



Appeal Decisions

Inquiry Held on 7, 8, 9 and 10 May 2024

Site visit made on 22 May 2024

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

an Inspector appointed by the Secretary of State

Decision date: 24th June 2024

Appeal A: Ref APP/C3620/C/23/3319368

Appeal B: Ref APP/C3620/C/23/3319369

Appeal C: Ref APP/C3620/C/23/3319370

Brook Willow Farm, Motorcross Track, Woodlands Road, Leatherhead, Surrey KT22 0AN and shown edged red on the plan attached to the notice

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mr Bruce Burgess, Appeal B is made by Mrs Cathy Martin and Appeal C is made by Mr Blake Burgess against an enforcement notice issued by Mole Valley District Council.
 - The enforcement notice, numbered 2020/0126/ENF, was issued on 13 March 2023.
 - The breach of planning control as alleged in the notice is:
Without Planning Permission the material change of use of the land for a motorcross track with associated jumps and rollovers.
 - The requirements and compliance periods of the notice are:
 - i) To cease the use of the Land as a Motorcross track (28 days)
 - ii) To remove the jumps, rollovers and any other paraphernalia associated with the use of the Land as a Motorcross track (6 months); and
 - iii) To restore the land to its former condition before the breach took place (6 months).
 - The appeals are proceeding on the ground set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended (the Act).
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Decisions

1. It is directed that the enforcement notice be corrected by replacing “remove” with “remove” in the second requirement, and by replacing “motorcross” with “motocross” where that word occurs throughout the notice. Subject to these corrections, the appeals are allowed and the enforcement notice is quashed.

Costs Applications

2. Applications for costs were made by Mr Bruce Burgess, Mrs Cathy Martin and Mr Blake Burgess against Mole Valley District Council. These applications are the subjects of separate Decisions.

Procedural Matters

3. To put the notice in order (before quashing it), I am correcting simple typographical errors (“remove”, “motorcross”) without any injustice resulting.
4. For the avoidance of doubt, the single issue before me to determine is whether immunity has been acquired for the unauthorised change of use of the land. It is not for me to consider the merits (or demerits) of that use, such as any effects on the living conditions of local residents as regards noise. The Council has statutory powers of abatement, should any noise nuisance exist or arise.

Reasons

5. For success on ground (d), the appellants must satisfy me on the balance of probabilities that no enforcement action was possible in respect of the alleged breach of planning control at the date the notice was issued (13 March 2023).
6. Section 171B(3) of the Act provides that no enforcement action may be taken after the end of a period of 10 years ('the relevant period') beginning with the date of the breach. Therefore, the appeals must succeed if I am satisfied to the necessary standard of proof that the land was put to use for a motocross track on a date before 13 March 2013 and that it was used continuously for that use over the relevant period¹.
7. The Council's Statement of Case (SOC) says that the appellants' claim that the track was in use in August 2008 is 'plausible'². Given that this date is supported by the evidence of the response to the Planning Contravention Notice (PCN)³, evidence given under oath by the appellants at the Inquiry and by the aerial photography – which satisfies me that a motocross track was in place when the May 2009 image was taken – I agree it is the relevant starting date for the use.
8. The Council's Inquiry position was that initial use as a motocross track may have been ancillary to a dwellinghouse or perhaps not even development⁴. However, I reject those arguments (which are largely unsupported, and upon which the enforcement notice itself is silent⁵). Based on everything I have seen and heard, the land is a former agricultural field some distance away from any dwellinghouse (including that of the appellants) and it is not intimately associated with any domestic residence so as to form part of a curtilage. Further, and in any event, I do not consider that the riding of motocross vehicles on a field in this context would have been a use ordinarily ancillary to the use of a dwellinghouse nor functionally and physically associated with it. Moreover, I accept the evidence of Mrs Martin (including that within her PCN response and proof) that since the track was created the land has been used by the appellants and their 'friends and friends of friends' to practice their sport^{6,7}. On that basis, I am satisfied that such use of the former agricultural field would have been a material change of use of the land from August 2008 due to the definable change in the character of the use made of the land. That date is therefore the starting date for the development targeted by the notice (and the date that the planning unit was created).
9. Further, I find the aerial photography persuasive that such use was continuous over the relevant period. Despite the poor quality of some of the images (particularly in the middle of the date range) a motocross track upon the appeal site clearly exists in each photograph within the 13-year period found in Appendix 4 of the Council's proof (May 2009 to May 2022).

¹ The Council confirmed at the Inquiry that it was not part of its case that a material change of use had occurred through the 'intensification' of use as a motocross track, despite that word being used in its Statement of Case. I also note that the notice did not allege a material change of use through intensification in Section 3.

