

Whether the development is inappropriate development

25. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence. Paragraph 152 of the Framework states that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. Policies CP8 and DM42 of the Wycombe District Local Plan (adopted August 2019) (WDLP) broadly conform to the general thrust of the national Green Belt policy.
26. The appeal site is located to the north of Fieldhouse Lane and is largely covered by hardstanding. It is apparent from the evidence before me that the site was previously an area of open land largely free from any built development, with trees and vegetation found across the site along with a worn track providing access to the Water Ski Club to the north.
27. The Framework directs that development within the Green Belt is inappropriate, with the exception of the types of development set out in paragraphs 154 and 155. Paragraph 155 of the Framework identifies certain forms of development, other than the construction of new buildings, that are not inappropriate in the Green Belt. This is subject to their preserving the openness of the Green Belt and not conflicting with the purposes of including land within it. Included, at 155 (e), are “material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds)”.
28. The words ‘such as’ indicate that 155 (e) is not an exhaustive list of uses that may be found to be not inappropriate. However, the exclusion it provides should only apply to uses that compare closely with the examples given. To my mind, those examples are defined by the presence of green infrastructure throughout the site, which the development does not achieve. Consequently, the use of the land for the parking of motor vehicles constitutes inappropriate development within the Green Belt. It is thus harmful by definition and should only be approved in very special circumstances.
29. The appellant also asserts that the hardstanding area represents an engineering operation and therefore meets the exception listed at paragraph 155 (b) of the Framework.

30. In respect of openness and not conflicting with the purposes of including land within the Green Belt, openness can be perceived both spatially and visually. The hardstanding area, which is capable of accommodating a large number of vehicles, is considerable in size and by occupying space that was previously undeveloped land has inevitably resulted in the significant reduction of the spatial openness of the site. Although there were no vehicles present at the time of my visit, the parking of vehicles on the site would only result in a further loss of spatial openness.
31. Despite the spatial reduction in the openness of the Green Belt, there is a much more limited visual reduction in openness. This is due to the appeal site being largely screened from external view by the existing bund which runs around part of the perimeter of the site. The hardstanding area would however be clearly visible by anyone accessing or using the Water Ski Club. As a result, the hardstanding and any vehicles which may be parked on the site are not visually prominent in the wider area. Whilst the visual harm to openness is therefore limited, there is nevertheless harm arising from the inappropriate development.
32. There are other considerations which are relevant when assessing the impact of the development on openness. The first is the frequency of the use. The evidence before me suggests that the site is not currently used continually for the parking of vehicles. The hardstanding area however is a permanent and clearly man-made feature that is appreciably and noticeably different to the pre-existing situation. This difference would be further exacerbated on the occasions when vehicles are parked upon the site.
33. Among the purposes of including land in the Green Belt is to assist in safeguarding the countryside from encroachment as set out under paragraph 143 (c). Given the scale of the hardstanding along with the nature of the vehicle parking use, I find that the development has an urbanising effect which runs contrary to the purpose of safeguarding the countryside from encroachment.
34. For the reasons given above, I conclude that the development does not fall within the exceptions outlined in the Framework and would be in conflict with Policies CP8 and DM42 of the WDLP. Accordingly, the development is inappropriate development, which, by its very definition is harmful to the Green Belt and should not be approved except in very special circumstances.

Character and Appearance

35. There are notable visual intrusions from urban forms of development and infrastructure in the vicinity of the site, including the nearby hotel complex. Even so, the predominantly rural character of the surrounding land gives the area a definite rural setting. From the available evidence it is apparent that the site surface possessed largely open and vegetated characteristics prior to the unauthorised development. This meant that in both a visual and physical sense the site related well to its rural setting.
36. The appeal site is now largely enclosed by a substantial bund which runs around the southern and eastern perimeter of the site along with trees and planting. Consequently, although the development will clearly be visible by users of the Water Ski Club, views into the site from external vantage points are generally well screened.

37. However, the achievement of good design is not limited to only the aesthetic appearance, but also its integration into the character of the area. Notwithstanding the presence of the nearby hotel and rugby club, the overall character is rural with large areas of green infrastructure. The wide expanse of hardstanding across the site results in a harsh and urbanised appearance that is at odds with the prevailing character of the area. Any use of the site for the parking of vehicles would only serve to exacerbate this harm.
38. The development therefore causes harm to the character and appearance of the area, and conflicts with Policies CP9, DM35, and DM37 of the WDLF. These seek, amongst other things, that all developments achieve a high quality of design which improves the character of the area and the way it functions.

