



Appeal Decisions

Hearing held and site visit made on 18 March 2025

by **L Douglas BSc (Hons) MSc MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 31 March 2025

Appeal A Ref: APP/C3810/C/24/3349317

Appeal B Ref: APP/C3810/W/24/3349316

Land at Former Shrublands Nursery (now Platinum Way), Roundstone Lane, Angmering, West Sussex BN16 4AT

- Appeal A is made under section 174 of the Town and Country Planning Act 1990 (as amended) (the Act) against an enforcement notice issued by Arun District Council.
 - Appeal B is made under section 78 of the Act against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
 - The appeals are made by Sigma Homes Limited.
 - In Appeal A, the notice was issued on 4 July 2024. The breach of planning control as alleged in the notice is 'Without planning permission, the erection of 40 substantially or partially complete dwellings and associated infrastructure and means of access'. The requirements of the notice are: Either: A) Restore the land to its condition before the breach of planning control took place, including the removal of all substantially or partially complete dwellings and all associated infrastructure and means of access; or B) Carry out the development in accordance with the conditions and limitations of the planning permission granted (LPA ref A/64/21/PL) 23 November 2021 for the demolition of existing buildings and erection of 40 No. residential dwellings including 12 No. (30%) affordable units and associated landscaping, road layout, parking provision and provision of Public Open Space. The period for compliance with the requirements is 13 months from the date on which the notice takes effect. Appeal A is proceeding on the ground set out in section 174(2)(f) of the Act.
 - In Appeal B, the application Ref A/57/24/DOC sought approval of details pursuant to condition Nos. 28 and 29 of planning permission Ref A/64/21/PL, granted on 23 November 2021. The application was refused by notice dated 25 June 2024. The details for which approval is sought are those of a proposed surface water drainage scheme and the maintenance and management of the surface water drainage system.
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Decisions

Appeal A

1. The enforcement notice is quashed.

Appeal B

2. The appeal is dismissed.

Appeal A – The enforcement notice

3. It is important for me to get the notice in order. I have wide powers under section 176 of the Act to correct any defect, error or misdescription in the notice, or to vary the terms of the notice, if I am satisfied that doing so will not cause injustice.
4. The notice alleges the erection of 40 dwellings without planning permission, on the basis that conditions attached to planning permission reference A/64/21/PL (the PP), as detailed in the banner heading above, have not been complied with. There are various conditions which have not been complied with, but conditions 28 and 29 are of particular note, as set out in the Appendix attached to this decision.

5. It is not disputed that conditions 28 and 29 are 'condition precedents' as they state development shall not commence until certain details have been approved. However, with regard to the relevant case law, it is disputed whether the conditions 'go to the heart' of the PP, which has implications as to whether the PP has been implemented.
6. The reason for condition 28 states it needs to be a pre-commencement condition as it is necessary to implement the surface water drainage system prior to building works commencing, but that is not what the condition requires. The condition requires that 'No building / No part of the extended building shall be occupied until the complete surface water drainage system serving the property has been implemented...'. Nonetheless, it is evidently far more difficult to show that the drainage system installed, or any other drainage scheme, is/would be acceptable since development commenced, with all 40 houses now substantially complete, and 27 sold and occupied.
7. The site was at risk of surface water flooding prior to the PP being issued, and the development may have improved surface water drainage because parts of the site were previously occupied by large greenhouses and other hard/impermeable surfaces, with no drainage features. I also note that large areas of the site were previously open and undeveloped land.
8. While the layout of the development approved by the PP restricts the extent and positions of drainage features, essential details of the drainage system remained outstanding at the time the PP was issued. As an intrinsic part of how the development would function throughout its lifetime on a site with surface water flooding concerns, it was extremely important for these details to be approved prior to the commencement of development. This would have ensured appropriate investigations could be carried out without hindrance.
9. Moreover, it is not disputed that an inappropriate drainage system could increase flood risk on and off the site. The claim that an appropriate drainage system has been installed is beside the point. It would have been logical, preferable, and far easier to agree an appropriate drainage system prior to the commencement of development. For example, the appellant has experienced difficulties undertaking reliable infiltration testing since the commencement of development, and other drainage investigations would now be impeded by the development carried out. Carrying out development prior to the approval of the details specified by conditions 28 and 29 ran the risk that approval may not be forthcoming, and that development may need to be demolished/amended to provide acceptable details.
10. In addition, condition 29 relates to the details which need to be approved to discharge condition 28. It was therefore also necessary for condition 29 to require the approval of details prior to the commencement of development, to ensure the proposed drainage system could be appropriately maintained.
11. I therefore find that approval of the details specified by conditions 28 and 29 would be essential for the acceptable completion, operation and maintenance of the development throughout its lifetime, and it was extremely important for those details to have been formally agreed prior to the commencement of development. The ability to test the drainage system installed since the commencement of development would not change my view on this point, as commencing development

