

Appeal Decision

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 28th May 2024

Appeal Ref: APP/X1545/C/22/3312131

The Lakes, Hall Road/Battle Rise, Heybridge, Essex, CM9 4PH (also known as Gravel Pits) ("The Land"), shown edged in red on the plan attached to the notice (Annex 1).

- 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 James Purdy (J & R Construction Services Ltd) against an enforcement notice issued by Maldon District Council.
 - The enforcement notice, Ref ENF/19/00116/CU-2, was issued on 7 November 2022.
 - The breach of planning control as alleged in the notice is the unauthorised use of lakes for informal recreational fishing purposes.
 - The requirement of the notice is to cease the unauthorised use of the Land edged in red on the attached plan for informal recreational fishing purposes in perpetuity.
 - The period for compliance with the requirement is 1 calendar month.
 - The appeal is proceeding on the grounds set out in section 174(2) (d) (e) of the Town and Country Planning Act 1990 as amended (the Act).
-

Decision

1. The appeal is allowed and the enforcement notice is quashed.

Costs Application

2. An application for an award of costs was made by the appellant against Maldon District Council. That application is the subject of a separate Decision.

Procedural Matters

3. Due to the nature of the legal grounds of appeal pursued, being solely concerned with how copies of the notice were served and how the land has been historically used, it was not necessary for me to conduct a site visit to make findings on the issues involved. The Decision was made on the submitted evidence with no prejudice caused to the parties.
4. The Council did not provide any comments in response or rebuttal to the appellant's Statement of Case under the appeal procedure¹. A letter had been sent on 12 January 2023 inviting comments on the appellant's 80 page submission (which included 32 statutory declarations and a number of pieces of documentary evidence). Neither did the Council provide any comments in response to third party appeal submissions or upon the appellant's costs claim.
5. While I have read the representations of interested third parties carefully, the merits of the development (or indeed, the demerits, given the extensive comments received in opposition to the unauthorised use) are not under consideration. However, the evidence as to historic use has been given weight.

¹ The Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002

Ground (e)

6. For success under this ground, the appellant must satisfy me on the balance of probabilities that copies of the enforcement notice were not served as required by section 172 of the Act. That section requires that copies should be served on the owner and occupier of the land to which the notice 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.
7. I am satisfied that the requirements of the above section were met as the Council served copies of the notice on the appellant and his company, as the owners of the site, and I have seen no substantive evidence that there are any settled occupiers of the land. I also note that a copy of the notice was affixed conspicuously to a gatepost at a significant site entrance alerting members of the public and users of the land as to the enforcement action.
8. Even were I not so satisfied, I would not have found any substantial prejudice² in this case as the appellant has been able to exercise full rights of appeal against the notice (and with the supporting evidence of users of the land, to which he refers).
9. Accordingly, ground (e) does not succeed.

Ground (d)

10. For an appeal to succeed under this ground, I must be satisfied on the balance of balance of probabilities that no enforcement action was possible on the date the notice was issued.
11. Section 171B(3) of the Act provides that, for the breach of planning control constituted by the unauthorised change of use, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach.
12. Therefore, as the notice was issued on 7 November 2022, the targeted use was immune from enforcement action if it was undertaken continuously from at least 7 November 2012 until the date the notice was issued ('the relevant period').
13. The targeted use is "*use of lakes for informal recreational fishing purposes*"³. The appellant's case, supported by evidence, is that this use has occurred continuously for at least the relevant period (far longer it is said). Contrary to suggestion by the Council, it matters not whether the use was permitted (or charged) by the landowner, just whether the land use alleged in the notice occurred over the relevant period (it appears common ground that there is a history of both consented and non-consented fishing).
14. It is a well-established legal principle⁴ that - if the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable - there is no good reason to dismiss this legal ground of appeal provided the appellant's evidence alone is sufficiently precise and unambiguous to justify success on the balance of probabilities.

² I may disregard non-service under section 176(5) of the Act provided that neither the appellant nor the person not served have been substantially prejudiced.

