

**PONDTAIL WOOD, MUDDLESWOOD ROAD, ALBOURNE, WEST SUSSEX (“the land”)**

**ENFORCEMENT NOTICE DATED 13 JUNE 2016**

**GROUND OFS OF APPEAL**

1. The appellant appeals on grounds (a) (b) (c) (f) and (g) of section 174(2) of the Town and Country Planning Act 1990 (as amended) (“the Act”). The lawful use of the land is for forestry. The use of land for forestry and afforestation is not development by operation of section 55(2) (e) of the Act. Hardcore and soils have been brought onto the land for the purpose of assisting in afforestation of the land by improving the existing soils, their drainage and accessibility.

**Background**

2. The use of land for forestry and afforestation is not development by operation of section 55(2) (e) of the Act. The lawful use of the land is for forestry and the land has been used for forestry purposes since the Second World War, largely for fast growing timber such as conifers and poplar, which have been clear felled from time to time. Although, technically, the land, having been wooded since 1600, is recognised as “ancient woodland” it has no special ecological value.
3. “Ancient woodland” is an area that has been wooded continuously since at least 1600 AD. It includes:
  - ‘ancient semi-natural woodland’ mainly made up of trees and shrubs native to the site, usually arising from natural regeneration;
  - ‘plantations on ancient woodland sites’ areas of ancient woodland where the former native tree cover has been felled and replaced by planted trees, usually of species not native to the site.<sup>1</sup>
4. Hardcore and soils have been brought onto the land for the purpose of assisting in afforestation of the land by improving the existing soils, their drainage and accessibility following the clear felling of a crop of conifer and poplar trees in 2016.

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<sup>1</sup> See Planning Practice Guidance

5. The use of the land for the storage of these materials has been entirely incidental and ancillary to the use of the land for the purposes of forestry and re-afforestation.

#### **The Enforcement Notice**

6. The Notice dated 13 June 2016 is the second such Notice to have been issued by the SDNPA, the previous Notice dated 2 June 2016 having been withdrawn.
7. The Notice has several fundamental drafting defects:
  - (i) The Notice refers to the deposit of waste as “operational works”. As a matter of law, the deposit of waste is a material change of use: see Section 55(3)(b) of the Act. [see appeal under Ground (b)]
  - (ii) The “cleared area of ancient woodland” where the operational works are alleged to have taken place is not described or identified.
  - (iii) The existing lawful use of the land is not identified. It is the appellant’s case that the entire appeal site as identified in the Notice has a lawful use for forestry.
  - (iv) The Notice alleges “the development of private ways”. That description of development is not a description of either engineering operations or “operational works”. The formation of private ways is permitted development within Part 6 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 (“the GPDO”). It is not clear what, if any, building, engineering or other operations are alleged to have constituted such works. It is noted that the requirements of the Notice do not refer or to set out any requirements in respect of the so-called “private ways”.
  - (v) The Notice requires the reinstatement of an access track. However, the removal of an access track is not part of the allegation and no breach of planning control is alleged in relation to it.
  - (vi) The requirements of the Notice at paragraph 2(d) of section 5 of the Notice refer to works that would “allow replanting as specified in the Restocking Notice”. There is no other reference to the “Restocking Notice” in the Notice to clarify what it refers to. For the avoidance of doubt, an Enforcement Notice should be clear on its face as to what it requires the recipient to do and any document which is referred to in the Notice should form part of the

Notice. If the reference to the Restocking Notice is a reference to a Restocking Notice issued under the Forestry Act 1967, (and which would be, in any case, appealable under separate procedure by section 16 of the said Forestry Act 1967) it is not clear which Restocking Notice. It is not identified by date or other specific information. In any case the Notice cannot rely on a notice served under a different statutory framework to achieve the requirements of an Enforcement Notice issued under the Act.

