

Withdrawal of Enforcement Notice

Reference:	APP/P1560/C/24/3341697 Appeal Reference 20/00322/BLDOP3
Location:	Land at Manningtree Railway Station, Station Road,, Lawford, Manningtree
Works:	Building operations to extend existing single storey deck over existing ground level car parking. Engineering works to increase land levels, install a sheet pile retaining wall, drainage, hardstanding, CCTV and lighting columns to facilitate the extension to existing ground level car parking. Replacement of and increase in number of existing lighting columns covering existing ground level car parking.

As a Local Planning Authority, we have a discretionary power to issue an enforcement notice where it appears to us:

- that there has been a breach of planning control, and
- that it is expedient to issue the notice, having regard to the provisions of the development plan and any other material considerations

We also have a discretionary power to withdraw an enforcement notice. That may be appropriate where there is no longer a breach of planning control or where it is no longer expedient to continue with enforcement action in light of a change in circumstances.

On 28 February 2024, the Council served on enforcement notice in respect of the works described above. In light of a Screening Direction from the Secretary of State dated 29 May 2024 that the works are not 'EIA Development', the Council has determined that it is no longer expedient to continue with enforcement action in respect of the works and has therefore decided to withdraw the enforcement notice.

The background to this matter is set out in an Enforcement Report issued by the Council on 25 March 2024. For the reasons set out in that report and on the face of the notice, the Council issued an enforcement notice an Enforcement Notice on 28th February 2024 in respect of the works described above.

In particular, the works did not benefit from a planning permission granted pursuant to the Town and Country Planning (General Permitted Development) Order 2015 ("GPDO") by reference to Article 3(10) and Article 3(11) of the GPDO. Aside from the operation of Article 3(10) and (11) of the GPDO, however, the works would otherwise benefit from a deemed planning permission granted by Article 3(1) of the GPDO by reference to Class A of Part 8 of Schedule 2 to the GPDO.

In particular, the Council is satisfied that the works fall within the scope of Class A being "*Development by railway undertakers on their operational land, required in connection with the movement of traffic by rail*". Greater Anglia is a railway undertaker by reference to s.262(1) of the Town and Country Planning Act 1990 ("TCPA 1990") and the works are taking place on their operational land, as defined by s.263(1)(b) TCPA 1990. In particular, Greater Anglia hold a leasehold of the land for the purpose of carrying on their undertaking (even though the land was not in fact being used for that purpose prior to the works).

A railway station car park is considered to be development which is required in connection with the movement of traffic by rail, given that the car park is required to enable passengers arriving at the station by car to travel on the railway.

The works are not excluded from the operation of the Order by any of the provisions in paragraph A.1 of Class A. In particular, the works are considered by the Council to be "wholly within" the railway station. While that phrase is not defined in the Order, the Council has taken into account the meaning of that phrase in other statutory contexts, such as s.83 of the Railways Act 1993 (which defines a station to include land used in connection with a station) and is in any event satisfied, in the exercise of its judgment, that the works are wholly within the railway station.

At the time that the enforcement notice was served the works were a breach of planning control and the Council determined that it was expedient to take enforcement action. The works to create the car park extension did not benefit from a planning permission granted pursuant to the Town and Country Planning (General Permitted Development) Order 2015 ("GPDO") by reference to Article 3(10) and Article 3(11) of the GPD

Aside from the operation of Article 3(10) and (11) of the GPDO, however, the works would otherwise benefit from a deemed planning permission granted by Article 3(1) of the GPDO by reference to Class A of Part 8 of Schedule 2 to the GPDO.

It was only the operation of Article 3(10) and (11) which meant that the works did not benefit from planning permission and were therefore in breach of planning control. In particular, Article 3(10) provides that "Schedule 2 development" (within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017) is not permitted by the Order unless a negative screening opinion has been issued by the local planning authority or the Secretary of State has made a screening direction that the development is not EIA development.

No such screening opinion or screening direction had been issued in respect of the works to create the car park at the time that the enforcement notice was served.

