



The Planning Inspectorate

An Executive Agency in the Department of the Environment and the Welsh Office

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Your Reference:
16/S/10667/2
Council Reference:
94/ENF/375
Our Reference:
T/APP/C/95/W1525/638372

Date: **20 FEB 1996**

Dear Sirs

**TOWN AND COUNTRY PLANNING ACT 1990, SECTION 174 AND SCHEDULE 6
PLANNING AND COMPENSATION ACT 1991**

APPEAL BY IAN PETER SMITH

**LAND AT THE REAR OF THE GREEN MAN PUBLIC HOUSE, EDNEY COMMON,
HIGHWOOD, CHELMSFORD**

1. As you know, I have been appointed by the Secretary of State for the Environment to determine your client's appeal against an enforcement notice issued by the Chelmsford Borough Council concerning the above mentioned land. I held an inquiry into the appeal on 30 January 1996. The evidence was taken on oath. I made an accompanied site inspection on the same day.

THE NOTICE

2. (1) The notice was issued on 3 April 1995.
- (2) The breach of planning control alleged is: without planning permission, the construction of a race track by the formation of earth and tyre mounds and erection of safety barriers.
- (3) The requirement is: to dismantle the mounds and safety barriers and remove all resulting material with the exception of earth from the site.
- (4) The period for compliance with the above requirement is two calendar months.

GROUNDINGS OF APPEAL

3. Your client's appeal against the notice was made on the grounds set out in S174 (2) (a), (c), (d), and (g) of the 1990 Act as amended by the Planning and Compensation Act 1991. However, as the prescribed fees under the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989-93 have not been paid to the Secretary of State and the Local Planning Authority within the period specified, the appeal is proceeding on grounds (c), (d), and (g) only. The deemed application for planning permission under section 177(5) likewise does not fall to be considered.

SITE DESCRIPTION, UNDISPUTED FACTS & SUMMARY OF PLANNING HISTORY

4. The appeal site consists of 3 fields, in total about 4.45 ha, which lie behind the Green Man Public House on the edge of Edney Common, a small settlement in the countryside near Chelmsford. The southernmost field, now used for horse grazing and occasionally as a football pitch, leads to the main field, which contains the race track referred to in the notice. This main field is adjoined to the west by a third field, marked "Paddocks" on Plan D, now grazing land which was used as car pits when racing took place on the site.
5. The site was originally used in the 1980s as a grass track for occasional motor cycle racing. Car racing began at the site in 1991 and continued until late 1994, when racing ceased at the site. Further details of the history of the operations which resulted in the mounds and barriers are given below with reference to the ground (d) appeal.
6. The surfaced track measures about 95m X 130m, and is about 8m wide, consisting of bare earth with a high shingle/gravel content. It is surrounded by a low-level Armco metal safety barrier (similar to those used at the side of motorways) which is bolted to timber posts fixed in the ground at 3m intervals. Gaps at the northern and southern ends of the barrier leave space for vehicles to enter and leave the track. The barrier is backed on its southern and western sections by an earth mound about 0.8m-1.2m high and about 2.5m wide, with tyres embedded in and against parts of the mound. Tyres are also wedged at places between the mound and the barrier. The northern section of the barrier is backed by tyres without earth mounding, and the eastern section is backed by hedging. South of the barrier, beyond an intervening spile fence, is a separate earth mound for spectator viewing.
7. The site lies within the approved Green Belt. On 22 February 1995 the Council issued an enforcement notice seeking to restrain use of the land for the racing of motor vehicles and associated storage of portable buildings, equipment and materials. This notice was not appealed, and duly took effect. A Stop Notice issued on 3 April 1995 brought forward the compliance date of the enforcement notice to 10 April 1995. On 3 April 1995 the Council issued a further enforcement notice, seeking to restrain use of the land for the storage of various non-agricultural materials which were connected with motor racing. This notice was also not appealed. By an Inspector's decision letter dated 9 June 1995 your client's appeal against the decision of the Council to refuse planning permission for the erection of fencing 2.4m high on part of the site was dismissed (see SLD 11).

