The Planning Inspectorate

Appeal Decision

Site visit made on 1 December 2017

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 11 December 2017

Appeal Ref: APP/J1860/C/17/3174898
The Post House, Ham Lane, Powick, Worcestershire WR2 4RD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr James Woods against an enforcement notice issued by Malvern Hills District Council (the LPA).
- The enforcement notice, numbered E/14/00202/PHY2, was issued on 29 March 2017.
- The breach of planning control as alleged in the notice is an engineering operation consisting of the deposition of material to form an earth bund on the land as hatched green on the attached plan.
- The requirements of the notice are to remove all deposited material from the land as hatched green on the attached plan, to lawfully dispose of the resulting materials and to reinstate the land to its previous levels.
- The period for compliance with the requirements is 4 months.
- The appeal is proceeding on ground (f) only as set out in section 174(2) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Matters of clarification

2. The appeal is made on ground (f) only and the merits of the unauthorised development carried out do not fall to be considered. I am only empowered to deal with the notice as issued and under the one ground pleaded. I cannot consider any wider planning issues relating to the site and, in particular, any on-going matters between the appellant, the Council and the Environment Agency (EA), relating to a new scheme to resolve flooding issues on the land.

Background information

3. The appeal property is a detached two storey dwelling house, located off Ham Lane. It is accessed via a private driveway which also serves several other properties. The site lies within the open countryside, a short distance away from the nearest settlement at Powick. The deposited material which forms the bund is located along the north-west boundary of a larger area of land to the north-east of the house. Although not quite as indicated on the plan attached to the notice, the deposited spoil is clearly recognisable on the correct area of land.

4. The property has a detailed planning history dating back to 1976 and various developments have been allowed, refused or withdrawn over the years. Approvals have included small alterations and additions to the main dwelling and a change of use

from a single dwelling house to a mixed Class C3 (dwellinghouse) and C1 (guest house). The conversion of a redundant stables and coach house to form a dwelling was refused permission in 1990 and in 2014 an outline application for the erection of 4 eco-homes was withdrawn. In 2015 and 2016 proposals for minor landscaping works and the formation of a new bund flood defence scheme were refused permission.

5. These proposals had not been acceptable to EA who advised that the unacceptably positioned deposited spoil be rationalised and that a defence, to protect The Post House, be constructed as close as possible to the house. It would appear that, at that stage, the appellant intended to import additional material. In January 2016 the EA submitted a plan which highlighted an acceptable defence which, it stated, would need to tie into higher ground.

6. The appellant has confirmed that it has always been his intention to submit an application to build flood protection measures that meet with the recommendations of the EA. In the appeal statement reference is made to the correct documentation being collated for a new application and that '*It is hoped that we will now be able to repurpose the soil which is currently on site…in order to be used to fabricate the bund as per the design put forward by the Environment Agency'.* I understand that an application has now been submitted. This is now for the LPA to consider.

Main issue

7. The main issue is whether or not the requirements of the notice are excessive and whether lesser steps would overcome the objections.

Reasons

8. The appellant argues that it would be excessive to remove the soil from the site, only to have it moved back when the application is finally approved. It is requested, therefore, that the enforcement notice be amended to instruct that a new planning application, based on the solution proposed and supported by the EA be submitted. It is considered that this application should be extended to encompass the Post House septic tank. It is contended, therefore, that the steps exceed what is necessary to remedy the breach of planning control and that the carrying out of the requirements would be detrimental to the environment due to heavy lorries required to facilitate removal of the soil.

9. The Council acknowledges that the EA have put forward the acceptable alternative scheme, but indicates that the appellant's intention to extend the scheme may not meet with EA approval. With regard to the suggested amendment to the notice the Council refers to the case of *Payne v National Assembly for Wales (2006) EWHC 597; (2007) 1P & CR.* In that case it was held that a requirement which relied upon details being submitted to a LPA for future approval rendered a notice a nullity. In this case if the notice were to be varied, as suggested by the appellant, there would be clear uncertainty in that the appellant would have no means of knowing whether or not the LPA was likely to grant approval. In any case an application has already been made.

10. Also, as indicated by the Council, such an application would not regularise the breach of planning control subject to the notice. Regardless of whether or not the application is approved, the moving of the material from its current position would still be required to overcome the harm caused.

11. I consider that the suggested amendment to the notice would be unlawful and cannot be considered as 'lesser steps' than those required. I now turn to the question of whether or not the requirement is excessive. The breach of planning control is the engineering operation to construct a soil bund. The requirement as worded would clearly remedy the breach and would bring the land back to the position it was in prior

to the unauthorised works being carried out. In the overall circumstances of this case it is my view that the requirement is not excessive.

12. With regard to the amended scheme, it would appear that an application has been made and the notice allows for a 4 month compliance period. If the scheme is granted approval then it would be for the appellant to liaise with the LPA to consider exactly how the works might be carried out. An LPA can be flexible in its interpretation or carrying out, of the requirements. It could consider it appropriate to use the soil from the unauthorised bund as part of the approved scheme, rather than having it removed completely from the land.

13. However, if the scheme is not granted approval there would be no guarantee that the breach would be remedied unless the enforcement notice is upheld as drafted. Therefore, I do not consider that the appeal should succeed on ground (f). The requirement is not excessive in my view and the appellant's suggested variation cannot be considered as a *'lesser step'* which would overcome the objections to the bund in its current position. The appeal, therefore must fail and the enforcement notice will be upheld.

Anthony J Wharton

Inspector