Article 3(11)(a) provides that development is to be treated as being not permitted by the Order where the local planning authority has adopted a screening opinion that the development is EIA development, and the Secretary of State has not made a screening direction to the contrary. At the time that the enforcement notice was served, the Council had adopted a screening opinion that the works were EIA

development and the Secretary of State had not made a screening direction to the contrary.

However, since the service of the enforcement notice and the making of an appeal against it by Greater Anglia, the Secretary of State has on 29 May 2024 made a screening direction that the works are not EIA development (i.e. contrary to the Council's position).

Had this screening direction been obtained by Greater Anglia prior to the carrying out of the works that are the subject of the enforcement notice, there would have been no question that the works were 'permitted development' and a breach of planning control would not have arisen.

The Secretary of State's screening direction that the works are not EIA development has significant ramifications for the enforcement notice. In particular, the Council needed to consider (and review) whether it is 'expedient' to continue with enforcement action in light of the Secretary of State's screening direction.

The Council has sought the view of Greater Anglia and other interested parties. Greater Anglia's position is that the works do now benefit from a planning permission granted by the GPDO. Furthermore, and in any event, even if it were now to comply with the requirements of the enforcement notice, it would be able to construct the same works thereafter in reliance upon its permitted development rights under Class A of Part 8 (pre-supposing that the Secretary of State maintains its position that the works would not be EIA development).

Greater Anglia's position is that this is a 'fallback' which would be a material consideration for the Inspector to take into account on the Appellant's Ground (a) appeal (or any planning application made to the Council in respect of the works).

The Council considers that there is some legal uncertainty as to whether the works now benefit from a planning permission granted by reference to Class A of Part 8 of Schedule 2 of the GPDO (*see additional note*).

Even assuming that the works are a breach of planning control (*see additional note*), the Council accepts that if the requirements of the enforcement notice were complied with in full, there is a real prospect that Greater Anglia would carry out the same works in reliance on its permitted development rights under Class A of Part 8 of Schedule 2 having previously obtained a negative screening direction from the Sec of State and there is no reason to think that the Secretary of State is likely to change his view that the works are not EIA Development.

The Council is mindful that it would be a waste of resources and lead to additional disruption from demolition and construction activities if Greater Anglia were required to comply with the requirements of the enforcement notice, only to carry out the same works thereafter in reliance upon its permitted development rights.

The council continues to give great weight to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty as directed by the NPPF. Full weight is also given to the Development Plan

unless material considerations dictate otherwise. Material consideration is given to the Dedham Vale AONB & Stour Valley Management Plan 2021-2026 in this review. However, irrespective of those matters, it remains the case that, by operation of the GPDO 2015, exactly the same works as are the subject of the enforcement notice could be carried out following compliance with the requirements of the enforcement notice (assuming that the existing works are not already lawful), as set out above. The screening opinion by the Secretary is given significant weight, and functionally changes the consideration on the development being a breach of planning to reasonably pursue.

Further to the above, the Council is mindful of the legal duties that apply by virtue of the location of the site in the Dedham Vale National Landscape (including, for example, s.85 of the Countryside and Rights of Way Act 2000). The Countryside and Rights of Way Act 2000 as amended provides under s.85 provides, "*In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.*"

It may be considered that a decision to withdraw the notice is a "function" in relation to, or as to affect the AONB, and accordingly Tendring Council must seek to further the purpose of conserving and enhancing the natural beauty of the area. The key point of the s.85 is that the Authority must *seek* to further the purpose of conserving.., but the CRoW Act does not specify the extent of achievement; it emphasises the obligation to seek furtherance without defining a specific outcome.

In this context, it is considered that the authority has fully complied with s.85 in serving the enforcement notice with clear reasoning and intention to seek to reverse the unauthorised harm of the development, despite this not being achieved as set out above and for evidenced reasons through no fault of the council. The Council shall continue to act to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty in this matter by working with the owners of the land, including seeking to achieve further landscaping that remains in the control of its function.

