

RE: LAND AT MICKLEDEN EDGE, MIDHOPE MOOR, BRADFIELD

APPEAL REFERENCE: APP/M9496/C/18/3215789

LIST OF APPEARANCES ON BEHALF OF PDNPA

APPEARANCES

Counsel: **Mr Hashi Mohamed**, No5 Chambers

Instructed by: **Reg Cooper**, Assistant Solicitor

Mr Rob Meetham CMLI, a landscape architect and Chartered Member of the Landscape Institute, for the PDNPA.

Mr John Keeley, Dip URP MRTPI, North Area Planning Manager at the PDNPA.

Mrs Frances Horsford, BSc (Hons) PgCert, MSc, Ecologist for the PDNPA.

Mr Andrew Cook, BA (Hons), Team Manager, Monitoring and Enforcement at the PDNPA.

PREAMBLE

1. Counsel on behalf of the Authority would like to thank the Inspector, the Appellant's team and Counsel, and the Authority for their patience in December 2020 following what was a nervous but now ultimately joyous occasion. I was sorry that we couldn't complete this matter sooner. It is unfortunate that it has led to this delay now, but I remain grateful for the universal understanding.

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OPENING REMARKS ON BEHALF OF PDNPA

INTRODUCTION

2. This appeal is brought by Dunlin Limited against an Enforcement Notice issued by the Peak District National Park Authority (“**the Authority**”), dated 21 September 2018 in relation to engineering operations consisting of the laying of geotextile matting and wooden log ‘rafts’ to form a track on Land at Mickleden Edge, Midhope Moor, Bradfield, South Yorkshire (“**the Notice**”).
3. This is alleged to be in breach of planning control, as the development has taken place without planning permission. The Appellant made a retrospective planning application which was refused, and the same was not subsequently appealed. An Enforcement Notice was then issued by the Authority which is now the subject of this appeal.
4. This appeal is made under Section 174 of the Town and Country Planning Act 1990. The appeal is only pursued under **Ground (a)** and **Ground (f)**.
5. The Site’s critical sensitivities in relation to its location and surroundings are accurately summarised in the statement of common ground. Those are not repeated here. It is common ground that the site, as a matter of policy (local and national) enjoys the highest level of protection.
6. The Appellant has suggested that the Notice is defective, and thereby a nullity and/or invalid. For the reasons previously set out in the Authority’s response, and to be elaborated upon at the Inquiry, the Notice is clear and fair in explaining what has been done wrong, and what is required to remedy the same.

THE LAW AND POLICY

7. National Parks, along with the Broads and AONBs, benefit from the **highest status of protection** in relation to conserving and enhancing landscape and scenic beauty. Paragraphs 176-177 of the **newly updated July 2021** NPPF (as opposed to 172 previously) requires that '**great weight**' be given to those matters in decision making. In the High Court in *Monkhill*¹, in a passage endorsed in the judgment of the Court of Appeal², Holgate J explained, "*The clear and obvious implication is that if a proposal harms these objectives, great weight should be given to the decision-maker's assessment of the nature and degree of harm. This policy increases the weight to be given to that harm.*"
8. Paragraphs 176-177 of the NPPF sets a **high bar** for development in the identified areas, and requires the decision maker to consider, as a matter of planning judgement, whether the circumstances are **sufficiently exceptional** to warrant development in the National Park / Natural Zone.
9. There are similarly other local policies cited in the evidence to which the Inspector will be referred, but are not repeated here for the sake of brevity. The same is reflected with the full list of policies cited at paragraphs 24-26 of the Statement of Common Ground.

THE EVIDENCE

10. The Authority will call on four witnesses as part of its evidence.
11. In relation to matters concerning landscape character and appearance, the Inspector will hear from **Mr Rob Meetham**.
12. As to the potential ecological impacts, the Inspector will have the benefit of evidence from **Mrs Frances Horsford**.

¹ See paragraph [51]

² See paragraph 19 and 25

13. On the planning balance, the Inspector will hear evidence from **Mr John Keeley**.
14. And finally on the specific Ground (f) appeal, the Inspector will hear from Mr **Andrew Cook**.

SUBMISSIONS

Nullity & Invalidity

15. It is unclear whether the Appellant still pursues the arguments around the enforcement notice being a nullity, or indeed that the requirements contained within it make it invalid.
16. For the avoidance of doubt, the Authority does not accept either proposition. The points in relation to this are comprehensively set out in the Authority's appeal statement.³ They can be revisited should that be necessary. A very similar argument was made in an appeal involving the same authority, dismissed on 9 May 2019. Inspector Moore's analysis is commended to the inquiry.⁴
17. This appeal is only pursued under Ground (a) and Ground (f). It follows that these are the only grounds on which the Inspector is being invited to adjudicate.

