

**LAND AT MICKLEDEN EDGE, MIDHOPE MOOR, BRADFIELD, SOUTH
YORKSHIRE**

APP/M9496/C/18/3215789

APPELLANT'S OPENING STATEMENT

Introduction

1. There was formerly a rutted and unsurfaced route, formed by the passage of vehicles, on and alongside the route of the appeal development. It was comprised of bare earth and loose stones in poor condition with some timber structures to seek to reduce rutting. This previous use by vehicles led to damage to the moor.¹
2. In 2012, the Appellant bought the appeal site and surrounding land.²
3. In 2013, Natural England carried out a Habitats Regulations Assessment³ and entered into both an Entry Level and Higher Level Stewardship Agreement (“the Agreement”) for various land parcels on the moor (including the land parcel within which one finds the appeal site) covering the period 1 September 2013 to 31 August 2023.⁴ The Agreement is supported by the Midhope Moors Moorland Management Plan (“MMMMP”).⁵ It contains the details for the work on the moor, including gully blocking, re-seeding of bare peat and bank profiling works above the 500m contour.⁶
4. The land had not been surveyed, and Natural England’s requirements were based on desk-top work undertaken by Moors for the Future. It was thus accepted that a Site Delivery Plan (“SDP”) would be produced and agreed to by Natural England. In April 2014, Dinsdale Moorland Services Limited produced the SDP. It proposed the installation of matting “to reduce further erosion, minimise impact and be able to restore the ground into favourable condition.”⁷ Natural England endorsed the SDP. Moreover, on 16 October 2014 it issued a statutory consent for the laying of the matting under

¹ SOCG para 20.

² SOCG para 6.

³ Included within Appendix 2 to Dan Richmond-Watson’s Proof.

⁴ The Agreement is also included within Appendix 2 to Dan Richmond-Watson’s Proof.

⁵ Also included within Appendix 2 to Dan Richmond-Watson’s Proof.

⁶ Para 3 of Dan Richmond-Watson’s Proof.

⁷ CD21 at page 14.

section 28E(3)(a) of the Wildlife and Countryside Act 1981 (“the 1981 Act”).⁸ Neither Natural England nor the Appellant envisaged that planning permission would be required.⁹

5. There are numerous photographs in the evidence showing the parlous condition of the moor caused by the pre-existing track prior to the laying of the matting: see, by way of examples, the March 2014 photographs at Mr Richmond-Watson’s Appendix 4, the photographs at Mr Richmond-Watson’s Appendix 6f1-2 and the photographs taken by an Authority Ranger on 30 November 2014.¹⁰
6. The matting was laid during the period January to 4 February 2015. There was some ground manipulation using an inversion technique on a previously damaged and non-interest vegetation section.¹¹ In the Authority’s own words, the matting was laid, “to reinforce the route for vehicular access to the moor west of the site where works to conserve and enhance the moor had been consented by Natural England.”¹² The matting’s visual impact was the greatest at the time it was laid,¹³ now more than 6 years ago, and its visual impact has reduced since then.¹⁴ Grass, heather and other vegetation grows under and up through it.¹⁵ The wooden log “rafts” were laid in late Spring 2018, where the ground was particularly wet and matting alone would not suffice. Their visual impact was the greatest at the time they were laid, and that visual impact has

⁸ See Appendix 3 to Dan Richmond-Watson’s Proof.

⁹ Para 5 of Dan Richmond-Watson’s Proof.

¹⁰ Document AJC3.

¹¹ SOCG para 20.

¹² Para 4.43 of the Authority’s Statement of Case (CD15).

¹³ SOCG para 21.

¹⁴ SOCG para 21.