hinders further investigations and any changes to the drainage system which may be necessary. For these reasons, conditions 28 and 29 'go to the heart' of the PP.

12. Furthermore, for the reasons explained below, I shall refuse to approve the details submitted to discharge conditions 28 and 29, and Appeal B will also be dismissed. Notwithstanding the Council's continued consideration of applications seeking to discharge conditions attached to the PP, given conditions 28 and 29 have not been complied with, the development carried out does not constitute the lawful implementation of the PP. I say that as condition 1 of the PP required development to commence within 3 years of the date of the decision (23 November 2021), and given conditions 28 and 29 have not been complied with, the PP has expired.
13. In that light, it is impossible for Step B at Paragraph 5 of the notice to be complied with, and it should be deleted to correct the notice. This would leave only Step A requiring the land to be restored to its condition before the breach took place. However, I am unable to correct the notice in this manner without causing injustice to the appellant, who would have likely pursued additional grounds of appeal or put forward different appeal arguments had the notice been drafted correctly at the outset. In addition, owners and/or occupiers of the houses the subject of the notice may have lodged appeals had the notice been drafted correctly.
14. For the reasons given above, I conclude that there is a fundamental error in the steps required to be taken by the enforcement notice. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the Act, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed.
15. In these circumstances, the appeal on the ground set out in section 174(2)(f) of the Act does not fall to be considered.

Appeal B – The details submitted in respect of conditions 28 and 29

16. A drainage system has been installed, which is claimed to be consistent with the details submitted as part of the appeal, apart from inspection chambers proposed for the permeable paving. I make no assessment as to whether the system installed is as shown in the details before me.
17. The main issue is whether the details of the proposed surface water drainage scheme (the Drainage Scheme), and the details of the proposed maintenance and management of the surface water drainage system, would ensure the development is satisfactorily drained.

Reasons

18. In summary, the Drainage Scheme comprises four soakaways (SA1, SA2, SA3, and SA4) and permeable paving. A fundamental issue in dispute is whether the design of the Drainage Scheme has been based on appropriate infiltration rates. The appellant's approach to designing SA1, SA2 and the permeable paving involved taking mean average infiltration rates obtained from various trial pits in pre-development testing. In the case of SA3 and SA4, the worst infiltration rate from three tests at trial pit TP206 was relied upon.
19. Pre-development infiltration testing was carried out over the winters of 2020-21 and 2021-22. Further infiltration testing was carried out after the commencement of development over November to December 2023. The appellant has since

disregarded the 2023 results, as they do not provide a fair representation of infiltration rates prior to the commencement of development.

20. The 2023 test locations were restricted due to development carried out, as explained in the Additional Soakage Testing Report¹. It is not disputed that the 2023 results show poorer rates of infiltration compared to the pre-development testing, and that this could be due to the effects of development, including the compaction of ground, erection of buildings, and the installation of soakaways. I shall not therefore take the 2023 results into account, but this supports my findings in Appeal A by highlighting the difficulties in designing a drainage scheme, or justifying the design of the Drainage Scheme, after development has commenced.
21. Taking mean averages of pre-development infiltration testing results from various locations to design SA1, SA2 and the permeable paving would be inconsistent with the relevant guidance. I have been referred to the following paragraph on page 5 of the BRE 365 guidance²:

'The use of full-depth soakage tests and repeat determinations at locations along the line of trench-type soakaways is important when soil conditions vary; if the soil is fissured, infiltration rates can vary enormously. In these situations, a preliminary design length for the proposed soakaway should be calculated from the first soakage trial pit result; if the design length exceeds 10 m, a second trial should be carried out at the design length distance along the line of the soakaway. In all ground conditions, a second soakage trial pit should be dug if the trench-type soakaway (designed on the basis of one soakage trial pit) is longer than 25 m; further soakage trial pits are needed at intervals of 25 m along the line of a long soakaway. If more than one soakage trial pit is used, the mean value of the soil percolation rates determined from the soakage trial pits is adopted for the final design, but this should be above the highest annual groundwater level'.

