



Direct Action Authorisation Report

Property address

Plot 107, Land adjacent to Long Road, Soberton as identified on the plan annexed to the enforcement notice dated 9 October 2018 (the "Site").

Introduction and summary

This report considers whether direct action under s178 TCPA 1990 should be authorised to clear the Site. The report considers the breach, the harm caused by that breach, whether any other factors outweigh that harm, and whether direct action is the most appropriate remedy.

The report recommends that direct action should be authorised.

History of the site

On 16 April 2018 it was reported by a local councillor that two persons had set up an encampment in tents on a plot in the field at Long Road and had brought with them their personal belongings and furniture. The councillor advised [REDACTED] told that a mobile home was due to be brought onto the field.

On 17 April 2018 an enforcement officer visited the Site and spoke to the two people [REDACTED]. They claimed to be homeless and indicated that they were looking to run a farming business on their plot (plot 107). The enforcement officer advised them that the breach of planning control was not acceptable and that enforcement action was likely.

Further site visits were carried out and there was evidence that the Site was being prepared for development. An interim injunction covering the Site and the wider surrounding land was obtained on 10 May 2018. On 11 May 2018 [REDACTED] brought a mobile home onto the Site. The injunction was confirmed on 23 May 2018.

Breach and enforcement notice

An enforcement notice was issued by the SDNPA on 9 October 2018 and was served by hand on that date. The notice alleged the following breach.

"Without planning permission, the material change of use of the Land from agriculture to a mixed use of agriculture and use as a residential caravan site together with ancillary operational development."

The notice required the following steps to be taken.

1. Cease the use of the land as a residential caravan site,

2. Remove from the Land all caravans/ mobile homes, vehicles not required for the purposes of agriculture on the Land and all other residential and domestic paraphernalia including gas bottles.
3. Remove the fencing and the resulting materials from the Land.
4. Return the Land to its previous condition and appearance as agricultural land and seeded to grass after compliance with steps 1 to 3.

The notice was not appealed. The current occupiers have confirmed having received a copy of the notice.

Evidence of continued non-compliance

A site visit on 15 April 2019 confirmed that residential occupation of the plot was ongoing. Officers met with [REDACTED] who confirmed he still occupied the caravan with [REDACTED] [REDACTED] who was at work during the visit. Officers observed that a static and a mobile caravan remained on site, that a silver car and various domestic items and gas bottles remained on site and that the site was fully fenced. Officers saw low level domestic animal husbandry but no evidence of agricultural uses within Plot 107.

A letter was hand delivered to the occupiers on 18 April 2019 giving notice that direct action was being considered and inviting the occupiers to comply with the notice. As at the date of this notice, there is no evidence that the occupiers have taken any further steps to comply.

A letter was received on 30 April 2019 from [REDACTED] in response to the 18 April letter making an unspecified threat of a claim for compensation but showing no sign of any willingness to comply with the enforcement notice.

Legislation

S178 Town and Country Planning Act 1990 states

- (1) Where any steps required by an enforcement notice to be taken are not taken within the period for compliance with the notice, the local planning authority may
 - (a) enter the land and take the steps; and
 - (b) recover from the person who is then the owner of the land any expenses reasonably incurred by them in doing so.

Considerations

Case law¹ suggests that the following considerations need to be weighed up when considering whether to use s178.

- the degree of harm done to the interests protected by planning control;
- the need for a swift or urgent remedy;
- the need to uphold and enforce planning control embodied in an effective enforcement notice and the criminal law;
- the personal circumstances of the occupiers and impact on the occupiers of removal

¹ R. (on the application of O'Brien) v Basildon DC [2006] EWHC 1346 (Admin)

- where the occupants have nowhere lawful or suitable to go, the prospects of success which they might have on a planning application or on appeal, and the time scale over which that might be resolved.

In addition, where Article 8 of the ECHR is engaged, it is necessary to ensure that action taken is proportionate. Case law² suggests this means whether the use of direct action is no more than is necessary to accomplish the objective of remedying the breach in planning control.

These factors are considered below.

