



Appeal Decision

Site visit made on 9 April 2019

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 09 May 2019

Appeal Ref: APP/M9496/C/18/3208720

Land at Cartledge Flat/Rushy Flat Dike, North of Hollingdale Plantation, Strines, Bradford, South Yorkshire

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Sir Philip Vyvian Naylor-Leyland against an enforcement notice issued by the Peak District National Park Authority.
- The enforcement notice was issued on 15 June 2018.
- The breach of planning control as alleged in the notice is without planning permission, engineering operations consisting of the laying of crushed stone on the Land to form a track.
- The requirements of the notice are:
 - a) Remove the crushed stone from the Land. The removal shall be carried out using low ground pressure tracked equipment or machinery. The removal shall commence at the north-west end of the Land and shall progress in a generally south-easterly direction along the Land until all of the crushed stone has been removed. Any equipment or machinery used in the removal of the crushed stone shall at all times during the removal works be stationed on the Land.
- The period for compliance with the requirements is four months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the 1990 Act as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs was made by Sir Philip Vyvian Naylor-Leyland against the Peak District National Park Authority. This application is the subject of a separate decision.

The notice

2. The appellant claims that the notice is a nullity or invalid for several reasons, which I consider below.
3. Section 173 of the 1990 Act, as amended, states what an enforcement notice shall include¹. The Act does not specify the consequences of failing to comply with s173, but section 176(1) provides a power to correct defects, errors or misdescriptions, provided no injustice to the appellant or the local planning authority would result.

¹ Section 173(1) says that an enforcement notice shall state (a) the matters which appear to the local planning authority to constitute the breach of planning control; Section 173(2) says that a notice complies with section 173(1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

4. The first matter relates to the ground (b) appeal. In its response to the appellant's grounds of appeal, the National Park Authority (NPA) invited a correction or variation of the allegation to delete the words "to form a track". The appellant considers this would result in a fundamental change to the nature of the alleged breach causing injustice.
5. An enforcement notice is a nullity if it is so defective on its face that it is without legal effect². A notice should be drafted so as to tell the recipient fairly, what he has done wrong and what he must do to remedy it. The appropriate test is derived from *Miller-Mead*³. A notice may also be "hopelessly ambiguous and uncertain so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or in what respect he had failed to comply with the condition or again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches". In such circumstances the notice may be found to be a nullity. Further caselaw on this issue is provided in *Sarodia*⁴, which examines the application of *Miller-Mead* in deciding whether or not a notice is a nullity.
6. The allegation is stated as engineering operations consisting of the laying of crushed stone on the land to form a track. The requirements flow from the allegation and seek to remedy the breach by the removal of the crushed stone. The notice clearly identifies the alleged breach of planning control and states what must be done to remedy it. A correction to the allegation is not necessary.
7. It is also argued that the NPA's suggestion amounts to an acceptance that the track was pre-existing, so the breach has not occurred as a matter of fact. This matter is more appropriately dealt with in ground (b) below.
8. The appellant refers to *Payne*⁵, which is not on all fours with the matters before me as it concerned a notice containing a requirement that a restoration scheme be submitted for approval of the local planning authority. This was found to be a nullity, incapable of being rectified. In *Wealden*⁶, it was a matter of whether a variation changing the description of development would cause injustice. In this case, I do not intend to correct or vary the notice as suggested by the NPA, so an assessment of whether it would cause injustice is not necessary.
9. The appellant continues that the notice is defective as the appellant should be able to identify its exact extent on the face of the notice. It is argued that the plan does not show the length and width of the track and, as such, it fails to meet Regulation 4(c) of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002⁷.
10. During the site visit, I walked the length of the track and was able to establish clearly its start and end points using the plan and comparing it to the surrounding features of the land. The exact width is not shown, but it would be extremely difficult to do this in the circumstances. Moreover, it is not necessary to survey the route in order to pinpoint its exact width for the purposes of the notice.

² Paragraph p173.06 Sweet and Maxwell Encyclopedia of Planning Law and Practice.

³ *Miller-Mead v Minister of Housing and Local Government* [1963] 2 WLR 225.