22. Although the above excerpt recommends taking mean averages of multiple infiltration tests, the context of that advice relates to the design of drainage features which exceed 25 metres (m) in length, where additional testing should be carried out at intervals of 25m along the line of the proposed soakaway. That is not the approach followed by the appellant. The appellant's approach could be said to roughly align with the spirit of the BRE 365 guidance in that mean averages can be used. However, the circumstances under which the guidance advises that they should be used are very different to those which apply in this case, where there has not been regular testing at 25m intervals in the location of each drainage feature. The significant distances between the locations of the trial pits relied upon for the design of each drainage feature, and the distances between them and the extents of each feature, may not provide reliable infiltration rates for their designs.
23. Also, whilst geology may be consistent across the site below the shallower soils, it remains unclear whether there is perched ground water within the site. The appellant's Statement of Case and Final Comments both refer to perched groundwater affecting pre-development groundwater investigations, yet Mr Clare suggested previous references to perched groundwater were unfortunate, and that "there was confusion in earlier reports" in this regard. Furthermore, the pre-development infiltration testing shows discrepancies in the soil's ability to infiltrate. It has not therefore been shown, with reasonable clarity, that consistent geology

¹ Additional BRE 365 Soakage Testing Report by Leap Environmental Limited, Ref: ADC/24/LP3564, dated 8 January 2024

² Digest 365: Soakaway design, by the Building Research Establishment, Revised 2016

provides a sound justification to rely on infiltration rates recorded significant distances from drainage features, or their mean averages, in this particular case. For these reasons, on the evidence currently available, the worst infiltration rate at TP206 should not be used as the basis for the designs of SA3 and SA4 either.

24. It has been suggested that splitting SA2 into two soakaways less than 25m in length, with designs each relying on the worst infiltration rate recorded at trial pit TP201 or TP202, would comply with BRE 365. However, this would not resolve matters, as two of the three tests at TP201 were not compliant with BRE 365 since water did not fall to 25% of the maximum water depth. The results for TP201 were based on the actual fall of water achieved and it is not disputed that the industry practice is to accept trial pits emptying to below 25% as 'near empty' between tests. Nonetheless, the failure of water levels in two out of three tests to fall to 25%, when the BRE 365 guidance states tests should drain to near empty each time, is a good indication that results from TP201 should not be relied upon to design surface water drainage features in this location.
25. It is not disputed that there should be 1m separation between drainage features and underlying groundwater levels. None of the proposed drainage features extend beyond 3m below ground level, and the Phase III Report³ concludes winter groundwater levels should be anticipated between 5m to 6m below ground level. However, the Phase III Report also states that long-term groundwater monitoring would be required to fully assess the groundwater regime. In light of the issues experienced during groundwater investigations, which included possible surface water flooding and perched or passing through water affecting boreholes, I am reluctant to accept winter groundwater levels would not affect the Drainage Scheme without further investigations/monitoring. On the evidence presented, it remains unclear whether winter groundwater levels are at least 1m below the proposed drainage features, and as such I cannot be confident the Drainage Scheme is fit for purpose.
26. I have also considered the claim that some residents had complained of water pooling in rear gardens and that the finished ground above SA1 is "like a quagmire when it rains". Although the Hearing was also told that permeable paving at the eastern end of the site had performed well during recent periods of heavy rain, I am mindful that the development is yet to encounter a 1 in 10-year rainfall event. I therefore assign very limited weight to claims that the Drainage Scheme is performing as it should without complaints from residents.
27. Alongside all of the above I note the statement made in the Additional Soakage Testing Report that, based on pre-development infiltration testing, 'it was considered that the soils on site were suitable for conventional soakaways provided that they extended through the clays into the underlying granular soils'. To that end, the permeable paving is the only drainage feature to extend down through the clays into the underlying granular soils, and I am unconvinced on the evidence presented that the sizes of the soakaways ensure they do not need to extend down deeper. Overall, there is significant doubt as to whether the Drainage Scheme has been appropriately designed to ensure the development would be satisfactorily drained throughout its lifetime.