Ground (a)

18. The Inspector's Note has already sought to define the main issues under this ground, and these are reflected to a great extent in the Statement of Common Ground.

³ See CD15, paragraphs 4.2-4.16

⁴ See paragraphs 2-12 of APP/.../3208720

19. The Authority's evidence will show the following;
- a) The impact on the landscape and scenic beauty of the National Park, which has the highest possible protection, is unacceptable; there are no exceptional circumstances demonstrated to support the principle of this development;
 - b) The impact on the Natural Zone is similarly too great and unjustified;
 - c) Given that local and national requirements make clear the need to '*conserve and enhance*', any improvements made to this particular route (as accepted by the Authority) on the previous state of the route/track is of limited value in understanding the sensitivities, and the harm that continues to be caused by the status quo. To conserve is to do no harm, and to enhance is to improve on the state in which it was initially found;
 - d) Despite Natural England's views heavily relied upon by the Appellant, the Inspector should attach great weight to the evidence of Mrs Horsford in relation to the impact on features of biodiversity importance. This Inspector will have to reach a fresh view on the likely impacts, as directed by the Regulations and as the current Competent Authority;
 - e) Whatever benefits are claimed do not outweigh the harm caused;
 - f) The proposition that the removal of the development is somehow so great that it ought to remain in situ in perpetuity is preposterous. This is in effect an argument pursuant to immunity via the back door on a site which local and national policy repeatedly asserts ought to be afforded 'the highest protection'. It is not in line with what the legislation and policy expects. This should be clearly rejected;

- g) There has already been a *de facto* temporary permission in place, all known capital works have to date been completed, with no outstanding works at this time; where is the evidential justification therefore for this track to remain in place?
20. This ground of appeal may fail a number of ways. The Inspector is able to establish that the development could have likely significant effect on the European Sites, and as the Competent Authority make a judgement following this. Alternatively, he is also able to reach a view that the effect of the development on the character and appearance of the area is so great that this alone is enough to dismiss the appeal. Indeed, the same view was reached by a colleague of his in a highly pertinent decision.⁵ For these clear reasons and for the reasons to emerge during the inquiry, this ground must fail.

Ground (f)

21. This ground is not advanced with much conviction. For the reasons set out in Mr Cook's evidence, the requirements are clear and they do not exceed what is necessary to remedy the breach. Alternatively, in the event the Inspector disagrees, there is plenty of scope to vary these without causing injustice to the Appellant.
22. This ground must also fail, or at best partially succeed.

COSTS

23. The Appellant has previously threatened costs against the Authority, although to date there has not been a formal application.

⁵ See CD36

24. In the event that such an application is still maintained, the Authority asks for sufficient time in the inquiry time to be made to respond to the same.

CONCLUSION

25. Ultimately, this is quite a simple case. There is now in place development in a highly sensitive location; it may have improved on what was previously there, but that is not enough. In order for it to be permitted, consent must be forthcoming from the Authority, taking advice from NE. Such consent can only be given following any development demonstrating that it has met the stringent local, national policy and legislation.
26. This development has not done so. It cannot simply pray in aid that it has (a) improved upon what was already there; having (b) failed to demonstrate with any real detail why such a track continues to be needed in such a delicate and important site; and (c) somehow continue to justify its persistence based on the notion that its removal would result in some unsubstantiated greater harm.
27. For all these reasons, and reasons to be explored at the Inquiry, the Inspector is respectfully invited to dismiss the appeal, uphold the Enforcement Notice together with any necessary amendments.

HASHI MOHAMED

Barrister

No 5 Chambers

20 July 2021

Midhope Inquiry - Chronology

21.8.2013 - HRA by NE (CD 20)

Late 2014/early 2015 - the track is laid

13.4.2018 - NE consultation, comment on a '*time limited consent*' (CD 23)

15.6.2018 - Retrospective planning application, committee report (CD6)

25.6.2018 - Decision Notice (CD8)

14.9.2018 - Enforcement Committee Report - HRA (CD 10)

19.9.2018 - FULL Enforcement Delegated Report (CD 12)

20.09.2018 - EIA Screening Opinion (CD13)

21.9.2018 - Enforcement Notice issued (CD1)

6.11.2018 - EIA assessment (CD14)

7.11.2018 - Appeal Statement from the Appellant (CD27)

8.3.2019 - Secretary of State Direction; not EIA development (CD31)

16.7.2019 - Enforcement Notice full response (CD 19)

5.6.2020 - PINS Appeal Start Letter

15.7.2020 - PDNPA Appeal Statement

17.7.2020 - Appellant's updated appeal statement