⁴ *Sarodia v London Borough of Redbridge* [2017] EWHC 2347 (Admin).

⁵ *Payne v NAW & Caerphilly CBC* [2007] JPL 117.

⁶ *Wealden District Council v SSE and Another* [1983] JPL 234.

⁷ This states that "an enforcement notice shall specify the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise".

11. I am satisfied that the track is accurately shown and the recipient would know what was targeted by the notice. Therefore, it meets the relevant regulations.
12. To conclude on this matter, I find that the notice tells the recipient fairly, what he has done wrong and what he must do to remedy it. It is not hopelessly ambiguous or uncertain and I do not consider it to be nullity or otherwise invalid.

The appeal on ground (b)

13. In order to succeed on a ground (b) appeal, the appellant must show, on the balance of probability, that the matter alleged had not occurred at the date of the notice.
14. The appellant claims that the work undertaken has not formed a track, but merely amounted to works to maintain or improve a pre-existing track or private way. Support is drawn from the plan attached to the notice, which is on an Ordnance Survey base that includes the notation "track" adjacent to the alleged track identified by a red line. As set out above, the NPA has suggested that the notice could be varied to remove reference to the track from the allegation. The appellant claims this is an acceptance that the track was pre-existing.
15. I saw that crushed stone has been laid on the land as shown on the plan attached to the notice. The stone has been laid to a relatively consistent width of around 2.5 to 3.0 metres. It had been levelled and there was evidence of compaction. The purpose of the crushed stone is clear in that it is used to improve access. This distinguishes it from hardstanding that may be used for some other purpose.
16. Whether or not a track or private way existed prior to the deposit of stone does not alter the fact that crushed stone has been laid on the land as identified. It is accepted that the previous route was not fully laid with stone along the length identified in the notice, and the width was more variable. Therefore, the works have formed a new track.
17. Consequently, on the balance of probability, the matter alleged had factually occurred at the date of the notice and the appeal on ground (b) must fail.

The appeal on ground (c)

18. In order to succeed on a ground (c) appeal, the appellant must show, on the balance of probability, the matter alleged in the notice does not constitute a breach of planning control. The appellant argues that the works do not constitute development as the track has only been repaired.
19. Under section 55(1) of the 1990 Act as amended, "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. The Courts have determined that engineering operations involve works with some element of pre-planning, which would normally, but not necessarily, be supervised by a person with engineering knowledge.
20. Due to the length of the track and volume of material used to create the stable surface, it appears that the works have been carried out using plant and machinery. This suggests that an element of pre-planning was involved and a

degree of skill was necessary to carry out the works. Consequently, I do not consider the works to be 'de minimis' and that they amount to an engineering operation within the meaning of development in s55(1).

21. The appellant has advanced an argument that the works would be 'permitted development' under Article 3(1) and Schedule 2, Part 9, Class E of The Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (the GPDO). This enables the carrying out on land within the boundaries of an unadopted street or private way of works required for the maintenance or improvement of the street or right of way.
22. I have had due regard to the Counsel's opinion sought by the NPA concerning what sort of works have been held to qualify as permitted development under Part 9, Class E; what constitutes a 'private way' and what works may be considered as 'maintenance or improvement'.
23. The NPA accepts that when the work was carried out in 2014, the route in question was a private way within the meaning of Article 2(1) of the GPDO. I understand that the track was, and continues to be, used for vehicular and pedestrian access to the moor for a variety of purposes. However, it is argued that the works fall outside the scope of permitted development as they did not constitute maintenance or improvement and its width has increased taking the works beyond the existing boundaries of the private way.
24. The main parties agree that the leading authority on the meaning and application of Part 9, Class E is from *Cowan*⁸. The Court determined that the ordinary meaning of 'improvement' is limited to changes which do not amount to a change in the basic character of the way in question.
25. In order to establish what the basic character of the route was, I have been directed to a plan showing the extent of the route in 2014. The appellant states that 13 percent of the route was already stoned, 64 percent was timbered and 23 percent was neither stoned nor timbered. It is acknowledged that the works have altered the appearance of the route, although it is argued that its appearance is now more appropriate to its setting. Also, it is accepted that the route now has a more uniform width of around 3.0 metres, but it is expected to settle out to 2.5 metres as vegetation encroaches.
26. A change in the surface or method of construction does not necessarily amount to a change in the basic character of the way. Therefore, I have also examined the photographic evidence submitted by the parties. This shows a significant difference in the appearance of the track after the stone was laid. It has changed from an uneven track of irregular width and surface type, to a clearly defined, stone track of uniform appearance and width. Post works, the route is clearly discernible in aerial photographs, whereas prior to the works the track was significantly less evident. In my judgement this amounts to a marked change in the visual character of the track, thus taking the works outside the scope of the permitted development rights in Part 9, Class E.
27. It is unclear whether the condition in Article 3(1), relating to Regulations 75 – 78 of the Conservation of Habitats and Species Regulations 2017, has been