³ It is important to underline that this is the targeted use, not some other use.

⁴ *Gabbitts v SSE & Newham LBC* [1985] JPL 630

Council's evidence in contradiction to the appeal

15. The Council's case is that the alleged material change of use did not occur until "on or around the start of June 2020 (give or take a month)". The stated basis for that view is that, despite a complaint-led enforcement investigation during the relevant period, the reported activities could have amounted to permitted development by virtue of a temporary change of use of land for not more than 28 days in total in any calendar year⁵.
16. However, while making that assertion, the Council has not provided any substantive evidence into this appeal so that I might consider whether its conclusion in that regard was well-founded. For instance, it has not provided detail of the earlier complaint(s) made during the relevant period or of the evidence collected from the resultant enforcement investigation said to support a view that enforcement action could not be taken. It did not produce such evidence in response to the appellant's initial grounds of appeal, nor in response to the significant evidence provided in opposition to the Council's position within the appellant's Statement of Case.

Evidence of others in contradiction to the appeal

17. I do not find that representations from third parties contradict the appellant's case. Indeed, they provide significant evidence from residents living nearby of the alleged use of the site over the relevant period. For instance:

"Around 2012, vehicles began to appear around the site, disgorging fishermen who, to make room for their tents and tackle began removing sections of the very reeds planted out to comply with the planning consent⁶. Fishing increased⁷, as did frustration on the part of the locals as disturbance and damage increased." (Freshwater Crescent Resident)

"It is reasonable to expect that given that one of the directors of the company, J&R Construction Services Ltd, to my knowledge, has applied for planning permission for The Lakes to be used for fishing purposes on a number of occasions (16/00300/FUL, 18/00061/FUL), and has been refused permission on each occasion and in the latter case had an appeal dismissed, that they were fully aware that recreational fishing was not permitted on the land and they could have, at that stage, and well before issue of the Enforcement Notice, taken action to deny access to the site to prevent the planning breach. However, fishing activity continued on the site despite it not being permitted..." (Northey View Resident)

Evidence of the appellant

18. The appellant has submitted 32 statutory declarations, from owners of the land past and present (one who operated a Fishing Club from 1987 to 1996) and from those who declare they have used the land ("regularly", "frequently" and "continuously") for fishing over the years (be it as it may with or without permission; the earliest date being 1978 and with most declaring that they have used the land this way for - at least- the entire relevant period).

⁵ Town and Country Planning (General Permitted Development) (England) Order 2015; Schedule 2, Part 4, Class B

⁶ I understand the reference to be to the 'Redevelopment of The Chalet Site for 124 dwellings. Public open space, landscaping, new highways and associated ancillary development' (06/00482/FUL). This consent related to a neighbouring site but with a planning agreement for the appeal site to be managed as a nature reserve with the provision of permissive access around the lakes.

⁷ This is suggestive that the site was in use for fishing before 2012.

19. The statutory declarations are solemn declarations of the truth made under an Act of Parliament and witnessed by a solicitor. Due to this factor, their large number, their consistency with each other - and their sufficiently precise, unambiguous and relevant contents - I give them substantial weight as evidence.
20. I have also been provided with copies of correspondence to and from the Council (2012-2016) which refers to (what appears to be a common awareness of) the use of the land for fishing. This evidence is consistent with the contents of the statutory declarations, and I afford it significant weight.
21. In all, the appellant's evidence is of substantial weight and is sufficiently precise and unambiguous. The Council has not submitted into the appeal sufficient substantive evidence of its own (nor is there from others) to contradict or otherwise make the appellant's version of events less than probable. Accordingly, I am satisfied on the balance of probabilities that the use alleged by the notice was undertaken continuously for a 10 year period from at least before 7 November 2012. By the time the notice was issued, immunity had been acquired by virtue of Section 171B(3) of the Act and it was too late for the Council to take enforcement action.

Conclusion

22. For the reasons given above I conclude that the appeal should succeed on ground (d). Accordingly, the enforcement notice will be quashed.

Andrew Walker

INSPECTOR