Planning harm

The enforcement notice set out the planning harm in some detail. This included

- The location of the site in the South Downs National Park
- Its conspicuous and prominent location
- Its breach of an Article 4 direction
- Its breach of policies (some emerging) including Winchester District Local Plan Joint Core Strategy, the SDNPA Local Plan, the NPPF
- Contravention of the statutory purposes of the National Park

This is ultimately an egregious breach in planning control. The site is very prominent; it is well within the National Park and is visible from a number of public realm vantage points in the area. The National Park exists to protect land such as this.

The site is not within an area identified for this type of development, it has no facilities and poor access. The land has been divided into a large number of small plots, with the apparent intention of encouraging mass development and making enforcement difficult. Some of the other plots have already been occupied and enforcement action is ongoing.

Likelihood of planning permission being granted if sought

While the planning merits of the development on the site have not been tested at appeal, there is no reason to think that any challenge to the impact on any of these policies would be successful. In particular, as part of its consideration of expediency of action before issuing the enforcement notice, the SDNPA considered the likelihood of planning permission being granted for the development (if sought) and decided it was very small indeed. There has been no significant change in planning policy terms since that assessment and officers are satisfied that there is no likelihood of planning permission now being granted.

It is also relevant that a planning application and appeal would take between 6 to 12 months to determine. If direct action were to be delayed pending that process, the breach would continue during the period.

Need for a swift and urgent remedy

The division of the land means that, if action is not taken on Plot 107, it is likely that further sporadic development will occur. Further, the prospect of lengthy enforcement action during which the planning breach remains in place undermines the purpose of the National Park.

² Chapman []

Need to uphold planning control

As paragraph 58 of the NPPF records, "effective enforcement is important to maintain public confidence in the planning system."

The planning policies applicable to the National Park are intentionally restrictive of development. It is vital to the success of the National Park that these are enforced effectively and consistently. The public have a special interest in seeing planning control upheld in a National Park because, if uncontrolled development is allowed, the beauty and purpose of the National Park will be lost.

The division of the land means that, if action is not taken on Plot 107, it is likely that further sporadic development will occur with the risk that the aims of the National Park will be frustrated by the scale of the development.

Needs of the occupiers

The occupiers were sent a welfare questionnaire giving them the opportunity to set out their personal circumstances. The questionnaire was returned uncompleted with an accompanying letter which gave no further details of any welfare needs.

However, from previous dealings with the occupants, officers are aware [REDACTED] there are no children on the Site.

Officers understand that the occupiers consider that they have nowhere else to go. They are believed to have left bricks and mortar accommodation voluntarily [REDACTED]. The occupiers [REDACTED], one is in work and officers are not aware of any reason preventing the other from finding work. Officers are not aware of any medical requirements that would necessitate their living in this particular location.

There is no doubt that, if direct action is taken and the caravan is removed from the site and transported to a storage facility, the occupiers will not have alternative accommodation immediately available. While the local authority has a duty to house in some circumstances, it seems unlikely that the occupiers would qualify, at least in the short term, for such support.

It would, however, be within the ability of the occupiers to move their caravan to an alternative authorised caravan site. The occupiers will be given sufficient warning of the direct action decision to enable them to arrange this. The occupiers [REDACTED] and there is no particular reason known to officers why they should be subject to rejection from authorised caravan sites.

It was clear from the letter received on 30 April 2019 that [REDACTED] may not fully understand the seriousness of the situation. Consequently, officers propose to offer to seek to meet with her to give a verbal explanation when warning of the direct action decision.

Welfare of animals

At the site visit on 15 April 2019, officers noted the presence of chickens, dogs and goats. Officers are confident that suitable housing can be arranged, at least in the short term, for all of these animals.