¹⁵ SOCG para 21.

reduced since then due to natural weathering and the fact that they are untreated. Grass, heather and other vegetation grows under and up through the “rafts”.¹⁶

7. The appeal development is in accordance with the Agreement, the MMMMP and the section 28E consent. The Authority welcomes the Appellant’s moorland restoration, conservation, enhancement and management. The appeal development is very likely to have reduced vehicle erosion on its route and on adjacent land. It affords emergency services access in the event of a moorland fire.¹⁷
8. Subject to conditions, Natural England has consistently supported the application for planning permission or at least not objected to it.
9. The Secretary of State concluded that any significant visual and landscape effects would be “limited and temporary” and that the appeal development is not likely to have significant environmental effects.¹⁸
10. The appeal development is likely to be required for ongoing moorland restoration, conservation, enhancement and management. Natural England has agreed to finance a Feasibility Study, with the survey work likely to occur this Autumn and ongoing work thereafter.
11. As Mr Leeming concludes, the impact of the appeal development in terms of landscape and visual impact is not significantly detrimental at present and further appropriate mitigation would improve the position going forward. As Mr Baker concludes, the appeal development has been beneficial in terms of ecology.

¹⁶ SOCG para 22.

¹⁷ For all these points, see para 23 of the SOCG.

¹⁸ CD31.

12. As many have testified, removal of the appeal development would damage the moor.¹⁹ Indeed, it is common ground that the Appellant would be obliged to give Natural England advance notice pursuant to section 28E(1)(a) of the Wildlife and Countryside Act 1981 and fulfil one of the three conditions in section 28E(3) of the same. Before giving any written consent under section 28E(3)(a), Natural England must apply regulation 63 of the Conservation of Habitats and Species Regulations 2017.²⁰ Removal of the appeal development would also give rise to an offence under section 28P(6) and/or (6A) of the 1981 Act.²¹
13. Amazingly, despite all of this, the Authority wants the appeal development to be removed. There are though legal and technical obstacles in its way. Moreover, its case is wholly lacking in substance on the merits.

Nullity

14. An enforcement notice requiring the commission of a criminal offence is a nullity: McKay v Secretary of State [1994] JPL 806.²²
15. The line of cases to the effect that nullity only arises where the failure to comply with the requirements of section 173 of the Town and Country Planning Act 1990 is apparent on the face of the notice itself have not considered the McKay principle, and it has not been expressly reversed. Indeed, it is difficult to envisage an enforcement notice ever expressly requiring, on its face, the commission of a criminal offence.
16. It is common ground that, before any removal of the appeal development, the Appellant would be obliged to give Natural England notice pursuant to section 28E(1)(a) of the

¹⁹ See para 12 of Dan Richmond-Watson's Proof.

²⁰ SOCG para 28.

²¹ See Andrew Baker's Proof at para 11.6.

²² CD35.

1981 Act.²³ But the enforcement notice requires various steps without the giving of such notice. It thus requires the Appellant to commit a criminal offence contrary to section 28P(1) of the 1981 Act. The effect of removal of the appeal development on the SSSI would also give rise to an offence contrary to section 28P(6) and/or (6A).

17. Given that it requires the commission of at least one criminal offence, it follows that the enforcement notice is a nullity without legal effect. The Inspector should conclude as much and then, in the usual way, decline jurisdiction and take no further action on the appeal.

Invalidity

18. The requirements of the enforcement notice need to be varied so as to require the Appellant, prior to carrying out any of the steps, to give Natural England notice pursuant to section 28E(1)(a) of the 1981 Act and fulfil one of the subsection (3) conditions. They also need to be varied so as to avoid the Appellant committing a section 28P(6) and/or (6A) offence.
19. However, varying the requirements of the enforcement notice in this way would cause injustice.
20. The enforcement notice is therefore invalid. The appeal should thus be allowed and the enforcement notice quashed.

Ground (a)

21. In respect of both or either of the engineering operations alleged in paragraph 3 of the enforcement notice, planning permission should be granted permanently.

²³ Provisions of the 1981 Act are at CD32.

