



Decision by Philip Barton, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-340-2051
- Site address: land 80 metres south west of Unit C1, Grange, Errol
- Appeal by Mr Morris Leslie against the enforcement notice dated 6 August 2020 served by Perth & Kinross Council
- The alleged breach of planning control: without planning permission, the clearance of existing woodland, carrying out engineering operations including soil stripping, the importation and deposition of inert waste, the installation of drainage and formation of hardstanding, and the introduction and deposition of mixed soil materials within a poplar woodland.
- Date of site visit by Reporter: 6 October 2021

Date of appeal decision: 20 October 2021

Decision

I dismiss the appeal and direct that the enforcement notice dated 6 August 2020 be upheld. Subject to any application to the Court of Session, the enforcement notice takes effect on the date of this decision, which constitutes the determination of the appeal for the purpose of Section 131(3) of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act).

Reasoning

1. The appeal against the enforcement notice was made on the following grounds as provided for by Section 130(1) of the 1997 Act:

- (f) the steps required by the notice to be taken (or the activities required by the notice to cease) exceed what is necessary to remedy any breach of planning control stated in the notice, or to remedy any injury to amenity caused by that breach, and
- (g) the period specified in the notice (to comply with the steps taken) falls short of what should reasonably be allowed.

GROUND (f)

2. The appellant does not dispute that the works described in the notice have been undertaken. However, he does dispute the extent of these works. From what I saw and was able to deduce during my site visit, drainage infrastructure (plastic pipes and an inspection chamber) has been installed under that part of the site edged in blue on the plan



attached to the notice (the blue-line site). A black plastic barrier was laid over the same area and hardcore material deposited upon it, which was then compacted to form a relatively firm surface. On another part of the site, within woodland, a mound of waste material, about five metres at its highest point, has been deposited and is now covered with vegetation.

Step One of the Notice

3. It is clear from the suite of aerial photographs adduced by both the appellant and the council that there was some hardstanding on the site prior to the unauthorised works being undertaken by the appellant. The aerial photographs, dated 2006, 2011, 2017 and 2018, show a progressive loss of tree cover and an increase in the amount of hardstanding over time. In 2006 unwooded parts of the site had largely been reclaimed by nature. The 2011 image shows evidence of hardstanding being brought back into use in the north-easterly corner of the site. However, this area is outside the blue-line site. The 2017 image shows further loss of tree cover to hardstanding as well as a thinning of tree cover elsewhere across the site. The 2018 image shows a significant loss of tree cover within the blue-line site. The extent of this area appears to be the same as what I saw during my site visit.

4. The appellant considers that the baseline position with regard to tree cover and the extent of hardstanding to be taken into account should be the situation shown in the 2017 image. It is possible that a former owner was responsible for creating the hardstanding shown in this image. Indeed, I note from the planning history included in the report of handling for application reference 18/01946/FLL that application reference 00/00118/OUT for a proposed new settlement on the site was withdrawn. The other applications referred to by the council postdate the appellant's acquisition of the land.

5. I have seen no evidence to suggest that the works required to create the hardstanding shown in the 2017 image were undertaken with the benefit of express planning permission. Neither does the appellant argue that the works are permitted by Class 22 of Part 7 of Schedule 1 to The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (as amended) (the Order). It is clear to me from the content of applications reference 18/01946/FLL and 19/02095/FLL, both of which were submitted on a retrospective basis, that the appellant is not engaged in forestry operations on the land.

6. The appellant is legally responsible for any unaddressed breaches of planning control that may have taken place prior to the land being transferred into his possession. Moreover, the appellant does not dispute that the works described in the notice have been undertaken. According to the evidence before me and what I saw, on the balance of probability I consider that the works described in the notice were undertaken sometime between 12 June 2015, when the site was transferred into the appellant's ownership, and before 26 June 2018, when the most recent aerial photograph adduced by the council was evidently taken.

7. I am also satisfied on the balance of probability that there is no lawful existing area of hardstanding within the blue-line site that must be excluded from the requirements set out in Step One of the notice.

Step Two of the Notice

8. Scottish Forestry is the Scottish Government agency responsible for forestry policy, support and regulation. It is a criminal offence under the provisions of section 23(1) of the Forestry and Land Management (Scotland) Act 2018 (the 2018 Act) to fell trees without permission. It is clear from the evidence I have seen that a significant number of trees were felled between 2011 and 2018. Any unauthorised felling undertaken after the 2018 Act came into force on 1 May 2018 may therefore be subject to criminal sanction. Any felling undertaken prior to 1 May 2018 without the required felling licence may also constitute an offence.

9. The appellant states that he has submitted a felling permission application under the provisions of section 25 of the 2018 Act. Section 36 of the 2018 Act empowers Scottish Ministers to issue a restocking direction. Section 37 of the 2018 Act makes it a criminal offence to fail, without reasonable excuse, to comply with a restocking direction.