GROUND (C)

8. Case for the appellant

The mound and the barrier are a means of enclosure, since they serve to keep vehicles in and spectators out from the race track. Therefore, their construction was permitted development under the provisions of Class A of Part 2 of Schedule 2 of the GDO. The effect of these provisions is to permit minor operations which consist of "the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure". The case law referred to at paragraph 3B-20270 of the Encyclopedia of Planning Law and Practice shows that whether or not a particular structure is a means of enclosure is a question of fact and degree in each case. The planning appeal decisions relied on by the Council [documents 9 (i)-(ii)] can be distinguished; the Chudleigh Case concerned scrap tyres piled as a barrier on one side of a field,

while the Tockenham Case concerned a tyre wall at the edge of a race track. In any case, the distinction drawn by the Inspector in the Tockenham Case between a means of enclosure and a safety measure is not supported by the wording of the GDO. There is no reason why an enclosure cannot also be a safety measure, as is often the case, for example, a fence to keep animals in.

9. Case for the Council

The words "or other means of enclosure" in the GDO are governed by the *ejusdem generis* rule - see Ewen Developments Ltd v SSE & North Norwich DC [1980] JPL 404, and other cases referred to at paragraph 3B-20270 of the Encyclopedia. Therefore, the means of enclosure must be similar to a gate, fence or wall. Here the function of the mounds and the barrier is not to enclose land in the normal sense, but to provide a safety measure for motor car racing. The facts are similar to the Tockenham Case, and the same reasoning applies. Further, the barrier does not wholly enclose the surfaced track, since it has gaps for vehicles to enter and leave the track. Moreover, the barrier forms part of a larger operation, including the earth and tyre mounds and spectator mound, part of which does not enclose the surfaced track. In addition, the term "track" in this context should not be confined to the surfaced track but should apply to the whole area on which racing etc takes place - see the definition of "track" under Section 55 of the Betting, Gaming and Lotteries Act 1953 which extends to the "premises on which racing etc takes place." Since the operations taken as a whole do not enclose this area, the whole development falls outside the scope of Class A - see Garland v MHLG (1968) 20 P & CR 100, CA. Consequently the development is not permitted by the GDO.

CONCLUSIONS GROUND (c)

10. The issue here is whether the mounds and barrier referred to in the notice amount to a means of enclosure of an area of land. The case law establishes that this is essentially a question of fact and degree in each case, and that the words "or other means of enclosure" in the GDO are governed by the *ejusdem generis* rule, so that to satisfy this test the means of enclosure must be similar to a gate, fence or wall - see Ewen Developments Ltd v SSE & North Norwich DC [1980] JPL 404, DC, Garland v MHLG (1968) 20 P & CR 100, CA, Pregate Properties Ltd & Another v SSE & Another (1973) JPL 313, DC, and the general principles set out at paragraph 3B-20270 of the Encyclopedia.

11. In my view the primary purpose of the operations referred to in the notice in this case was not to enclose land, but to form a safety device, to minimise damage caused when vehicles leave the track and to protect spectators. The structures do not completely enclose an area. There are gaps in the barrier for vehicles to enter and leave the track. The mounds are not continuous. The spectator mound is a separate embankment, set back further from the track, behind the barrier.

12. Taking all these factors into account, and having studied the photographs which have been helpfully provided, I do not consider that these structures have a function of enclosure. In my view these various structures, which are for the safety and comfort of spectators and participants in motor racing, are not a means of enclosure of the type envisaged by the GDO. Accordingly, in my view these structures are not permitted development within this Part of the GDO. The appeal on ground (c), therefore, fails.

GROUND (d)

13. A summary of the relevant evidence given at the inquiry in relation to the operations referred to in the notice is as follows:

(i) Mr. Kearney said that he first saw the track in 1989 when he was preparing a planning report for Mr. and Mrs. Dale who were then potential purchasers of the Green Man. The track surface was then the same earth/gravel finish as now, surrounded partly by an earth barrier about 0.6m high and/or by piles of tyres and old straw bales. In 1990 he rode a motorcycle around the track. He also attended motorcycle meetings there in 1990 and in 1991. Car racing began in 1991. By Summer 1991 the mound was in its present position, although it has since been slightly heightened and widened. Tyres were on site by 1991 but were placed on the ground (as shown in photographs 1-4), not embedded in the mound as now (as shown in photographs 15-20). In Summer 1991 he drove a Scout Armoured Car around the track. After Summer 1992, when Mr. and Mrs. Dale left the Public House, he had not visited the site until shortly before the inquiry. The track has not altered since, except that the safety barrier fencing has now been installed and there are more tyres on site. The Armco crash barrier had not arrived by Summer 1992.