Representations received have noted that no interim or formal guidance has yet been published for Relevant Authorities to help them meet their Section 85 obligations, but that Natural England advises:

- *the duty to 'seek to further' is an active duty, not a passive one. Any relevant authority must take all reasonable steps to explore how the statutory purposes of the protected landscape (A National Park, the Broads, or an AONB) can be furthered;*

The Council maintains that reasonable steps to "seek to further" have been taken in the actions to serve an enforcement notice. However, a review of that reasonable position is essential given the screening opinion now material. The pursuit of the enforcement notice is no longer reasonable as set out above given the permitted development position. Should any material consideration such as the screening opinion be challenged by any party, and that position changed, it is reasonable to review again as appropriate at that

time. For now it is not reasonable to guess the outcome of any future challenge (if made) for the purpose of this decision at this time. A withdrawal decision does not negate the ongoing efforts to further the statutory purpose. All reasonable steps to explore how protection of the landscape can be furthered with continued commitment to work with Greater Anglia and other interested parties on landscaping arrangements.

- *The new duty underlines the importance of avoiding harm to the statutory purposes of protected landscapes but also to seek to further the conservation and enhancement of a protected landscape. That goes beyond mitigation and like for like measures and replacement. A relevant authority must be able to demonstrate with reasoned evidence what measures can be taken to further the statutory purpose.*

This passage contains two key points, avoiding harm and demonstrating further measures. Avoiding harm is possible in some circumstances, but the council can not control the unauthorised actions of companies and individuals before they happen, but it can further conservation by serving notice to reverse that harm when such powers are available. Despite no legal requirement for the landscaping given the circumstances, the council now continues to seek further enhancement of the landscape the available measure to be taken forward for conservation and enhancement.

- *The proposed measures to further the statutory purposes of a protected landscape, should explore what is possible in addition to avoiding and mitigating the effects of the development, and should be appropriate, proportionate to the type and scale of the development and its implications for the area and effectively secured. Natural England's view is that the proposed measures should align with and help to deliver the aims and objectives of the designated landscape's statutory management plan.*

There are no proposed measures to further the statutory purpose for this section to be assessed against, except for landscaping proposals to explore. It is intended that proposals shall explore what is possible and avoid/mitigate the effects of the landscaping in itself, proportionate and would be secured. Any such landscaping shall be judged under the duty on its merits in due course.

Conclusion

Following the Secretary of State's Screening Direction and in light of the position of Greater Anglia and the matters set out above, the Council has reached the view that it is no longer 'expedient' to continue with enforcement action in respect of the works. In consideration of withdrawal the notice, all reasons for and against action, benefits and harm of the development as outlined in the officer expediently report in serving the notice have been reviewed and given due regard.

The position that the works would still be permissible under their permitted development rights even if the enforcement notice were complied with supports the decision to withdraw the notice. The Council recognises that enforcing the notice

would be an inefficient use of resources and cause unnecessary disruption, as the works could simply be reinitiated thereafter.

The Council reaffirms its commitment to conserving and enhancing the natural beauty of the AONB and will continue to collaborate with landowners to achieve this goal by working with Greater Anglia to address and mitigate any remaining environmental or aesthetic impacts as far as possible, including landscaping and mindful of its obligations including s.85 of the Countryside and Rights of Way Act 2000 to conserve and enhance the natural beauty of the AONB.

The Council was not required and did not consider it necessary appropriate to carry out a public consultation in respect of this decision, but it has nonetheless communicated its intention to all those who made representations to the planning inspectorate in respect of Greater Anglia's appeal against the enforcement notice, giving those parties an appropriate opportunity to comment if they wished to.

Recommendation: enforcement action is withdrawn.

The notice is therefore recommended to be withdrawn. The Council retains the right to reserve an enforcement notice in appropriate circumstances and the Council also notes that Greater Anglia has reconfirmed its commitment to providing landscape enhancements as referred to in its appeal submissions. Both the human rights act and equality act have been given due regard in respect of this decision potential consequences (Additional Note 2).



21/06/2024

.....
John Pateman-Gee –
Head of Planning and Building Control

.....
(Date)

I endorse the above recommendation.