10. These powers are exercisable by Scottish Forestry. They are contained within separate legislation and are therefore outside the scope of this appeal. It would be inappropriate and contrary to the public interest to delay the determination of this appeal until the felling application has been decided, or until any other conditions or directions relating to felling and/or restocking have been discharged.

11. The appellant argues that the material deposited in the woodland is causing no harm to the trees. This is disputed by the council. However, this is not the question that I need to address. The question in this case is whether the act of depositing the material constituted an act of development that requires planning permission, either expressly or by Order.

12. Section 26(1) of the 1997 Act explains: ““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”. Section 277(1) of the 1997 Act explains: ““buildings or works” includes waste materials, refuse and other matters deposited on land, and references to the erection or construction of buildings or works shall be construed accordingly and references to the removal of buildings or works include demolition of buildings and filling in of trenches”. Although the land is not part of a waste handling site, section 26(3)(b) of the 1997 Act provides a useful steer. It states:

“(b) the deposit of refuse or waste materials on land involves a material change in its use, notwithstanding that the land is comprised in a site already used for that purpose, if—

- (i) the superficial area of the deposit is extended, or
- (ii) the height of the deposit is extended and exceeds the level of the land adjoining the site.”

13. Earthworks comprise an engineering operation. Furthermore, the 1997 Act clearly indicates that the deposition of material on land constitutes “works” and that such works would involve a material change of use of the land, particularly when the height of the deposit exceeds the level of adjoining land. Taking residential permitted development rights in Class 3D(2)(b) of Part 1 of Schedule 1 to the Order as a comparator, a de minimis level change may be 0.5 metres or less, although this can only be treated as a guide. In this respect, I note that Step Two of the notice requires the deposited material to be redistributed across the blue-line site “to an even depth of 0.5m”.

14. In this case, I am satisfied that the deposition of the mound of material, higher than the level of adjacent land (and by substantially more than a de minimis amount) falls within the definition of development because it is an engineering operation and/or a material change in the use of the land. Moreover, engineering operations are specifically excluded from those operations permitted by Class 22(1)(d) of Part 7 of Schedule 1 to the Order (forestry buildings and operations).

15. I find that the deposited material requires planning permission, is not permitted development, and does not benefit from express planning permission. It is therefore unauthorised. I am satisfied that requiring its redistribution across the blue-line site does not exceed what is necessary to remedy the breach of planning control stated in the notice.

Step Three of the Notice

16. Planning permission is not normally required to plant trees because such activity is not defined in the 1997 Act as an act of development. However, the blue-line site is allocated as open space in the Perth and Kinross Local Development Plan, which was adopted on 29 November 2019. The unauthorised development has had the effect of extending the adjacent mixed use area into this open space allocation, thereby diminishing its amenity value, contrary to the objectives of the adopted local development plan.

17. I have explained above why the pending deliberations of Scottish Forestry are not directly relevant to my determination of this appeal. If felling permission is granted and a restocking direction is made, then this would justify reversing relevant actions taken to remedy the harm to amenity caused by the breaches of planning control.

18. I note the content of the appellant's arboricultural assessment, but these matters are only relevant to the felling application and any subsequent restocking direction issued by Scottish Forestry. I must not prejudge what Scottish Forestry might decide with regard to the most appropriate mix of species for this site.

19. Replacing the felled poplars with trees of the same species is, in my view, the minimum intervention required to remedy the harm to amenity caused by the unauthorised development. Consequently, the requirement set out in Step Three cannot reasonably be considered to exceed what is necessary to remedy such injury.

Step Four of the Notice

20. The appellant has no objection to meeting the requirement set out in Step Four of the notice.

21. The appeal on ground (f) fails.

GROUND (g)

22. The appellant states that the planting season for trees "tends to be from around mid-November to early March". I accept that this window of opportunity is subject to weather conditions being favourable.

23. Reference is made to a new planning application being submitted in the future and to a delay in compliance allowing time for the felling permission application to be decided.

The timing of the submission of the new planning application is uncertain and I have already explained why waiting for the felling application to be decided and for any restocking direction to be issued would be inappropriate. Moreover, Scottish Forestry may decide to refuse to determine the felling permission application and instead pursue a criminal prosecution for the unauthorised felling. This would delay even further the implementation of the measures required to remedy the injury to amenity caused by the breaches of planning control.

24. No substantive reasons have been advanced to justify extending the period of compliance. The council asserts that the appellant has the resources, technical knowledge and ready access to the plant and machinery required to comply with the requirements set out in the notice. The appellant does not refute this assertion.

25. There will be about 28 days from the date of determination of this appeal before the planting season for trees commences. Given the appellant's apparent resources, this represents an adequate time period within which to comply with Steps One and Two of the notice and to order the replacement trees specified in Step Three. This would leave 92 days remaining within which to comply with Steps Three and Four – all of which are within the tree planting season. It is unlikely that bad weather would prevent tree planting for this entire period. I am satisfied, therefore, that 120 days allows sufficient time for the appellant to comply with all of the steps contained within the notice.

26. The appeal on ground (g) fails.

Philip Barton
Reporter