(ii) Mr. Hirse said that in 1990 he and Bob Radley had decided to start banger racing on the grass track. At that time the track was surrounded only by post and rail fencing and assorted tyres. He therefore arranged for delivery of old tyres, earth and clay to the site. Mounding was provided around the track in its present position, with tyres placed on and around the more banks. This work was completed in early 1991, in readiness for the first meeting which was due to be held on Easter Saturday (30 March 1991), although that meeting was subsequently postponed because of bad weather. Views of the mound were taken by him in 2 photographs taken early in the year, sometime before 30 March 1991 - see photographs KH1 and KH2. Later in 1991, sometime after 30 March 1991, the spectator mound was added to give spectators a better view. Mr. Hirse had raced at the site in 1991, but had given up racing later in 1992 because of a personal differences with the organiser. He had helped install the Armco safety barrier in 1994.

(iii) Mrs. Dale stated that she was the licensee of the Green Man from 14 December 1989 until 22 September 1992. She knew that the site had been used for some 6 years previously for motor cycle grass track race meetings. On 10 April 1990 the Auto-Cycle Union issued an organising permit to the 500 c.c. Sidecar Association authorising use of the site for grass track racing for motorcycles. At about this date (i.e., April 1990) Mr. Hirse and Mr. Radley had carried out work on the site, transporting earth to build mounds, and bringing in lorry loads of tyres to put onto the mounds. The earth mounds and tyres were in place for the first race meeting in 1991. They remained there until 1992 when Mrs. Dale vacated the Green Man.

(iv) Mr. Enefer said that he had been employed as a lorry driver by Danbury Haulage for about 9 years. As such, he delivered a lorry load of about 60 or 70 tyres and 2 loads of clay to the site in late February or early March 1991. When he delivered these tyres, they were stacked on the ground, not embedded in mounds as shown on photos KH1 and KH2. He had also assisted in putting in posts for the Armco barrier in 1994.

(v) Mr. Oliver said that he first knew the site in 1991 when he took part in banger race meetings

there. His son, Daniel Richard Oliver, had driven a bulldozer on the site in February 1991 to prepare the driveway for laying of concrete. The concrete was never laid, but his son had also levelled the track. None of this work affected the mounds, which were in place by the first race in 1991. He (Mr Oliver Senior) was involved in erection of the Armco fencing in 1994. Tyres were wedged in between the mound and the fencing in places. The mounds today are higher than they were in 1991, but only slightly - being less than half higher than they were in 1991.

(vi) Mr. Smith said that he had first visited the site in 1994, when he took an oral lease of the site for a rent payable for each racing day. He organised banger racing at the site in 1994 until September 1994, when racing stopped. The track was then as he first saw it, with the exception of the Armco fencing which he arranged to be installed as a safety measure during 1994.

(vii) M/s Durant said that the Council received complaints in 1991 about use of the site for banger racing and for military events. Following Council investigations these uses ceased for a time. However, there were further complaints in Spring 1994 about use of the land for banger racing. The total number of racing events held in 1994 did not exceed the 14 days permitted by the GDO, but equipment and vehicles remained on the land between events, so that the use of the land for non-agricultural purposes exceeded the 28 days allowed by the GDO during 1994. This led to the enforcement notices and the Stop Notice already referred to. M/s Durant herself had first visited the site in January 1995. The earth mounds and safety barrier were then as now. These are as shown in the aerial photographs [photos E1-2] taken on 28 September 1994 and the colour photographs [photos Nos 15-20] taken in her presence on 14 February 1995. Comparison with the earlier photographs [photos 1-5] taken by another Council officer on 16 December 1991 shows that the mounding and tyres had been altered since 1991 in the following ways: the tyres had been placed on top of and/or inside the mound; the mound had been heightened and widened; a spectator mound had been provided; the Armco barrier had been installed; tyres had been wedged in places between the Armco barrier and the mound.