Little Marlow Lakes Country Park

39. The appeal site falls within Little Marlow Lakes Country Park, a country park which includes several former gravel pits and areas of woodland. The supporting text to Policy RUR4 of the WDLF identifies that the main purpose of the park is to provide and improve opportunities for the enjoyment of the countryside by the public.
40. Policy RUR4 further states that, amongst other things, the country park is allocated for outdoor recreation, and that any development will be required to provide safe, convenient, and direct access to Marlow and Bourne End for pedestrians, cyclists, and disabled users. The Little Gravel Pits Supplementary Planning Guidance (March 2002) (SPG) identifies the appeal site as a potential development area, albeit for a use related to leisure and recreation.
41. The appellant contends that as there is an access through the site to Marlow Water Ski Club, the site is therefore accessible to the public and contributes towards the community use of the Country Park. However, this access was existing in any event and has not been facilitated by the development. There is no evidence that the development, namely the material change of use of the land to the parking of vehicles and laying of hardstanding, is related to leisure or recreation. Considering the large expanse of hardstanding and lack of green infrastructure at the appeal site, I do not agree with the appellant's assertion that an outdoor recreational use would likely result in a less visually permeable form of development or that it would have a greater visual impact. Policy RUR4 also specifically states that car parking facilities should be provided in the east side of the park, whereas the appeal site is located towards the western side.
42. Furthermore, the development does not currently provide safe, convenient, and direct access to Marlow and Bourne End for pedestrians, cyclists, and disabled users. The appellant refers to refused planning application 22/08240/FUL ("the 2022 application") which is said to have included pedestrian and cycle connections from the site, therefore complying with this part of Policy RUR4. However, I do not have sufficient information before me with regards to either the specific details of any such connections, including its specific route or construction, or how it would be delivered and secured going forward.
43. The development also fails to provide publicly accessible open space or contribute to the continued development and long-term management of the country park. Accordingly, the development fails to meet the overall aims and objectives of the country park, and is in conflict with Policy RUR4, and guidance contained within the SPG.

44. The Council has also referred to Policy CP7 of the WDLP which sets out the key infrastructure requirements necessary to support growth. It further states that provision will be made for new infrastructure to support growth through planning obligations and other funding streams. However, given the type and scale of the development subject of this appeal, I do not find that there is any direct conflict with the policy.

Biodiversity and Protected Species

45. The Council's reasons for issuing the enforcement notice includes concerns that the development has an adverse impact on protected species and/or their habitats, and that it has not been demonstrated that the development has led to a measurable net gain in biodiversity.
46. Paragraph 180 of the Framework requires development to provide net gains for biodiversity, however, it does not indicate how much gain is required. Similarly, whilst the development plan policies referred to by the Council require there to be biodiversity enhancements or a net gain, the level of that gain is not specified. Although from January 2024, The Environment Act 2021 requires all sites, except small sites, to deliver at least 10% biodiversity net gain, this does not apply to planning applications submitted prior to this date. Nevertheless, both the relevant development plan policies and the Framework require the development to provide some net gain.
47. As part of the appeal the appellant has provided a Biodiversity Net Gain Assessment (NGA). Though the Council have raised concerns over the baseline and calculations used in the NGA, even when taking the appellant's calculations, it concludes that the development results in a biodiversity net loss of 6.9%. The NGA further concludes that there is insufficient land available within the site to provide the onsite biodiversity required. Given the wide expanse of hardstanding across the site, I find no reason to disagree with this view.
48. In view of the above it is stated that the appellant is reviewing off-site alternatives to deliver the necessary biodiversity net gain (BNG) or, if no off-site alternatives can be found, that the appellant will review options to deliver BNG through the purchase of biodiversity credits. There is no scheme for the off-site provision of BNG before me, and at this stage it is unclear how the required BNG would be achieved. The appellant asserts that this could be secured with a suitable planning condition.
49. However, noting advice regarding the use of planning conditions set out in the PPG, a negatively worded condition limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases. Such a condition should only be used in exceptional circumstances. This is not the case here. I do not therefore consider that in this instance the matter of BNG can be suitably addressed by planning condition.
50. With regards to the effect of the development on protected species, the appellant has undertaken a Preliminary Ecological Appraisal (PEA) which concluded that, subject to all outlined mitigation being carried out, there would be no impact to protected species or their habitats. The Council however contend that the PEA is not based on the condition of the site prior to any works taking place. In any event, I note that when approving the 2018

permission the Council considered that the development was acceptable, subject to securing ecological enhancements, including benefits for birds, invertebrates, reptiles, and other species. Accordingly, I see no reason why a similar suitable planning condition could not be imposed on any future grant of planning permission to secure any mitigation required and to ensure there are no adverse impacts upon protected species.