⁸ *Cowan v SSE* [2000] 79 P & CR 457.

discharged⁹. I have not seen evidence of this but, in any event, I have found that the works are outside the scope of permitted development.

28. I conclude that it has not been shown, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control. There is no evidence that planning permission has been granted for the development and, for the reasons given above, it would not benefit from permitted development rights under Schedule 2, Part 9, Class E of the GPDO.
29. Consequently, the appeal on ground (c) must fail.

The appeal on ground (a) and the deemed planning application

Main Issues

30. I consider that the main issues are the effect of the development on: (i) the character and appearance of the area, in particular, the special landscape qualities of the National Park and; (ii) sites of national and international importance for nature conservation.

Character and Appearance

31. The land lies within the Peak District National Park. The Authority's Landscape Character Assessment (2009) identifies the landscape character area as 'The Dark Peak' with a character type of 'Open Moors'. The relevant characteristics are described as an open undulating high gritstone plateau with extensive blanket peat covered by cotton grass bog and heather moorland. It is further described as a wild, unsettled landscape with wide views to distant surrounding hills. The development is also within the Natural Zone, as defined in the development plan, which encompasses wilder areas of the National Park with minimal obvious human influence.
32. Policy L1 of the Core Strategy¹⁰ seeks to resist development in the Natural Zone, other than in exceptional circumstances. Exceptional circumstances are set out in Policy LC1 of the Local Plan¹¹, which include development that is essential for the management of the Natural Zone or for the conservation or enhancement of the National Park's valued characteristics.
33. The appellant submits that the track meets the terms of Policy L1 in that it conserves the valued landscape character, when judged against its former appearance and taking account of natural weathering. Having regard to *Tesco Stores*¹², it is considered that the proper interpretation of "conserve" in Policy L1 is to have a neutral or non-harmful effect.
34. I saw that the track has bedded in since the photographs were taken, and in several areas the vegetation has encroached reducing its overall width. However, it remains visible from a wide area of open access land. The track crosses open moorland that is characterised by its expansive aspect and lack of obvious human influence. It cuts across the landscape and is visually intrusive

⁹ Regulation 75 provides that it is a condition of any planning permission granted by a general development order made on or after 30 November 2017 that development which (a) is likely to have a significant effect on a European site or a European offshore marine site, alone or in combination with other plans or projects, and (b) is not directly connected with or necessary to the management of the site must not be begun until the developer has received written notification of the approval of the LPA under Regulation 77.

¹⁰ Peak District NPA Local Development Framework: Core Strategy (October 2011).

¹¹ Peak District NPA Local Plan.

¹² *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13.