Alternatives

There are a number of alternative courses of action available to the SDNPA to encourage compliance with the enforcement notice. The advantages and disadvantages of each are considered:

- Doing nothing** The SDNPA is entitled to disregard the continued breach and take no further action if it is considered appropriate. However, in this case the planning harm is particularly egregious and, given the number of further plots on the wider site, failure to enforce strongly is likely to result in many more cases of development in breach.
- Prosecution** The likely cost to the SDNPA of prosecution for breach of the EN is around £5000 assuming a prosecution in the magistrates court. There is no likelihood of meaningful recovery of these costs. Prosecution is likely to result in a small fine. Prosecution will not itself achieve the immediate remedy of the planning breach unless the occupiers decide to comply. Prosecution remains an option even after direct action is carried out.
- Committal** (for breach of the injunction). As an exercise of the court's inherent jurisdiction, the power to commit to prison is one which civil courts are notoriously slow to exercise. It is likely that several hearings would be required with consequent cost implications. Any prison sentence is likely to be short and, like prosecution, does not itself achieve the immediate remedy of the planning breach.
- Direct action.** Direct action carries the advantage that the planning breach is immediately remedied, that there is power to recoup costs (though recovery is likely to be minimal given the land values) and that the action sends a strong message to other land owners who may be tempted to develop the wider site in breach of planning control.

Proportionality of the remedy

The need for planning enforcement is reflected in the primary legislation and given support in the NPPF. The s178 remedy is clearly linked to this importance as it is one of a suite of powers designed (and limited) to achieving compliance with enforcement notices. The direct action power is the only one which has the direct effect of achieving compliance and remedying the planning breach; other powers such as prosecution are aimed at punishing non-compliant offenders, rather than remedying the breach itself. Taking direct action can therefore be seen as not excessive in the sense that it is only power which achieves compliance.

Provided that other relevant factors are considered and a balance reached, the direct action power can be considered a proportionate response to the planning breach.

Risk assessment

In undertaking direct action, the SDNPA needs to be aware of certain risks.

Risk of harm to SDNPA/WCC and contractor staff

There is likely to be conflict and/or hostility from the occupiers and potentially their neighbours on the site. Local police support will be sought but the contractors are believed to have sufficient experience in direct action to avoid conflict. The contractor will be responsible for the safety of its workers. While a WCC staff member will be required on site to supervise, the risk of harm to the council staff member is thought to be low.

Risk to SDNPA reputation

There is a risk that direct action will be seen as excessive and heavy-handed. However, experience suggests that members of the public support strong action by councils in planning enforcement to ensure a level playing field. There is a serious risk to the SDNPA's reputation if no action is taken and the matter is allowed to drag on. In addition, in this case, there is a real risk that, if action is not taken now, there will be mass development in breach on this site and the SDNPA will be seen to have missed the opportunity to send a strong message.

Risk to SDNPA finances

While costs of the action can be recovered from the owner of the land, (and a charge can be placed on the land to support recovery), the land has little value and it is likely that some costs will not be recoverable. Storage charges can be levied for individual items taken to storage prior to release of those items. However, this carries the risk that the items will simply be abandoned, leaving the SDNPA with disposal costs.

There is a risk that, once the work is instructed, the owners may decide to comply leaving the SDNPA with cancellation costs. The work will be instructed as flexibly as possible to avoid such costs.

However, the financial risks are effectively limited to the cost of the action which is outlined in the quote received. There is a small risk of compensation for loss if either the direct action or the enforcement notice could be shown to be outside the SDNPA's powers but very few of the items on the site appear to have any substantial financial value so that risk is limited.

Contractor

Taking direct action is a specialist area of planning enforcement. The right contractor needs a blend of onsite construction/demolition expertise and an in depth knowledge of planning legislation, the powers available to the SDNPA and the limits on these powers. There are many issues that will crop up during the action including

- injunctions and the threat of injunctions,
- health and safety allegations
- allegations of breach of powers
- physical assaults
- dispute over what was on site at any stage during the action and the defensibility of the cost of any action.

It is essential that the right contractor is employed to ensure that overall cost is minimised, value for money is obtained, and to ensure that the SDNPA's reputation is upheld and its duties properly carried out. Officers believe that it is essential for the chosen contractor to have previous experience in carrying out direct action and is able to make suitable site records and credibly defend their actions in court.

The SDNPA has instructed [REDACTED] a specialist direct action contractor. A quotation has been obtained to project manage the direct action and compile appropriate records which is believed to represent suitable value for money.

