

LAND AT MICKLEDEN EDGE, MIDHOPE MOOR, BRADFIELD

APP/M9496/C/18/3215789

APPELLANT'S STATEMENT OF CASE

1. The points and statutory grounds of appeal below are in the alternative.

Nullity

2. The appeal site is land in a site of special scientific interest. The appellant is an owner or occupier. The requirements in paragraph 5 of the enforcement notice require the appellant to carry out, or cause or permit to be carried out, an operation specified in the notification under section 28(1)(b) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) while the notification remains in force but without giving notification to Natural England. They thus require the appellant to contravene section 28E(1) of the 1981 Act, which is an offence under section 28P(1) of the same, and/or commit a section 28P(6) and/or (6A) offence.
3. An enforcement notice requiring the commission of a criminal offence is a nullity: McKay v Secretary of State [1994] JPL 806.
4. The enforcement notice is therefore a nullity, without legal effect. The Secretary of State (or his appointed Inspector) should conclude as much and then, in the usual way, decline jurisdiction and take no further action on the appeal.

Invalidity

5. The requirements of the enforcement notice need to be varied so as to require the appellant, prior to the carrying out of the steps, to give Natural England notice pursuant

to section 28E(1)(a) of the 1981 Act and fulfil one of the conditions specified in section 28E(3) of the same. They also need to be varied so as to avoid the appellant committing a 28P(1), (6) or (6A) offence and to require the appellant to undertake habitats regulations assessment pre-compliance.

6. The requirements of the enforcement notice also need to be varied so as to delete the reference to “peat bog” in paragraph 5d) and substitute an accurate description or descriptions.
7. However, varying the terms of the enforcement notice as set out (whether individually or in combination) will cause injustice to the appellant.
8. Given that the invalid enforcement notice cannot be remedied without causing injustice, the appeal should be allowed and the notice quashed.

Ground (a) appeal

9. In respect of both or either of the two breaches of planning control alleged in paragraph 3 of the enforcement notice, planning permission ought to be granted (permanently, or, in the alternative, temporarily).
10. The enforcement notice was issued on 21 September 2018, after the publication of the revised National Planning Policy Framework (“the Framework”) and which has since been superseded by the 2019 version. Paragraph 4 of the enforcement notice wrongly refers to paragraphs of the superseded original Framework.
11. The appellant will demonstrate that the reasons in paragraph 4b-d) of the enforcement notice are unfounded. The appeal development took place on and adjacent to a pre-existing track. It does not have a significant visual impact. It does conserve the landscape and scenic beauty of the National Park. Exceptions set out in the relevant

policies do apply. The appeal development does conserve and enhance valued landscape character. It has not resulted in a significant loss of habitat. It is unlikely to have led to compaction and hydrological damage. The appeal development has not had an adverse impact on the integrity of the SAC and SPA. It would not damage or destroy the special interest features for which the SSSI has been notified. By contrast, complying with the steps set out in paragraph 5 of the enforcement notice would destroy, damage or disturb special interest features for which the SSSI has been notified. The appeal development is directly connected with or necessary to the management of the European site; alternatively, it is unlikely to have a significant effect on the European site; alternatively, it will not adversely affect the integrity of the European site; alternatively, planning permission should be granted in any event. The appeal development is in accordance with the development plan, or else there are material considerations indicating that planning permission should be granted.

12. Natural England has entered into an Entry Level and Higher Level Stewardship Agreement for land including the appeal site. It has approved the Midhope Moors Moorland Management Plan. It has given consent for specified operations on land including the appeal site and the laying of the matting on the appeal site, pursuant to section 28E(3)(a) of the 1981 Act. It did not object to the appeal development subject to mitigation measures (which can be secured by planning condition).
13. The appeal development is of benefit to the moor and its restoration, conservation, enhancement and management. It also affords emergency services access in the event of a moorland fire. These benefits are to be weighed in the planning balance.
14. The appellant will seek to agree a list of proposed planning conditions with PDNPA.

Ground (f) appeal

15. There was a pre-existing track on the Land.
16. The appellant has laid geotextile matting and wooden log “rafts” on that pre-existing track.
17. The appellant can only be required to remove the geotextile matting and the wooden log “rafts”.
18. Paragraph 5 of the enforcement notice requires the appellant to do more than remove the geotextile matting and the wooden log “rafts”.
19. It follows that the steps required by the enforcement notice to be taken exceed what is necessary. The Secretary of State’s appointed Inspector reached the same conclusion in the Strines appeal,¹ in which the ground (f) appeal succeeded in part and the requirements of the enforcement notice were varied. The appellant will endeavour to agree with PDNPA, pre-inquiry, that its ground (f) appeal must be allowed and the requirements of the enforcement notice varied.

Other matters

20. Lest the Secretary of State (or his appointed Inspector) is minded, despite the ground (f) appeal, to include, in paragraph 5 of the enforcement notice, steps exceeding the removal of the geotextile matting and the wooden log “rafts” but in substitution for the existing steps a-f, or any of them, the appellant will provide evidence that the existing steps a-f will not work and will cause harm and it will also provide alternative steps including to complement retention of the geotextile matting and wooden log “rafts”.