22. As Mr Leeming concludes, the impact of the appeal development on landscape character and visual amenity is not significant. Moreover, mitigation over the period to 2025 would positively improve landscape character and visual amenity as well as actively preventing detrimental erosion.
23. Mr Leeming's conclusions are the product of a clear and detailed methodology, using recognised terminology, in accordance with current best practice endorsed by the Landscape Institute. He compares and contrasts the appeal site and the effect of the appeal development at several moments in time, including the present and the future.
24. By contrast, the Authority's evidence on landscape and visual impact is superficial in the extreme. There is no methodology, recognised or otherwise. It does not deploy recognised terminology. Mr Meetham's section 4 is little more than a few short assertions. Only two paragraphs are devoted to visual effects.
25. The contrast between the Appellant's comprehensive evidence and the Authority's superficial evidence is repeated in terms of ecology.
26. Mr Baker's evidence is informed by a detailed Condition Assessment using Common Standards Monitoring. It identifies three generic upland feature types on or next to the appeal development: Acid Grassland (Upland); Alpine Dwarf-shrub Heath; and Springhead, rill and flush (Upland). Grassland was dominant.
27. By contrast, the Authority has not done a full survey (as Ms Horsford admits²⁴). This may explain its reliance upon reports and a thesis relating to blanket peat and blanket bog. The fundamental flaw in this approach is that the appeal site is neither blanket peat nor blanket bog. Moreover, the author of the first report (Natural England)

²⁴ See the first numbered para 3.5 of her Proof.

consents to the matting and conditionally supports the planning application. What is more, the thesis student's work informed the second report (published by a partnership, including Natural England) which actually concludes that the trialled wooden structure and plastic mesh had "little effect".²⁵

28. Unsurprisingly perhaps, given the superior quality of the Appellant's ecology evidence, the Appellant will be inviting the Inspector to prefer Mr Baker's evidence and adopt his conclusions including to the effect that the appeal development has been entirely positive for the ecology of the track and the surrounding moorland and to the effect that removal of the appeal development would damage habitats and have a high risk of failure.
29. As recorded above, the Authority welcomes the Appellant's moorland restoration, conservation, enhancement and management. The appeal development is likely to be required for this in future. It is agreed that the appeal development is very likely to have reduced vehicle erosion on its route and on adjacent land. No useful purpose would be served by damaging the moor in removing the appeal development, and then allowing that erosion to recur. It is agreed that the appeal development affords emergency services access in the event of a moorland fire, the risk of which is all too real.
30. The Appellant thus invites the Inspector to grant permanent planning permission. In the alternative, temporary planning permission should be granted until 31 December 2025 (the future year assessed by Mr Leeming) or until 31 August 2023 (when the Agreement expires).

²⁵ See page 12 of this report, which is at FH CD8.

Ground (f)

31. Ground (f) can be addressed very shortly.
32. The requirements of the enforcement notice do not remedy the breach of planning control by restoring the land to its pre-breach condition. Rather, they exceed what is necessary to achieve that purpose in that they seek to enhance the land. Moreover, the method of removal specified plainly exceeds what is necessary to remedy the breach and must be deleted (as happened in the Strines appeal).²⁶
33. If the Inspector gets to the ground (f) appeal, it is obvious that it must be allowed.

Other matters

34. Various corrections to the enforcement notice are needed, and which can be made without causing injustice. These can be discussed during the inquiry or set out in closing. The Appellant provided the Authority with a set of draft conditions in November 2020. It has heard nothing as to these in response.

Conclusion

35. The Inspector is respectfully invited to determine that the enforcement notice is a nullity or invalid. Otherwise, the Inspector will be respectfully invited to allow the appeal under ground (a) or, if not, under ground (f). The Appellant will also be applying for costs.

STEPHEN WHALE
LANDMARK CHAMBERS, LONDON
21 JULY 2021

²⁶ See para 56 of Inspector Moore's decision at CD36.