- and damaging to the area's valued characteristics. Comparing the impact of the track to what existed previously, it is now a defined and obvious manmade feature through an otherwise wild landscape. The previous route was less intrusive. Consequently, its effect is not neutral and the defined valued landscape character is not conserved.
35. It is argued that there are other similar stone surfaced ways within the Natural Zone, but I have not been provided with details of these and I am unable to make an assessment in relation to the consistency with which development plan policy is applied.
36. The appellant has provided extensive information about the estate's work in habitat management and improvement and how the subject way has enabled a significant amount of conservation work. It is also explained how maintenance and improvement of key management routes is necessary to prevent widespread surface/peat degradation through concentrating access along a defined route, whilst also increasing public access. However, Policy LC1 clearly states that development that would serve only to make land management or access easier will not be regarded as essential. This criterion is repeated in the emerging plan policy DMC2.
37. I have considered the suggestion that the route facilitates the estate's wildfire strategy and agricultural work, and I accept the benefit the track offers in that respect. Nonetheless, the evidence suggests the track's primary purpose is recreational. Access to the grouse 'butts' is required on a relatively regular basis for shooting. It has not been shown that the development is essential within the meaning of the development plan policy.
38. I appreciate that farmers and land managers have an essential role in looking after the special qualities of the National Park, but that role needs to complement its statutory purposes. In this case, the development may have an economic benefit but it would not conserve and enhance the natural beauty of the area contrary to the first purpose. Although the Framework seeks to support a prosperous rural economy, this needs to be balanced against conserving and enhancing the natural environment.
39. The fallback position, that the route existed previously, carries limited weight as the present route is significantly different in terms of its extent and surface treatment.
40. To conclude on this matter, I find that the development has an adverse effect on the character and appearance of the area, in particular, the special landscape qualities of the National Park. The benefits of the development would not outweigh the harm to the landscape and scenic beauty of the National Park, which has the highest status of protection. The development does not accord with Policy L1 of the Core Strategy, Policies LC1 of the Local Plan and Policies DMC1 and DMC2 of the emerging Development Management Policies, which seek to ensure development respects, conserves and enhances all valued characteristics of the site.

The effect on sites of national and international importance

41. The subject track is part of longer route that crosses open moorland from Mortimer Road, in an area known as Rushy Flat Dike. The moorland is open access land under the Countryside and Rights of Way Act 2000. It is within an

- area known as the Dark Peak, which is recognised as being of national and international importance for a range of upland species and habitats.
42. The NPA says that the area is designated as section 3 Moorland, as defined in the Wildlife and Countryside Act 1981, and is also part of the Dark Peak Site of Special Scientific Interest (SSSI). The SSSI citation states that “the combination of plateaux blanket mires; wet and dry heaths and acid grasslands, together with associated flushes and mires on moorland slopes, represents an extensive tract of semi-natural upland vegetation typical of and including the full range of moorland vegetation of the South Pennines.” It goes on to state that “the Dark Peak moorlands support the full range of breeding birds found in the South Pennines, some of which are represented at their southern most viable English locations” and that “the moorland breeding bird assemblage is of great regional and national importance.”
 43. The condition of this part of the SSSI was last assessed by Natural England in March 2012, as unfavourable-recovering in relation to blanket bog. I note that this is disputed by the RSPB who considers the unit of land to be unfavourable-no change or declining due to the threat of rotational burning.
 44. The land is designated as a Special Area of Conservation (SAC), as defined in the ‘Habitats Directive’¹³ and a Special Protection Area (SPA) under the ‘Birds Directive’¹⁴. The relevant primary conservation objective for the SAC is to maintain or restore degraded blanket bog to an active state, and the for SPA is to maintain or restore populations of breeding merlin, golden plover and short-eared owl. Consequently, I attribute the nature conservation importance of the Dark Peak area to its blanket bog habitat, which is defined as irreplaceable habitat in Annex 2 of the National Planning Policy Framework (the Framework)¹⁵, the breeding bird populations and upland vegetation.
 45. The appellant’s case is that access is required to the moorland for effective stewardship and management in line with the statutory purposes of the National Park. The NPA considers the works have led to the loss of important moorland habitat, which constitutes an adverse impact on the designated sites.
 46. Evidence submitted by the RSPB shows that the length of the entire track lies on blanket bog/deep peat soils and is surrounded by the same habitat. It is argued that the track impacts on the integrity and hydrological function of the blanket peat due to compression, impacts on drainage and erosion.
 47. In February 2014, Natural England carried out a Habitats Regulations Assessment (HRA) of the project which was described as “improvements to the surface and sections of the New Butts Track”,¹⁶ and consent was given. The HRA first concluded that the works were not necessary to the management of the European site. As such, it was required to consider the likely effect of the works described in relation to disturbance of breeding birds and damage or loss to the blanket bog habitat. The conclusion was there would be no likely significant effect. However, it was assumed that the delivery timetable would avoid working in the bird nesting season and the route of the track would be restricted to that of the existing surfaced section of track.