24/06/2024

.....
Gary Guiver –
Director of Planning

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(Date)

Additional Note:

Are the works a breach of planning control or are they now permitted by operation of the GPDO 2015?

The Council considers that there is some legal uncertainty as to whether the works now benefit from a planning permission granted by reference to Class A of Part 8 of Schedule 2

On the one hand, 'development' (for which planning permission is required) is defined by s.55 TCPA 1990 as the 'carrying out' of building, engineering and other operations. The works in this case was not permitted at the time they were carried out and it is arguable that the GPDO only operates prospectively to grant permission for the carrying out of development. The Council notes, for example, that there is no equivalent provision to s.73A TCPA 1990 in respect of the retrospective effect of a planning permission granted on application in the GPDO 2015. On the other hand, there is nothing in Article 3(10) or (11) GPDO 2015 which explicitly provides that a negative screening opinion or direction must be obtained prior to the carrying out of the works in question, as is the case in respect of other permitted development rights (such as when 'prior approval' is required).

Ultimately, whether the GPDO 2015 operates to grant planning permission for the works in these circumstances is a matter of law and there is no authority, so far as the Council is aware, on the point of law in issue.

While it may, therefore, be the case that the works are no longer a breach of planning control by operation of the GPDO 2015, the Council has, for the present purpose of deciding whether it is expedient to continue with enforcement action at this time, assumed that the works are not permitted by the GPDO 2015 and therefore continue to be a breach of planning control.

Additional Note 2:

The public sector equality duty provides that a public authority must, in the exercise of its functions, have due regard to the need to:

- a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics are:

- age.
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

Consideration has been given to the duty imposed under Section 149 to have regard to the need to: eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Act; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and, foster good relations between persons who share a relevant protected characteristic and persons who do not share it. In this matter the authority has not been provided with any specific information on any affected parties' protected characteristics, including current or potential occupiers of the site nor owners/management of the site. However, it is noted that the development includes the provision of additional disabled spaces and that

these will be retained by the withdrawal of the enforcement notice, thereby affecting persons who identify with any (including more than one) of the protected characteristics. There are no known negative impacts identified, but it is considered that the decision to withdraw the notice may disadvantage person/s with one or more of the protected characteristics.

In taking decisions, the Authority must have regard to, and ensure compliance with, the provisions of the Human Rights Act 1998 (as amended). Article 1 of the First Protocol, Article 6 (a right to a fair hearing within a reasonable time), Article 8 (right to respect for private family life) and Article 14 (prohibition of discrimination) are relevant when considering decisions in relation to planning enforcement including issuing and subsequently withdrawal of an Enforcement Notice. The Council may interfere with a particular right with justification, where is it necessary and proportionate to do so with consideration of competing interests. There is a clear public interest in pursuing a legitimate aim, by enforcing planning law and planning regulation in a proportionate way. In deciding, whether enforcement action is taken or not, local planning authorities should, where relevant, have regard to the potential impact on public safety, the health or morals, housing needs and welfare of those affected by the proposed action, and those who are affected by the breach of planning control.

In taking the decision to issue an Enforcement Notice, the Council must have regard not only to the implications for Human Rights in expediting the proposed action but also the implications of not pursuing action – informed by the information available at the time of the decision and as has been reviewed in this case. In taking the decision to cease formal enforcement action, the Council has regard to the nature of the breach of planning control as set out in the reports associated with this case, the impacts on users on the car park facilities, the users of the ANOB and PROW, users of the wider location and users of the community. The impacts of ceasing formal action will be the continuation of the additional parking areas including additional DDA spaces, a level of safety and security offered by the new high intensity lighting and CCTV.

It is therefore the Authority's view that the proposed ceasing of enforcement action is justified and necessary given the reasonable actions available in this case and is not discriminatory and is proportionate having regard to all the circumstances of the case including the screening opinion now issued. The Authority are satisfied that the decision as recommended is reasonable and compatible with the provisions of the Human Rights Act 1998.