- (vii) The Notice is directed at “engineering works, including the alteration of site levels, the creation of drainage channels and the development of private ways.” The word “including...” indicates that the scope of the engineering works is more extensive than the matters specified, but the Notice does not say how. This form of words has been specifically deprecated in R. (East Sussex Country Council) v Secretary of State for Communities and Local Government [2009] EWHC 3841 (Admin). Per David Elvin Q.C. sitting as a Deputy High Court judge: *“The use of the word “including” was particularly unfortunate, because it made it clear that what followed it was not a complete description and did not make clear what the allegations were. This is important, as a matter of public policy, because those who are affected by such notices should know what is being alleged and what steps have to be taken with respect to them. It is also important, because in due course if the enforcement notice takes effect and the steps are not complied with they may be followed by prosecution. The breaches should be specified because it is also important to know what action has been taken to enforce against a particular property which will appear from the planning register which is open to the public.”*
8. The Notice is so defective that either it is a nullity, or it is so defective that it should be quashed as invalid and incapable of correction or variation by the Secretary of State pursuant to his powers without causing injustice to the appellant. The Secretary of State has powers under section 176 of the Act to correct or vary the Notice on appeal, but in the event that the Secretary of State is asked by the South Downs National Park Authority (“SDNPA”) to exercise such powers, they can be

exercised only where the Secretary of State is satisfied that it would not cause injustice to the parties. The appellant reserves his position in this respect.

**Ground (b): Those matters have not occurred**

9. The lawful use of the land is for forestry. The use of land for forestry and afforestation is not development by operation of section 55(2) (e) of the Act. Hardcore and soils have been brought onto the land for the purpose of assisting in afforestation of the land by improving the existing soils, their drainage and accessibility.
10. The Notice alleges a breach within section 171A(1) of the Act, and the alleged breach is for “operational works” involving the importation and deposit of waste.
11. By section 55(3)(b) the deposit of waste materials on land involves a material change of use. Accordingly the alleged breach cannot comprise “operational works” , as a matter of law.
12. The appellant does not accept that, as a matter of fact, waste materials have been imported and deposited on the land. The Notice does not include hardcore and soils in the “waste materials” referred to in the allegation.
13. No materials of any kind other than hardcore and soils have been imported. Those materials (hardcore and soils) were imported for the purpose of improving the access over and drainage of the land so as to enable the planting and harvesting of commercial crops of small conifer “Christmas trees” on the site. No material change of use of the land has taken place.

**Ground (c): Those matters (if they have occurred) do not constitute a breach of planning control**

14. The lawful use of the land is for forestry including re afforestation following clear felling of the last crop of trees.
15. No materials of any kind other than hardcore and soils have been imported. Those materials were imported and are stored on the land for the purposes of improving the access over and drainage of the land so as to enable the planting and harvesting of commercial crops of small conifer “Christmas trees” on the site. Accordingly their present storage on the land is incidental to the use of the land for the purposes of storage.

16. No operational development or material change of use of the land has taken place. The improvement of the stability and drainage of the land for purposes of forestry does not constitute development, but is an activity ancillary to the lawful use.
17. The Notice alleges “the development of private ways”. That description of development is not a description of either engineering operations or “operational works”. The formation of private ways is permitted development within Part 6 of Schedule 2 of the GPDO. The importation of the materials for the formation of private ways is not per se development, but is ancillary to the use of the land for purposes of forestry or afforestation. It is not clear from the Notice what, if any, building, engineering or other operations are alleged to have constituted such works. It is noted that the requirements of the Notice do not refer to or set out any requirements in respect of the so-called “private ways” and if, which is denied, the “development of private ways” is development in breach of planning control it is not enforced against by the Notice.
18. The importation of hardcore and soils for forestry (which the Notice does not allege as comprising any part of the alleged deposit of waste) is therefore (i) not development and (ii) not in breach of planning control. It is noted that the requirements of the Notice do not require the hardcore to be removed and if, which is not admitted, its importation and deposit is in breach of planning control it will be permitted by under enforcement by operation of section 173(11) of the Act.
19. As the Notice fails to identify with any particularity at what “waste material” the allegation in the Notice is directed, the reference should be deleted as it is too vague and uncertain.

