
Appeal Decision

Site visit made on 2 March 2017

by Roger Clews BA MSc Dip Ed DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 07 April 2017

Appeal Ref: APP/J1860/C/16/3159575

Land to the north of Hillview Gardens, Ryall, Ripple, Worcs WR8 0QJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 [hereafter, "the 1990 Act"].
 - The appeal is made by Taylor Wimpey UK Ltd against an enforcement notice issued by Malvern Hills District Council.
 - The enforcement notice, numbered E/16/00133/PHY2, was issued on 31 August 2016.
 - The breach of planning control as alleged in the notice is: *Without planning permission, the unauthorised raising of the levels of the ground on the Land.*
 - The requirements of the notice are: *Restore the ground on the Land to its condition and levels before the breach took place, including the lawful disposal of the resultant material from the Land.*
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) & (g) of the 1990 Act.
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Decision

1. The appeal is allowed on grounds (f) (in part) and ground (g) only and the enforcement notice is varied as follows:
 - (a) by deleting the sentence that appears in section 5 of the notice, under the heading "WHAT YOU ARE REQUIRED TO DO", and replacing the deleted sentence with the following sentence:

"Restore the raised ground levels on the Land to their condition and levels before the breach took place, including the lawful disposal of the resultant material from the Land."
 - and
 - (b) by deleting one month and substituting six months as the period for compliance in section 6 of the notice.
2. Subject to these variations, the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act.

Background

3. Taylor Wimpey UK Ltd, the appellants, are building housing on land off Ryall Road at Holly Green near Upton upon Severn. Reserved matters approval for Phase I of the development (25 dwellings) was granted in December 2015, and full planning permission for Phase II (33 dwellings) was granted in May 2016.

The Phase I site lies next to Ryall Road with the Phase II site to its east. The enforcement notice applies to an area of land which takes in the southernmost parts of both sites, next to their boundary with properties in Hillview Gardens. I shall call this "the appeal land". It is intended to provide public open space for both phases of the development and also to accommodate the liquid propane gas [LPG] tanks that will supply the houses.

4. From the "existing levels" drawings provided it is clear that before building work began the appeal land sloped generally south-eastwards. But during my site visit I saw that substantial amounts of new soil have been deposited in two areas of the southern part of the appeal land. Towards the western end of the appeal land the new soil forms a pronounced mound more than 1m above the original ground level. The gas tanks are buried in this mound. Some way to the east of the mound another area of new topsoil has also raised the original ground level, but to a lesser extent.
5. The alleged breach of planning control identified in the enforcement notice refers to the raised ground levels that have resulted from these operations. On the northern part of the appeal land there has also been some lowering of the original ground level to accommodate the site compound, but this is not referred to as part of the alleged breach.

Reasons

Ground (c)

6. For the appeal to succeed on ground (c) it must be demonstrated that the matters alleged in the enforcement notice did not in fact constitute a breach of planning control. The appellants do not dispute that ground levels on the appeal land have been raised, but argue that this was effectively authorised when the Council approved the reserved matters application for Phase I and the full planning application for Phase II.
7. I am not persuaded by this argument. If the appellants intended, as part of their proposed development, to make the significant increase in ground levels that has occurred on the appeal land, I would expect to see that clearly indicated on the application drawings. But there is no indication on any of the approved drawings that an increase in ground levels was intended. On the contrary, the references to "underground gas tanks" on the Phase I drawings, and the continued presence of the existing contour lines and spot heights on the appeal land as shown on the Phase II slab level plan, strongly suggest that no significant change in ground levels was proposed.
8. In these circumstances, there is no reason to expect the Council to have imposed conditions requiring details of ground levels on the proposed open space area to be submitted for approval. They were entitled to take the application drawings at face value and assume that no significant change in levels was intended.
9. I conclude that the increase in ground levels that has occurred on the appeal land does not benefit from planning permission and so constitutes a breach of planning control. The appeal on ground (c) fails.

Ground (a) and the deemed planning application

10. On ground (a) I must consider whether or not planning permission should be granted for any breach of planning control which may be constituted by the matters stated in the notice¹ – in this case, the raising of ground levels on the appeal land. Under s.177(1)(a) of the 1990 Act, I am empowered to grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates. However, I am not empowered to grant planning permission for any other development that does not form part of the matters stated in the enforcement notice.
11. The appellants' grounds of appeal do not appear to suggest that planning permission should be granted for the raised ground levels in their current form. Instead they describe additional works that are proposed to create a series of raised bunds and landscape buffers, ranging in height from 900mm to 400mm, along the appeal land's southern and eastern boundaries and around the location of the gas tanks. Those works are shown on a series of drawings which, at the time of my site visit, were the subject of a planning application to the Council, ref 16/01298. The drawings also show close-boarded fencing along the western and southern boundaries of the appeal land. That application, I was subsequently informed, was refused by the Council on 29 March 2017.
12. In their ground (a) appeal the appellants invite me to *consider the revised levels information* [that is, those shown on the drawings for planning application ref 16/01298] *and to vary the enforcement notice so that the ground levels can be completed in accordance with the submitted information*. But as explained above, that course of action is not open to me. I can only grant planning permission for all or part of the matters that are the subject of the notice. I cannot vary the notice to include additional development, such as the creation of the proposed bunds, that does not form part of the alleged breach of planning control.
13. For the purposes of the present ground (a) appeal, therefore, I must decide whether or not planning permission should be granted only for the development that is the subject of the enforcement notice.
14. The high mound that has been created around the gas tanks is a large and obtrusive feature. It has an artificial, engineered appearance that contrasts with the otherwise apparently natural contours of the southern part of the appeal land. It is clearly visible from the public highway at the end of Hillview Gardens and from the rear of neighbouring residential properties. From the top of the mound there are intrusive views into the rear gardens and windows of those neighbouring properties. The unauthorised development therefore harms the character and appearance of the area and the living conditions of neighbouring residents, and thus conflicts with South Worcestershire Development Plan [SWDP] policy SWDP 21.
15. As the appellants acknowledge, surface water from the proposed public open space will gravitate towards the southern boundary of the appeal land. While the approved drainage strategy for the housing development as a whole will

