
Appeal Decision

Site visit made on 3 July 2019

by Sandra Prail MBA, LLB (Hons), Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 17 July 2019

Appeal Ref : APP/M2270/C/18/3210902

Land at Tollslye, Bayham Abbey, Lamberhurst, Tunbridge Wells, Kent, TN3 8BG.

- 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 Michael Mallion against an enforcement notice issued by Tunbridge Wells Borough Council.
- The notice was issued on 6 August 2018 .
- The breach of planning control as alleged in the notice is without planning permission the undertaking of an engineering operation in order to create a lake.
- The requirements of the notice are (i) drain the water from the lake between the months of November 2018 and March 2019 in the manner advised by the Environment Agency in their email dated 6 December 2017 which is attached to this notice, (ii) following the drainage process in (i) above restore the land to its original state prior to the creation of the lake by infilling with inert material and (iii) permanently remove from the land all resultant material and debris created by the actions at (i) and (ii).
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b) and (d) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: the appeal is dismissed and the enforcement notice is upheld with variation.

Preliminary Matters

1. The appeal form lodged an appeal under grounds (a) and (c) . Arguments concerning immunity (pertinent to ground (d)) have been raised in the Appellant's submissions. As the Council has had the opportunity to respond to these arguments I shall consider a hidden ground (d) appeal.
2. The Appellant argues that as a matter of fact there has not been an engineering operation. This is more pertinent to a ground (b) appeal than a ground (c) appeal and I shall consider it accordingly.
3. The requirements of the notice specify time periods which have passed. I am satisfied that no injustice will be caused to either party if I vary the notice to amend the dates. Accordingly, I shall do so if appropriate.

Ground (b) appeal

4. This ground of appeal is that the breach of planning control has not occurred as a matter of fact. The onus of proof rests on the Appellant and the test of evidence is the balance of probabilities.

5. The Appellant argues that there has not been an engineering operation. He says that he dug a few holes and cleared silt which enabled the lake to refill naturally and that this did not constitute an engineering operation. He says that with a friend he dug bore holes and removed silt with a mini-digger over a period of about 4 months.
6. Development is defined in section 55 of the 1990 Act (as amended) to include the carrying out of building, engineering, mining or other operations in, on, over or under land. 'Engineering operation' is not specifically defined but it is well established that it involves a physical change to land usually through earth works, including the construction of lakes and ponds. There is no necessity for the works to have been carried out by engineers.
7. In this case the lake is relatively extensive in size with a circumference of approximately 240m. Although there is limited detail before me as to the actual physical work undertaken I find as a matter of fact and degree that the works involved a physical change to the land through earth works and that they were of a scale that cannot reasonably be considered as de minimus.
8. I find that as a matter of fact and degree that the construction of the lake the subject of this appeal reasonably falls within the meaning of an engineering operation and therefore this ground of appeal does not succeed.

Ground (d) appeal

9. This ground of appeal is that at the date when the notice was issued it was too late to take enforcement action. Section 171B(1) of the 1990 Act indicates that for operational development (including engineering operations) no action may be taken after the end of a period of four years beginning with the date on which the operations were substantially completed.
10. The notice was issued on 6 August 2018 and therefore the relevant four year period runs from 6 August 2014.
11. The Appellant says that the lake was complete no later than May 2014. But there is little supporting evidence before me as to the date of substantial completion. The evidence, including that from a neighbour, is not sufficiently detailed or precise to enable me to conclude with any certainty that the works were completed before the relevant four year period.
12. I do not find the Appellant to have discharged the burden of proof that rests with him in this appeal. He has not provided precise, unambiguous evidence to show on a balance of probabilities that the development was substantially complete more than four years before the issue of the notice.
13. For the reasons given, the appeal on ground (d) does not succeed.

Ground (a) appeal and deemed application

Main Issues

14. The main issues in the determination of this appeal are the effect of the development on (i) the character and appearance of the area with particular regard to its location in the registered Bayham Abbey Historic Park and Garden (the Park) and the High Weald Area of Outstanding Natural Beauty (the AONB) and (ii) protected species.

Character and appearance

15. Tollsyle is a detached house within the Park and within the AONB and Landscape Character Area. The Park covers an extensive area in part laid out as formal gardens and including Bayham Lake, a substantial waterbody. The River Teise and extensive areas of woodland are nearby. The lake the subject of this appeal sits outside the garden area of the dwellinghouse and is accessed by a private track.
16. The development plan (including the Tunbridge Wells Core Strategy (the Core Strategy) and saved policies in the Tunbridge Wells Local Plan (the Local Plan)) mirrors the National Planning Policy Framework (the Framework) in recognising that development should respect its surroundings and that great weight is to be given to conserving and enhancing landscape and scenic beauty in an AONB. Policy 4 of the Core Strategy provides that the Borough's landscapes including the AONB will be conserved and enhanced. I have also taken into account Supplementary Planning Document Borough Landscape Character Area Assessment 2002 (the SPD) which recognises the potential appropriateness of ponds as part of landscaping proposals.
17. Retrospective planning permission has been refused for the construction of the lake the subject of this appeal. The refusal was upheld on appeal. I agree with previous Inspector's planning judgement that the development unacceptably harms the character and appearance of the Park and the AONB contrary to relevant development plan policies and fails to preserve or enhance the AONB landscape. I have no reason to doubt the Appellant's desire to enhance the area but the formation of an ornamental lake attractive to wildlife is not compatible with its setting. I agree with the previous Inspector that it amounts to an uncharacteristic domestication which is not in keeping with this part of the Park.
18. The fact that the lake is not visible from public vantage points does not justify development that does not respect its surroundings. I cannot agree with the Appellant's assertion that it enhances the area simply because he considers it to be more aesthetically pleasing than the former marsh land. I am not persuaded on the evidence before me that the lake's biodiversity value is of such significance as to warrant planning permission being granted.
19. I am of the opinion that the identified harm is less than substantial for the purposes of the Framework and no public benefits arising from the development outweigh that harm.
20. The development causes undue harm to the character and appearance of the Park and fails to conserve or enhance the landscape and scenic beauty of the AONB. It fails to accord with relevant policies in the development plan (including Core Policy 4 of the Core Strategy) and the Framework. I have considered whether conditions could overcome this harm and have taken into account the Planning Practice Guidance. But just like the previous Inspector I do not consider that conditions could overcome the identified harm.

Protected species

21. I do not doubt the Appellant's desire to increase wildlife habitat. He says that the lake supports more wildlife than previously. But there is no quantitative

supporting evidence before me that demonstrates this nor that there has been no harm to protected species. I therefore share the Council's concerns.

22. I conclude that that it has not been demonstrated that there has been no unacceptable harm to protected species. I therefore cannot be satisfied that there is no conflict with saved policy E1 of the Local Plan or policy CP4 of the Core Strategy.

Conclusion

23. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice , as varied, and refuse to grant planning permission on the deemed application.

Formal Decision

24. It is directed that the notice be varied to substitute 'November 2019 and March 2020' for 'November 2018 and March 2019' in paragraph 5 (ii) of the Notice. Subject to this variation 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 as amended.

S. Prail

Inspector