**Ground (a): Planning permission should be granted**

20. This ground arises only if, and to the extent that, the appeals under grounds (b) and (c) do not succeed.
21. The lawful use of the land is for the purposes of forestry, including afforestation. The Notice is directed at the deposit of hardcore, soils and unspecified “waste materials” and engineering operations including alteration of site levels, creation of drainage channels and the development of private ways.

22. There is no requirement in the Notice to remove the alleged hardcore or the private ways, so they can reasonably be expected to be permitted by under-enforcement per section 173(11) of the Act.
23. The failure to specify or identify the “waste materials” or the extent of the engineering works beyond those identified in the Notice means that the deemed application under section 177 of the Act is effectively confined to the importation of soil, alteration of site levels and creation of drainage channels, all of which are incidental and ancillary to the use of the land for forestry.
24. The appellant intends to replant the land that had been clear felled with small conifers “Christmas Trees” as a commercial crop and the “works” are for that purpose.
25. Once completed, the works/ use will have no material effect on the landscape or the natural beauty of the area. The land is to be replanted with conifers which will be harvested and then cut down according to demand and the land replanted.
26. The continuing use of the land for forestry is an appropriate use of land within the National Park and is respectful of its statutory designation.
27. The development accords with National Policy in the NPPF and with local policy in the statutory development plan which comprises the adopted Mid Sussex District Plan 2004 and the emerging South Downs National Park Preferred Options Local Plan.
28. If (which is denied) and insofar as there are “operational works” for the importation and deposit of [unspecified] waste which requires planning permission, the appellant reserves his position until the SDNPA identifies the waste which the Notice is directed at. It is the appellant’s case that the deposit of materials on the land has been for the purposes of forestry and in due course is intended to be assimilated into the landscape to promote the use of the land for growing small conifers.
29. The development causes no harm, is consistent with the National Park location and accords with policy.

**Ground (f): The steps required by the Notice are excessive**

30. The only harm identified is harm to visual appearance and the amenity that accompanies the use of the land for forestry, which is intended to continue.
31. The steps required go well beyond the remedying of any harm to the landscape and the appearance of the land.
32. As to the specific requirements (section 5 of the Notice):
- (i) Paragraph 2 appears to be mis-written and the appellant has assumed that the word “left” should be replaced by the word “leave”. However the words “leave in a condition which will enable the ancient woodlands soils to recover” is so vague and uncertain as to be meaningless.
  - (ii) As to paragraph 2(a), it is not accepted that the land comprised “previously undisturbed ancient woodland soils” which can be exposed. The land had been used for many years for commercial timber cropping by planting and clear felling fast growing conifers and poplar. There was little or no “previously undisturbed ancient woodland”.  
The “drainage channels” do not need to be removed to remedy any injury to amenity.  
The requirement to use “Only machines which can be operated with a good degree of accuracy and sensitivity” is so vague and uncertain as to be meaningless.
  - (iii) As to paragraph 2(b), this requires the re-instatement of an access track, the removal of which is not referred to in the allegation in the Notice and is not claimed to constitute a breach of planning control. The requirement clearly exceeds the steps required to remedy the breach of planning control described in the allegation.
  - (iv) As to paragraph 2(d), the steps required are all related to “allow regeneration of replanted trees in good forestry practice, as per the “UK Forestry Standard” to allow replanting as specified in the Restocking Notice”. UKFS is contained in a document of some 116 pages and the guidelines are set out in seven further documents; in total many hundreds of pages of guidance. The requirements to comply with the whole of that series of documents is excessive and goes far beyond what is necessary to return the land to its previous state; assuming that is what is sought.

- (v) As to the Restocking Notice, this is not attached to the Notice and is not clearly identified so that the appellant can know which document is referred to.
- (vi) If the reference to a Restocking Notice is a reference to a Notice made under the Forestry Act 1967, that notice is (a) created out with the planning system, being concerned with an entirely separate statutory regime and (b) would in due course be the subject of an appeal.

**Ground (g): The period for compliance is too short**

33. The period for compliance is too short, takes no account of season (which is essential in such a location) and is unreasonable. It is not practical and possible to have carried out the entire works including providing compliance reports from an expert ecologist within the period allowed. In any event, expert evidence will need to be provided on a feasible compliance period.

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