³ Phase III Site Investigation Report by Leap Environmental Limited, Report ref: LP2952 Issue I, dated 21 July 2022

28. The plans do not show a fall at the base of the permeable paving, but while this may result in pooling of water in the geomembrane wrapped trench sections, I have not been provided with clear reasons as to why this may be problematic. Considering the construction details of the permeable paving I see no need for its deep base to be capable of inspection provided its surface is appropriately maintained, were this drainage feature otherwise shown to be of acceptable design.
29. Drawing all of these matters together, it has not been demonstrated that the Drainage Scheme would satisfactorily drain the development. As the Drainage Maintenance and Management Plan (the DMMP) follows those details, the DMMP is therefore insufficient to discharge condition 29. I say that accepting it would be a straightforward process to attach the relevant plans and any technical details to the DMMP, and there are limits to what condition 29 can achieve. However, it was surprising for the Hearing to be told that rights of access to the drainage features in private rear gardens are in place, when this is not explained or evidenced in the DMMP. Furthermore, there is a lack of specific detail of the management company which would be employed to maintain and manage the Drainage Scheme, and there are insufficient details of how it would be financed throughout the lifetime of the development.

Conclusion

30. For the above reasons I am unable to confirm the details submitted in respect of conditions 28 and 29 are acceptable to show the development would be satisfactorily drained in accordance with Policies W SP1, W DM1, W DM2, and W DM3 of the Arun Local Plan 2011-2031 (2018). These seek to support development which takes account of flood risk and incorporates appropriate mitigation measures to reduce flood risk through the management of surface water and the integration of effective sustainable urban drainage systems, amongst other things.
31. The details submitted in respect of conditions 28 and 29 should not therefore be approved, and Appeal B should be dismissed.

L Douglas

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Jack Smyth	Counsel instructed by Sigma Homes Limited
Haroon Khan	Knights PLC
Ollie Clawson	Knights PLC
Adam Light	Sigma Homes Limited
Philip Clare	Leap Environmental Limited
Brian Chamberlain	Odyssey Consulting LLP
Arek Kadlec	Odyssey Consulting LLP

FOR THE LOCAL PLANNING AUTHORITY:

Jack Trevelyan	Arun District Council (ADC)
Catherine Welch	ADC
Karl McLaughlin	ADC
Sarah Burrow	ADC
Paul Cann	ADC

INTERESTED PARTIES:

Timothy Huckin	Resident at the appeal site
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APPENDIX – Conditions 28 and 29 of planning permission reference A/64/21/PL

- 28) Development shall not commence, other than works of site survey and investigation, until full details of the proposed surface water drainage scheme have been submitted to and approved in writing by the Local Planning Authority. The design should follow the hierarchy of preference for different types of surface water drainage disposal systems as set out in Approved Document H of the Building Regulations, and the recommendations of the SuDS Manual produced by CIRIA. Winter groundwater monitoring to establish highest annual ground water levels and winter Percolation testing to BRE 365, or similar approved, will be required to support the design of any Infiltration drainage. No building / No part of the extended building shall be occupied until the complete surface water drainage system serving the property has been implemented in accordance with the agreed details and the details so agreed shall be maintained in good working order in perpetuity.

Reason: To ensure that the proposed development is satisfactorily drained in accordance with policies W SP1, W DM1, W DM2 and W DM3 of the Arun Local Plan. This is required to be a pre-commencement condition because it is necessary to implement the surface water drainage system prior to commencing any building works.

- 29) Development shall not commence until full details of the maintenance and management of the surface water drainage system is set out in a site-specific maintenance manual and submitted to, and approved in writing, by the Local Planning Authority. The manual is to include details of financial management and arrangements for the replacement of major components at the end of the manufacturer's recommended design life. Upon completed construction of the surface water drainage system, the owner or management company shall strictly adhere to and implement the recommendations contained within the manual.

Reason: To ensure that the proposed development is satisfactorily drained in accordance with policies W DM1, W DM2 and W DM3 of the Arun Local Plan. It is considered necessary for this to be a pre-commencement condition to ensure that the future maintenance and funding arrangements for the surface water disposal scheme are agreed before construction commences.