² Within its context, I take that word at its ordinary meaning – *seeming reasonable or probable*.

³ To which I give significant weight, due to the warning the PCN gave of a criminal conviction and penalties for giving false or misleading information.

⁴ As understood by Section 55 of the Act and thereby requiring planning permission.

⁵ Of note is that the PCN, dated 22 December 2020, said that the apparent breach was a material change of use from agricultural – not from a primary residential use (and, also, not an intensification of motocross use).

⁶ This is entirely consistent with the PCN response where Mrs Martin explained that 'we ride our motocross bikes' and that there was no business use.

⁷ And subsequent use by groups of children, including from 2021 by vulnerable children and young people as part of a Surrey County Council project.

10. While broadly of the same basic shape over much of its history⁸, the changes to the track over the years in my view only go to strengthen the appellants' case that it has been continually used over a long period. Over time the track seems to have become wider and more pronounced, with the land scarified, and I find that consistent with witness evidence⁹ which similarly points to a regular and continuous use as a motocross track for at least the relevant period. While grass has grown on and up to the track in some of the photographs, I find as a matter of fact and degree that this is likely to be a natural result of the track's locus within a verdant field and it does not reliably indicate any break in use – the track becomes grass-free in later years which is consistent with Mr Blake Burgess's evidence that he purchased and used a tractor to harrow the track.
11. Further, there is nothing I can see that suggests any other use over the relevant period. Significantly, I am satisfied that had a council enforcement officer visited the site at any of the dates associated with the photographs they would have most likely formed a view that the land was in use as a motocross track. Continuity of use of the land is the issue, not simply the continual presence of users or daily activity.
12. I have not seen any site visit evidence from the Council's officers, or from others, to contradict the appellants' version of events. Rather, the case in opposition to the appellants' claim of historical use and acquired immunity largely consists of complaints made by third parties about noise considered to be coming from the site in more recent years.
13. I have heard from elected members and other witnesses that noise became of concern to some local residents from 2018/2019. However, the weight I give to that evidence is tempered by the fact that – according to the Council's own appeal submissions – no complaint or referral appears to have been made to the Council (for investigation by its officers through the statutory noise nuisance abatement function, for instance) until 2020. In my mind, that casts into doubt the extent of perceived noise issues until then.
14. It *may* be that there was an increase in environmental noise from around this period or, as set out in the Council's SOC, there may be other reasons for emerging complaints:

"The first complaint received by the Council occurred in the summer of 2020. It is acknowledged at this time the country was in lock down, and the noise from the adjacent M25, the adjacent Sewage Treatment Works and River Lane Playing fields, would not have been so apparent, therefore, the noise of the track could have been perceived to be louder due to the lock down lack of day to day noise. This is considered to be a reasonable consideration as to why there had not been any complaints to the use of the track earlier."

The lockdown may also explain why Mr Kirby, speaking on behalf of residents on River Walk (a development I understand to have been completed in 2018) gave evidence that since Spring 2020 and not before, he and others experienced noise from the site which was perceived to steadily increase. In this context I am mindful of the advice of the Council's scientific officer that once a noise is identified as annoying, sensitivity to it will increase.

⁸ The early photographs possibly show that the track was established, at least in part, by the riding of quad bikes amongst the motocross vehicles in use (these vehicles are mentioned in the response to the PCN, seen in photographs and referred to in the written evidence).

⁹ Some of which have summarised in the table in pages 15-17 of the appellants' closing submissions.

Another significant factor in this regard is the fact that – in August and September 2020 – Mr Baxendale built a new ‘Endurocross’ track(s) next to the appeal site upon which his son practiced for a professional career and upon which he operated a business which ran training days for paying customers (*Southern Off Road*). I also find it likely that this was a reason for the emerging complaints that year.