¹ 1990 Act, s.174(2)(a)

reduce overall run-off rates, I have seen no clear evidence to counter the Council's concerns about the effects of raising ground levels on the appeal land. In particular, it seems to me that this has the potential to cause a localised increase in the risk of flooding to immediate neighbouring properties, thereby conflicting with SWDP policy SWDP 29.

16. It might be possible to screen the gas-tank mound to some extent from neighbouring properties, and vice-versa, through the provision of fencing and planting, which could be secured through conditions on a planning permission. Fencing around the mound itself, to discourage access onto it, could also help prevent overlooking of neighbouring properties. But such measures would not address the issue of flood risk, and the mound's obtrusive, artificial character would remain clearly visible to those using the public open space.
17. The creation of the substantial bunds proposed by the appellants in planning application ref 16/01298 would be a significant engineering operation in its own right and could not reasonably be required by a condition on any permission granted in response to this ground (a) appeal. Consequently, any effects they might have, whether as a barrier and flood defence for neighbouring properties in Hillview Gardens or in reducing the visual impact of the mound, are not factors that I can take into account.
18. For these reasons I find that the harm caused by the unauthorised development, and the resulting conflict with the development plan, could not be overcome by the use of conditions.
19. I have had regard to the statement from the specifier sales manager for Calor Gas to the effect that, for safety reasons, LPG tanks cannot be fully buried in the ground but must be "semi-submerged" to prevent water damage to the regulator and tank valves in their turrets. But those understandable safety concerns do not justify the harm caused by the particular form and location of the raised ground levels on the appeal land, or demonstrate that no other form or location is possible.
20. Drawing all the above points together, I conclude that the appeal on ground (a) fails and that planning permission should be refused for the unauthorised development.

Ground (f)

21. The basis for an appeal on ground (f) is that *the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach*². The appellants have not made any case on ground (f) in these terms. Instead their ground (f) case largely replicates their case on ground (a), which I have considered above.
22. It is not open to me to allow the appeal on ground (f) on the basis that additional development, over and above any element of the unauthorised development referred to in the enforcement notice, would remedy the breach of planning control or any injury to amenity caused by it.

² 1990 Act, s.174(2)(f)

23. However, the appellants have also pointed out that, by requiring the ground levels on the appeal site to be restored to their original condition, the notice applies not only to the raised ground levels on the southern part of the appeal land, but also to the lowered ground levels on the northern part, where the site compound has been created. Taken at face value, the notice would require those lowered levels to be raised back to their original height. But there is nothing in the alleged breach of planning control that mentions lowered ground levels, and no evidence that the lowered ground levels on the northern part of the appeal site have caused any injury to amenity.
24. Accordingly, the notice's purported requirement to restore the lowered ground levels on the northern part of the appeal site to their original condition exceeds what is necessary to remedy the breach of planning control or to remedy any injury to amenity caused by it. The appeal on ground (f) therefore succeeds to that extent. I shall vary the notice so that it requires only the restoration of the raised ground levels on the land to their condition prior to the breach.

Ground (g)

25. The notice seeks compliance with its requirements within one month. However, it is clear that there have been continuing discussions between the appellants and the Council on the proposals contained in planning application ref 16/01298. The proposals were revised as a result of those discussions and in response to public consultation, and the appellants indicated that the present enforcement appeal would be withdrawn if planning permission for them were granted.
26. Although that application has now been refused by the Council, it may be that further discussions will take place in an attempt to resolve the situation. As building work is apparently scheduled to continue for at least another year, it would seem that there may be scope for further adjustments to the proposals. The appellants also have the option of making an appeal against the Council's refusal of planning application ref 16/01298.
27. In this situation it would be reasonable to allow additional time for an acceptable solution to be sought. However, the lengthy period sought by the appellants – until the end of the building programme – is too long in view of the harmful effects of the raised ground levels. In my view a compliance period of six months should provide time for further discussions to attempt to resolve the situation, while also ensuring that those harmful effects do not persist for an unreasonable length of time. The Council have the power to extend the period further if circumstances justify it.
28. The appeal therefore succeeds on ground (g) and the compliance period is extended from one to six months.

Roger Clews

Inspector