14. Case for the appellant

No immunity is claimed for the Armco barrier, since it is conceded that this was erected less than 4 years before the notice. However, this was a later and quite separate operation from the construction of the earth and tyre mounds which was substantially completed early in 1991, before 30 March 1991, the expected first day of racing for 1991. The subsequent alterations to the earth and tyre mounds were insignificant. Worthy Fuel Injection Ltd v SSE & Southampton CC (1983) JPL 173, QBD establishes that where a development is carried out in stages, it is a question of fact and degree in each case whether there is one operation or more. This question should not be decided simply on the present appearance of the construction, but should take into account the whole history of the construction. Here there is clear evidence that the tyres and earth mounds were in place and functioning long before the barrier was erected. The ground (d) defence, therefore, succeeds in relation to the earth and tyre mounds referred to in the notice.

15. Case for the Council

Earth and tyre mounds were originally created more than 4 years before the date of these matters, but further substantial works were carried out later, within the 4 year period, when the mounds were heightened and widened, the barriers were installed, the tyres were repositioned, embedded in the mounds and/or wedged against the barriers, and the spectator mound was

created. On any view, therefore, these later works cannot be immune from enforcement. However, the tyres, mounds and barriers all now appear as a single operation, serving a common purpose. The barriers are closely integrated with the main earth and tyre mounds, retaining these in places. If the barriers were removed, parts of the mounds would fall in. In these circumstances it is necessary to look at the whole construction as a single operation even though historically it is the result of a series of developments carried out in separate stages over a period of time

- see the decision in the Worthy Fuel Case. The matter must be determined at the date of the notice, whatever the intentions of the operators at the time when the development was carried out
- see the cases of Prengate Properties and Ewen Developments Ltd already cited.

SUMMARY OF FINDINGS

16. From the totality of evidence, including the photographs, I make the following findings of fact:

- (i) the earth and tyre mounds and the safety barriers now at the site have not materially altered since 3 April 1995 when the notice was issued;
- (ii) at the date of the notice (3 April 1995) these barriers and mounds (a) had the appearance of a single operation; (b) served a common purpose, namely the facilitating of safety and convenience of participants and spectators at motor racing; (c) were closely integrated functionally, with the barriers retaining the mounds in places, so that if the barriers were removed, parts of the tyres and earth mounds would fall in.
- (iii) on 3 April 1991, i.e., 4 years before the notice, the physical condition of the site was materially different, because although earth and tyre mounds then existed, these were lower and narrower and were unsupported by any metal safety barrier, there were no tyres embedded in earth mounds or wedged or piled against a safety barrier, there was no metal safety barrier, nor was there a spectator mound.

CONCLUSIONS GROUND (d)

17. It was agreed at the inquiry that the onus of proof is on the appellant to show, on the balance of probability, that the operations referred to in the notice were substantially completed before 3 April 1991 - see Nelsovil Ltd v MHLG [1962] 1 WLR 404; Thrasivoulou v SSE [1984] JPL 732. It is conceded that between 3 April 1991 and 3 April 1995, i.e. less than 4 years before the notice, the following operations took place which affected the mounds and barriers on site at the date of the notice: tyres were moved from stacked positions and were placed on top of and/or inside the earth mounds; the earth mounds were heightened and widened; a spectator mound was constructed; the Armco safety barrier was installed around the entire circuit of the race-track, with 2 gaps for vehicles to enter from each of the adjoining fields which make up the site; tyres were wedged in places between the Armco barrier and the earth mounds.

18. The appearance of the present mounds and barrier is strongly indicative of this being one self-contained operation, because the barrier, tyres and mounds all appear to form one construction. These structures all combine together to serve a common purpose, as a safety device. Your client in evidence explained that without the backing of some physical feature which can help to absorb impact, such as a mound of tyres or earth, or a hedge, the Armco barrier on its own is not a very effective safety barrier for motor racing. Moreover, in this case I accept

the Council's evidence that removal of the safety barrier would cause part of the earth and tyre mounds to collapse.

19. Taking all these matters into account, and having regard to the considerations referred to in the Worthy Fuel Injection Case, I consider that all these works should be treated as one self-contained operation. In these circumstances, to apply the division suggested by the appellant between those parts of these operations which were carried out more than 4 years before the notice and those which were not does not seem to me practical or realistic in this case. I therefore conclude that the mounds and barrier referred to in the notice were effectively constructed in one operation which was completed within the 4 year period, despite the fact that parts of the mounding were originally created more than 4 years before the notice. It follows in my view that the development as a whole was not substantially completed more than 4 years before the notice. I therefore conclude that none of these structures is immune from enforcement. Accordingly the appeal under ground (d) fails.