Public Sector Equality Duty

In making its decision the SDNPA must also have regard to its public sector equality duty (PSED) under s.149 of the Equalities Act. The duty is to have due regard to the need (in discharging its functions) to:

- a. Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
- b. Advance equality of opportunity between people who share a protected characteristic and those who do not. This may include removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; taking steps to meet the special needs of those with a protected characteristic; encouraging participation in public life (or other areas where they are underrepresented) of people with a protected characteristic(s).
- c. Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.

The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

It is not believed that any of these characteristics are relevant in this case.

The PSED must be considered as a relevant factor when considering its decision but does not impose a duty to achieve the outcomes in s.149. The level of consideration required (i.e. due regard) will vary with the decision including such factors as:

- a. The importance of the decision and the severity of the impact on the SDNPA's ability to meet its PSED
- b. The likelihood of discriminatory effect or that it could eliminate existing discrimination.

The SDNPA should give greater consideration to decisions that have a disproportionately adverse impact on a protected characteristic and this impact may be unintentional. In appropriate cases, this may involve an understanding of the practical impact on individuals so affected by the decision. Regard should be had to the effect of mitigation taken to reduce any adverse impact.

Further, the PSED is only one factor that needs to be considered when making a decision and may be balanced against other relevant factors. The SDNPA is also entitled to take into account other relevant factors in respect of the decision, including financial resources and policy considerations. In appropriate cases, such countervailing factors may justify decisions which have an adverse impact on protected groups.

Human Rights

In taking direct action, the SDNPA is undoubtedly interfering in the Article 8 right to respect for private and family life and the Article 1 right to the protection of property.

However, such interference can be justified where it is necessary and proportionate, is in the public interest and is justified in order to protect the rights and freedoms of others (for example neighbours and the public).

Balance

Officers have sought to balance all of these factors in their recommendation but the decision ultimately vests with the decision maker.

Officers believe that further action to enforce compliance is necessary to uphold the integrity of the planning system, to remedy the breach of planning control and to avoid the further unauthorised development that would come with a weak approach to this breach.

The proposed direct action is believed to be the minimum necessary action to achieve compliance with the enforcement notice. No other legal remedy has the direct effect of achieving compliance and all expose the SDNPA to significant cost risks and lengthy delays to the enforcement process. There is no likelihood of planning permission being granted for the development on this site and an application would simply delay compliance unacceptably.

The development is in the National Park and planning policy supports the restriction of development to protect the national park. Taking action is therefore clearly in the public interest and is justified in order to protect that interest.

While the occupiers' rights to family and home life will be interfered with, they are largely the authors of their situation. They established a home and continue to live in it on an environmentally protected site in knowing breach of planning control. There is no evidence that they face more difficulties in complying with the notice than any other member of the public. There is no evidence that they require additional protection as a result of a protected characteristic. There is no evidence that any particular welfare requirements are sufficient to outweigh the clear interest in the effective upholding of the planning system. There is no evidence that they have nowhere to go and other authorised caravan sites would be available to them albeit at a cost.

Officers therefore recommend that direct action is authorised.

Delegated authority

The Director of Planning is authorised under the SDNPA's Scheme of Delegation to make all decisions required and take all actions necessary in the discharge of the functions of the Authority falling within the terms of reference of the Planning Committee, except (inter alia):

“(vii) enforcement action which requires prosecution, the service of a “Stop Notice” or any other Notice or action which in the opinion of the Director of Planning might potentially have significant financial risks for the Authority”.

Planning enforcement, and therefore direct action, comes within the terms of reference of the Planning Committee. Officers are satisfied that, on the basis, of the financial risks identified above, the risks of the direct action are not such as to require approval of the Planning Committee.

Recommendation

1. That direct action under s178 TCPA be carried out to implement items 1 to 4 of the requirements of the Enforcement Notice.
2. That [REDACTED] be appointed to carry out the work.
3. That a warning letter should be sent to the occupiers notifying them of the decision and that officers make attempts to meet with them in order to give a verbal explanation.

4. That this decision be published on the SDNPA's website in accordance with the Openness Regulations, redacted for any confidential material.

Approved on 9 May 2019 by Tim Slaney,
Director of Planning,
South Downs National Park Authority

Signed