¹ APP/M9496/C/18/3208720, dated 9 May 2019. The development and circumstances in that case are distinguishable from the development and circumstances in this case.

These alternative steps may also be material to the determination of the ground (a) appeal, whether in connection with planning conditions or otherwise. The appellant will discuss the following draft alternative steps with PDNPA in an attempt to reach agreement:

- a) Spray up to 20% of the existing grass sward with selective herbicide in the Spring following the Appeal Decision, followed by the re-seeding by hand of this area with good quality vernalised local heather. Additional herbicide spraying and re-seeding in the following Spring if heather establishment has not increased by 6% of the total area.
- b) Hand works to the geotextile matting on the 25m total length (6 short lengths) of vertically and horizontally unstable stretches pursuant to agreed protocols.
- c) Hand works to deploy coarse heather brash mini bales and small quantities of local soil to round off the ends of the wooden log ‘rafts’ to encourage further sediment to accumulate, and to encourage growth in the grooves and in the depressed areas between the individual poles, with the possible installation of two under “raft” drainage pipes.
- d) Targeted deployment of various *Sphagnum* plugs in the two wet flush areas with high organic matter content and also in the sediment areas around the wooden log “rafts” in the year following the Appeal Decision and annually thereafter for a defined period.
- e) Possible further *Sphagnum* plug deployment, but at a higher density than currently proposed, on the small areas of exposed peat face on the modified deep peat close to the south east origin of the track. This work to occur in the year following the Appeal Decision and annually thereafter for a defined period.

21. The enforcement notice was issued on 21 September 2018. PDNPA failed to serve with it a notice complying with regulation 37(3) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. The appellant wrote to PDNPA informing them and requesting they serve a regulation 37(3) notice. On 6 November 2018, PDNPA sent the appellant by first class post a letter and notice to comply with regulation 37(3). The appellant wrote to PDNPA that day, seeking clarification on eight points. On 16 November 2018, PDNPA sent an interim response. On 26 November 2018, the appellant requested a Secretary of State screening direction. On 8 March 2019, the Secretary of State directed that the appeal development is not EIA development. The appellant will refer to the terms of this screening direction, accompanying full statement of reasons and consultation responses in support of its appeal. On 16 July 2019, and supplementing its letter of 16 November 2018, PDNPA finally answered all the points in the appellant's 6 November 2018 letter. The appellant will refer to this correspondence in support of its appeal.
22. Although the appellant is not pursuing a ground (c) appeal, it reserves the right to contend other than in connection with this appeal that the appeal development (or similar) is not "development" within the meaning of section 55 of the Town and Country Planning Act 1990.
23. Given that there was a pre-existing track, the words "to form a track" in paragraph 3 of the enforcement notice should be deleted. The words "used in the construction of the track from the Land." in the first sentence of paragraph 5b) should be replaced with "in the laying of the geotextile matting." The words "used in the construction of the track" in the second sentence of paragraph 5b) should be replaced with "in the laying of the geotextile matting". These corrections will not cause injustice to the appellant or any other party.

Appeal procedure, witnesses and common ground

24. The appeal will be determined after a local inquiry.
25. The appellant intends to call 5 witnesses, to make good the points in this Statement of Case, covering: background and factual matters; landscape and visual impact; ecology; botany; and planning.
26. The appellant will endeavour to agree a Statement of Common Ground with PDNPA, in good time before the opening of the inquiry, covering such matters as the appeal site and surroundings, the appeal development, designations, planning history, relevant policies, other matters agreed and the main issues.

Costs

27. The appellant intends to apply for a full, alternatively partial, award of costs, to reflect PDNPA's service of a null/invalid enforcement notice, its procedural failings, the position adopted by Natural England, and the fact that the ground (f) appeal should patently be allowed.

Conclusion

28. The Secretary of State (or his appointed Inspector) should determine that the enforcement notice is a nullity or invalid, or else he or she should allow the appeal under ground (a) or ground (f). He or she should make a costs order in the appellant's favour.

List of documents

29. The appellant will refer to a range of documents in support of its appeal, including but not limited to:

- (a) Entry Level and Higher Level Stewardship Agreement; Midhope Moors Moorland Management Plan;
- (b) Natural England section 28E(3)(a) consent;
- (c) Natural England correspondence (17 July 2015; 8 February 2016; 23 February 2016; 30 June 2017; 18 July 2017; 13 April 2018; 21 June 2018; 3 July 2018);
- (d) PDNPA officer reports, decision notices and enforcement notice;
- (e) Request for screening direction, consultation responses, Secretary of State screening direction and full statement of reasons;
- (f) Correspondence with PDNPA (6 November 2018; 16 November 2018; 16 July 2019);
- (g) Photographs of the appeal site, before, during and after the appeal development;
- (h) 9 May 2019 Strines Appeal Decision;
- (i) Development plan;
- (j) National Planning Policy Framework;
- (k) McKay v Secretary of State [1994] JPL 806;
- (l) SSSI/SPA/SAC notification and documentation; and
- (m) 23 July 2019 correspondence from Dinsdale Moorland Specialists Limited.

DUNLIN LIMITED

17 JULY 2020