GROUND (g)

20. In order to allow time for removal and safe disposal of the tyres, you ask that the 2 months compliance period be extended to 6 months. The Council does not strenuously oppose an extension of the compliance period, but asks that the work should not be delayed until winter when wet conditions may hamper removal work. As I saw on my visit, the removal work will be substantial, because of the considerable amount of materials involved. In all the circumstances I consider the request for extension to be reasonable, and I will alter the compliance period accordingly by enlarging it to 6 months. To this extent the appeal under ground (g) succeeds.

21. I have taken into account all other matters contained in the representations but find none which outweighs the considerations leading to my main conclusions

FORMAL DECISION

22. For the above reasons and in the exercise of the powers transferred to me, I vary the enforcement notice by the deletion of 2 months and the substitution of 6 months as the period for compliance. Subject thereto I dismiss your client's appeal and uphold the notice as varied.

RIGHTS OF APPEAL AGAINST DECISION

23. This letter is issued as the determination of the appeals before me. Particulars of the rights of appeal against my decisions to the High Court are enclosed for those concerned.

Yours faithfully

R F Woodhouse

R F WOODHOUSE MA (Cantab) Barrister
Inspector

File Ref: T/APP/C/95/W1525/638372

APPEARANCES

FOR THE APPELLANT

Mr B R Spencer Solicitor, Wortley Byers, 38 Ingrave Road, Brentwood, Essex CM15 8AX
He called:
Mr M S Kearney BSc DipTP MRTPI 121 Warwick Road, Rayleigh, Essex SS6 8TF.
Mr K Hirse 87 Cressing Road, Witham, Essex CM8 2NO.
Mrs P F Dale 12 Rutland Court, Denmark Hill, London SE14.
Mr D Enefer 16 Bedford Close, Tiptree, Essex CO5 ODB.
Mr R Oliver 1 Camelot Close, Chelmsford, Essex.
Mr I P Smith Priory Hall Farm, Old House Lane, Boxted, CO4 5RF.

FOR THE PLANNING AUTHORITY

Mrs C Ashurst Senior Solicitor with the Council.
She called:
M/s S Durant BA MRTPI Planning Enforcement Officer with the Council.

DOCUMENTS

- 1 List of persons present at the inquiry.
- 2 Letter of notification 14/8/95 and attached list of persons notified.
- 3 Letter 1/9/95 from local resident opposing appeal.
- 4 Invoice from R D Ellis dated Feb 1991 produced by Mr Smith.
- 5 Auto Cycle Union Organising Permit dated 10/4/90 produced by Mr Smith.
- 6 Copy of Rules for Greenman Raceway produced by Mr Hirse.
- 7 Advertising leaflet for Banger racing at Greenman Raceway produced by Mr Hirse.
- 8 Appendices produced by M/s Durant.
- 9 Appeal decisions/ law reports referred to:
 - (i) T/APP/W1525/A/95/248841/P8 dated 09/06/95 (SLD11) (re this site).
 - (ii) T/APP/C/89/Z1130/14/P8 dated 27/03/90 [1990] JPEL 783 (re site at Chudleigh).
 - (iii) APP/C/91/J3910/612819 dated 10/01/94 re site at Tockenham, Wilts.
 - (iv) Ewen Developments Ltd v SSE & North Norwich DC [1980] JPL 404, DC.
 - (v) Garland v MHLG (1968) 20 P & CR 100, CA.
 - (vi) Pregate Properties Ltd & Another v SSE & Another (1973) JPL 313, DC.
 - (vii) Worthy Fuel Injection Ltd v SSE & Southampton CC (1983) JPL 173, QBD.

PLANS

- A Copy of the plan attached to the enforcement notice.
- B Location Plan SLD3 produced by Council.
- C Plan scale 1:1250 produced by Council showing direction of photographs.
- D Plan dated November 1994 drawn by JR Bishop ARIBA for application 94/CHL/1502.

PHOTOGRAPHS

- 1-4 4 Colour photos of site dated 16/12/91 produced by Council.
- 15-20 6 Colour photos of site dated 14/02/95 produced by Council.
- E1-2 2 Colour aerial photos of site dated 28/9/94 produced by Council.
- KH1-2 2 Colour photos of site taken early 1991 produced by Mr Hirse.