51. Therefore, on the basis of the information before me, I am unable to conclude that the proposal does not adversely affect biodiversity or that it would deliver a net gain in biodiversity. It therefore conflicts with Policies CP10, RUR4, and DM34 of the WDLP, and Policies DM11, DM13, and DM14 of the Council's Adopted Delivery and Site Allocations Plan for Town Centres and Managing Development (adopted July 2013) (SAP). Together these require development to protect and enhance biodiversity to ensure a net gain in biodiversity within individual development proposals. It would also not comply with the Framework which requires development to minimise impacts on and provide net gains for biodiversity.

Trees

52. The Council's fifth reason for issuing the notice relates to the impact that the development has on existing trees, including those which are covered by Tree Preservation Orders. Although the Council states in its reasons for issuing the notice that, without contrary evidence, the development would have an adverse impact upon existing trees, it is not explained what that adverse impact is or would be.
53. Whilst the Council have referred to what they describe as outdated arboricultural information being submitted, a Tree Survey and Preliminary Arboricultural Assessment (AIA) dated December 2023 has been provided by the appellant as part of the appeal submissions. Overall, the AIA concluded that there should be no-long term negative impact to the retained trees. Most of the recommendations included in the AIA related to tree protection measures that would be required during works to form a pedestrian footpath and cycle route proposed as part of the 2022 application. There is no indication in the AIA that the retention of the existing development on the appeal site is, or will have, an adverse impact on any retained trees.
54. Overall, I accept the appellant's case in relation to the trees and do not consider that the Council has adequately explained how the development subject of the enforcement notice has an adverse impact on retained trees on the site. The development therefore accords with Policies CP10, RUR4, and DM34 of the WDLP, and Policy DM11 of the SAP. These seek, amongst other things, to ensure that developments enhance green infrastructure and that trees are protected and retained.

Other Considerations

55. Given the appellant's contention that the use of the land for the parking of vehicles had not occurred, and that the hardstanding was not inappropriate development in the Green Belt, no specific other considerations have been put forward in the appeal statement of case. Nevertheless, the appellant has provided a Parking Needs Assessment dated November 2022, with a further addendum dated December 2023.

56. Both documents detail a significant shortfall of parking spaces at the nearby Globe Business Park. The latest survey revealed that 179 cars were parked on the appeal site, which currently assists in alleviating some of the parking stresses in the area. It is further considered that if the business park was at full capacity, then there would be a need for around 365 parking spaces. The Council accepts that there is a clear and known parking issue at Globe Business Park.
57. Consequently, although it appears that the appeal site is not currently being used for parking by any businesses at Globe Business Park, it is apparent that the use of the site for that purpose would assist in alleviating the parking issue and provide support for those businesses and the jobs they provide. However, given the appeal sites Green Belt location, very little evidence has been provided to demonstrate that there are no other suitable sites or alternative options available. On that basis, I afford moderate weight in favour of the social and economic benefits of the development.

Planning Balance and Conclusion

58. The Framework states that inappropriate development is, by definition, harmful to the Green Belt and should not be supported except in very special circumstances. It goes on to advise that substantial weight should be given to any harm to the Green Belt and that very special circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
59. In this case the Green Belt harm relates to the significant loss of openness in a spatial sense, along with some limited harm to openness in visual terms and Green Belt purpose (c). Taken together this amounts to a matter of substantial weight, to which I must also add the harm to the character and appearance of the area, biodiversity, and the policy conflict in relation to Little Marlow Lakes Country Park.
60. The social and economic benefits of the development attract moderate positive weight in favour of the development. However, these considerations do not outweigh the substantial weight that I have given to the harm caused to the Green Belt and the additional harm identified. Consequently, the very special circumstances necessary to justify the development do not exist.
61. For the reasons set out above, the development conflicts with the development plan when read as a whole, and the Framework. Material considerations do not indicate that a decision should be taken other than in accordance with that plan. Having considered all other matters raised, I therefore conclude that the appeal on ground (a) should be dismissed, and planning permission be refused on the deemed application.

Ground (f)

62. An appeal on ground (f) is that the steps required to be taken exceed what is necessary to remedy the breach of planning control, or as the case may be, the injury to amenity. The notice seeks to remedy the breach of planning control by requiring the cessation of the unauthorised use and the removal of the operational development.
63. In light of my findings on the ground (b) appeal above, the undertaking of engineering operations to create a vehicular access and the erection of fencing

have not occurred and have been deleted from the allegation. Accordingly, requirements 3 and 4 in section 5 of the notice should also be deleted.

64. With regards to the remaining requirements, the purpose of the notice is to remedy the breach of planning control, and no lesser steps other than those set out would achieve that purpose. For these reasons the appeal on ground (f) succeeds to a limited extent

Conclusion

65. For the reasons given above the appeal on grounds (b) and (f) succeed in part. I have upheld the enforcement notice with corrections and refuse to grant planning permission on the deemed application.

David Jones

INSPECTOR