¹³ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

¹⁴ Council Directive 79/409/EEC on the conservation of wild birds.

¹⁵ February 2019.

¹⁶ Under Regulation 21 of Habitats Regulations.

48. It is not clear when the works took place. Crucially, it is accepted by the appellant that the stone covers a more extensive area than that which previously existed. The appellant draws support from *Morge*¹⁷, which considered the proper application of 3(4) of the Regulations 1994¹⁸. It was found, among other things, that the planning authority were entitled to rely on Natural England's assessment. However, in this case, Natural England assessed a scheme which is materially different to the development before me. A different conclusion may have been reached if all the information relating to the extent and timing of the works had been known. I must take a precautionary approach and I cannot be certain that Natural England's assessment of likely significant effect on the protected site stands.
49. In addition, the development is likely to have a continuing adverse impact on the designated SSSI. The benefits of the track include providing access to the upper moorland for land management and stewardship purposes, which carries due weight. However, this would not outweigh the impact which adversely affects the special interest features of the SSSI.
50. I have established that the development could have a likely significant effect on the European sites but I am intending to dismiss the appeal due to the effect of the development on the character and appearance of the area. Consequently, I do not need to undertake an Appropriate Assessment, or give any further consideration to HRA, as there is no prospect of deemed planning permission being granted.
51. To conclude on this issue, I find that the development would conflict with Policy LC17 of the Local Plan, Policy L2 Core Strategy, Policy DMC11 of the emerging Development Management Policies and paragraph 175 of the Framework, which require development proposals to protect and, where possible, enhance sites of recognised importance for nature conservation.

Conclusion

52. I conclude that the appeal on ground (a) and the application for deemed planning permission should fail.

The appeal on ground (f)

53. The appellant has appealed under ground (f) on the basis that the steps required by the notice to be taken exceed what is necessary. The terms are considered to be overly prescriptive and there was a pre-existing track which should be allowed to remain.
54. Section 173 of the 1990 Act, as amended, indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve; to remedy the breach of planning control which has occurred or to remedy any injury to amenity which has been caused by the breach. In this case, the reasons behind the notice refer to the effect of the development on the special landscape qualities of the National Park and nature conservation. The notice is directed at remedying the breach of planning control and what must be considered is whether the requirements exceed what is necessary to achieve that purpose.

¹⁷ *Morge v Hampshire CC* [2011] UKSC 2.

¹⁸ SI 1994/2716. This requires the competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.

55. I appreciate that there was a pre-existing track. However, the notice is seeking to remove the crushed stone, not the timber or any other materials that were laid previously. In that respect the requirement is not onerous.
56. The requirement specifies how the crushed stone should be removed. The NPA explains this to minimise the risk of further damage to the sensitive habitat. While I appreciate the concerns of the NPA, the removal of the crushed stone alone would remedy the breach and satisfy the statutory purpose behind the notice. The method of removal specified exceeds what is necessary to remedy the breach and should be deleted.
57. To this limited extent, the appeal on ground (f) succeeds and the notice will be varied accordingly.

The appeal on ground (g)

58. The appellant is seeking further time to comply with the varied requirement in order to avoid adverse weather conditions. A compliance period of 12 months is sought.
59. Due to the impact of the works it is necessary to remedy the breach as soon as practicable. The timing of this Decision is such that the works could be carried out in the summer months when it is less likely that adverse weather would be encountered. Consequently, I am satisfied that four months would be proportionate and reasonable.
60. Therefore, the appeal on ground (g) fails.

Conclusion

61. For the reasons given above, I conclude that the appeal should succeed in part only. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decision

62. It is directed that the enforcement notice is varied by the deletion of the following words in paragraph 5a):

“The removal shall be carried out using low ground pressure tracked equipment or machinery. The removal shall commence at the north-west end of the Land and shall progress in a generally south-easterly direction along the Land until all of the crushed stone has been removed. Any equipment or machinery used in the removal of the crushed stone shall at all times during the removal works be stationed on the Land”.

63. Subject to the variation the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Debbie Moore

Inspector