15. I am therefore unpersuaded that the lack of noise complaints before they were first made carries any significant weight in contradicting the appellants’ claim of continuous motocross track use from 2008. In my judgement, the complaints in more recent years can be explained by the above factors and do not make the appellants’ version of events less than likely.
16. As far as it is relevant, and I mention simply due to the reliance placed by the Council on the existence of noise complaints as an indicator of external impacts said to be associated with a contemporaneous material change of use, I have seen no evidence that the Council has at any time considered noise from the site to have been so significant that it has created a statutory noise nuisance (triggering the Council’s statutory duty to issue a noise abatement notice or take other steps according to environmental protection legislation)¹⁰. Further, I have seen evidence from local residents who do not seem to have been impacted by noise to any significant degree. In any event, even had use of the site generated more noise in recent years (and notwithstanding that the Council at the Inquiry was explicit that no intensification had occurred in the legal sense) that does not necessitate a finding that the character of the use of the land had materially changed at that time.
17. On the same theme, even had Mrs Martin’s social media posts and business cards been successful in creating a commercial element (although there is insufficient evidence of that) it does not follow that the character of the use would have necessarily been materially different to that before. However, I found her evidence under oath credible and find that she continued to operate the track as a non-commercial venture. There is no evidence I have seen that, for instance, the advertised camping took place.
18. In addition to the significant weight I place upon the aerial photographs, evidence of continuity is further amply demonstrated by the large amount of first-hand witness evidence of track use over the relevant years (just some of which have been summarised in the table in pages 15-17 of the appellants’ closing submissions), social media posts, a number of corroborating photographs¹¹ and a track diary compiled by Mrs Martin.
19. The track diary covers the period August 2008 to July 2023 and provides details of track riders (and other information) relating to hundreds of dates broken down month by month over the period. I give the track diary significant weight as evidence of what Mrs Martin has collated from various sources¹² – bearing in mind this is not a business which would ordinarily keep various formal records and returns, but largely a community of friends and acquaintances with a common interest. Nevertheless, it is a detailed log with a

¹⁰ Mr Thomas’s evidence that noise from motorbike use as heard in his parents’ garden dramatically changed in 2018 (from irritation before that date to preventing sitting in the garden after) has to be seen within that context. It is also, despite the different home locations, apparently at odds with Mr Kirby’s evidence of quiet before 2020.

¹¹ Notwithstanding difficulties associating a proportion of the photographs with the appeal site, others can be by reference to the nearby telecommunications mast and waste management centre in the images.

¹² Including personal family calendars, notwithstanding that I have not seen the original entries in all of these.

large number of entries covering the breadth of 15 years with specific and clear information as to use of the site over the relevant period (and more).

20. The Council has been critical of the fact that many entries in the diary have not been accompanied by supporting material (for instance, from Facebook) but in my view that does not reduce the evidential value of the track diary to any significant degree. On the balance of probability, having heard evidence under oath, I accept as a matter of fact and degree that the track diary is a sufficiently reliable record of track use on the dates it specifies. I further accept what Mrs Martin has said about her not being 'technically savvy' as regards to historic Facebook records. I also accept as a plausible explanation what Mr Blake Burgess said at the Inquiry about date discrepancies of photographs due to the transfer of images between devices.
21. While the Council has highlighted other dates that the track was used – as, for instance indicated by complaint records and other documents – it does not mean that track diary in itself as a piece of evidence is not sufficiently precise and unambiguous. Indeed, I find it so (as I do the appellants' evidence as a whole) and give it significant weight as evidence of what it contains even if it is not totally comprehensive as to the days the track was used. Indeed, the further dates only add more weight to the appellants' claim of continuity of use. Additionally, the evidential weight of the track diary is strengthened by dates of complaints which coincide and corroborate what has been written within it.
22. I interpret Mrs Martin's email of 12 June 2020 (to the Council's environmental health department) as referring to 2 years of riding at the times to which she refers (10am to 4pm) – and not to the number of years that the track has been in use. Indeed, her subsequent email of 21 June 2020 says that "I have been riding my track for over 10 years and no one has ever complained". This evidence supports the case of the appellants. A text message sent by Mrs Martin the same day to Mr Fahey has to be considered in this context, and I accept the evidence given under oath by Mrs Martin that it was a typographical error for her to write 2 years instead of 12 years.
23. For the above reasons, taking the evidence as a whole, I find that immunity from enforcement action had been acquired by the time the notice was issued through at least 10 years continuous use of the land as a motocross track. Indeed, I find that immunity had been acquired by the end of August 2018¹³.

Conclusion

24. For the above reasons, I conclude on the balance of probabilities that at the date that the enforcement notice was issued, the time for taking enforcement action had expired.
25. The appeals succeed on ground (d). The enforcement notice will be corrected and quashed.

Andrew Walker

INSPECTOR

¹³ Even were I not of that view – addressing Mr Thomas's point about the visibility of jumps in earlier aerial photographs, I am satisfied they can be seen in the March 2012 image (11 years before the notice).

APPEARANCES

FOR THE APPELLANTS: Kate Olley (Francis Taylor Building) instructed by Kingsley Smith Solicitors LLP

She called:

Cathy Martin
Anne Hopper
Talan Skeels-Piggins
Matthew Sayer
Lee Baxendale
Georgina Potter
Chris Rowell
Aaron Burgess
Blake Burgess

FOR THE LOCAL PLANNING AUTHORITY: Izindi Visagie (Ivy Legal Ltd) instructed by Mole Valley District Council

She called:

Izindi Visagie

INTERESTED PERSONS: Adam Thomas, Clive Turnbull, Richard Kirby, Councillor Hammond