



Appeal Decisions

Inquiry Held on 26 and 27 November 2019

Site visit made on 27 November 2019

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 January 2020

Appeal A Ref: APP/C1760/C/19/3220542

The land at Whitehouse Field, Goodworth Clatford, Andover, Hampshire

- 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 Simon Nelson of Nelson Asset Management Ltd against an enforcement notice issued by Test Valley Borough Council.
 - The enforcement notice was issued on 6 December 2018.
 - The breach of planning control as alleged in the notice is:
 - 3.1 On 25th November 1997 planning permission was granted (LPA Ref; TVN.6179/8) for extension to golf course providing 5 additional holes together with associated ground works on the Land subject (inter alia) to the following conditions
 - "02. The development hereby permitted shall be carried out and completed strictly in accordance with the submitted plans, specifications and written particulars for which permission is hereby granted or which are subsequently submitted to, and approved in writing by the local planning authority and in compliance with any conditions imposed by the local planning authority."
 - "06 No development shall commence until fully detailed plans showing ground level alterations involved with each tee and green have been submitted to and approved in writing by the Local Planning Authority and the construction of the tees and greens shall be carried out in accordance with these approved plans."
 - 3.2 The plans submitted with the application, included a Layout Plan (Ref: 97063A) and cross-section (Ref 97062). In addition, by written notice dated 26th February 1998 approval was given, pursuant to condition 6, for a revised Layout Plan (Ref: 97063B) and cross sections (Ref: 9021 and 9022) in respect of details of alterations to ground level for tees and greens. Together these plans are referred to as the "Approved Plans".
 - 3.3 The conditions set out at paragraph 3.1 above have been breached in that the ground level of the Land has been raised above that which was permitted by the Approved Plans.
 - The requirements of the notice are:
 - 5.1 Return the ground levels of the land to those shown on the MJ Rees Drawing marked "The Enforcement Plan Hampshire Golf Club Andover" (No.8918; September 2018) annexed hereto
 - 5.2 Remove from the Land all items associated with the releveling thereof, including all mobile homes, shipping containers, portacabins, skips, plant, machinery and construction materials.
 - The periods for compliance with the requirements are:
 - Paragraph 5.1 above – six (6) months.
 - Paragraph 5.2 above – seven (7) months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b) and (d) 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.
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Appeal B Ref: APP/C1760/C/19/3220546

The land at Whitehouse Field, Goodworth Clatford, Andover, Hampshire

- 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 Simon Nelson of Nelson Asset Management Ltd against an enforcement notice issued by Test Valley Borough Council.
 - The enforcement notice was issued on 6 December 2018.
 - The breach of planning control as alleged in the notice is without planning permission:
 - 1) the formation of hardstanding on the Land in the approximate position shown hatched green on the attached plan: and
 - 2) the formation of bunds on the Land in the position shown approximately cross hatched blue on the attached plan.
 - The requirements of the notice are:
 - 5.1 take down the bunds to the level of the ground immediately adjoining and remove from the land all materials resulting from such works
 - 5.2 break up the hardstanding and remove from the Land all materials resulting from such works.
 - The periods for compliance with the requirements are:

Paragraph 5.1 above – six (6) months.
Paragraph 5.2 above – seven (7) months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (c) and (d) 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.
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Appeal A) Decision

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

Appeal B) Decision

2. The appeal is allowed and the enforcement notice is quashed.

Application for costs

3. An application for costs was made by Test Valley Borough Council against Nelson Asset Management Ltd and another by Nelson Asset Management Ltd against Test Valley Borough Council. These applications are the subject of a separate decisions.

Preliminary Matters

4. All evidence to the inquiry was given on oath.
5. It was confirmed in submissions and within the agreed Statement of Common Ground (SOCG) that the appeals are proceeding on ground (c) rather than (b) as originally pleaded. Submissions on behalf of the appellant confirmed that the grounds of appeal are focused on ground (c). I will not therefore consider whether the matters alleged have occurred as a matter of fact.
6. Furthermore, it was confirmed at the inquiry, that the ground (d) appeals relating to both cases were not being pursued but that an appeal on ground (f) would be more appropriate with respect to Appeal B.

Appeal A – the notice

7. The notice relevant to Appeal A at requirement 5.1 refers to “The Enforcement Plan Hampshire Golf Club Andover” with a reference No 8918 dated September 2018. This plan was not annexed to the copies provided prior to the inquiry. There is no dispute by the appellant that the plan was annexed to the notice when it was issued. I was provided with a copy of the notice including the plan, from the register of enforcement notices by the Council.

Appeal A

Ground (c)

8. The appeal on this ground is that the alleged breach of planning control does not constitute a breach of planning control. The onus is upon the appellant to demonstrate their case.
9. The appellant considers that the works that have taken place are pursuant to carrying out the development approved by planning permission TVN.6179/8 (the planning permission). Furthermore, in their view, they are in compliance with the plans approved and therefore 2 of the conditions imposed upon that decision that are referenced in the allegation.
10. The main issue in dispute between the parties is what datum level should be used to interpret heights shown on the approved drawings. I have been referred by both parties to legal authorities relating to the interpretation of a planning permission. As a starting point, reliance by both parties was given to the Ashford case¹. In that case, it was held that a planning permission which is clear and valid on its face should be interpreted by reference to the planning permission itself, including the conditions as well as the express reasons for the conditions. It should not be necessary to look to the planning application documents or other extrinsic evidence. It is however permissible to look at extrinsic material including the application where there is an ambiguity in the wording of the permission and where that would resolve the ambiguity. The logic to this reasoning is that the public should be able to rely on a document which is plain on its face without having to consider whether there is a discrepancy between the permission and the application.

Length of time to take enforcement action

11. A long time has passed since the development was commenced and at times the Council appear to have either considered the approved development was in the process towards implementation, the approved plans were complied with or that they were not sure. Much of the correspondence has been in reaction to queries from Goodworth Clatford Parish Council, who had expressed concerns about the amount of fill being brought in. There was also correspondence with the firms responsible for the earthworks on the site, amongst others. The Council did not however make any formal determination regarding compliance or otherwise with the planning permission until eventually enforcement action was authorised.
12. I do not consider that the time that elapsed before authorising enforcement action or any of the correspondence produced in evidence, indicates that the Council’s discretion to take enforcement action had been fettered. Conversely,

¹ R(oao) v Ashford BC ex p Shepway [1999] PLCR 12

the appellant before purchasing the site, in April 2017, could have submitted an application under the provisions of s191 or s192 of the Act to obtain a formal determination about the lawfulness of the existing development at that time or what they proposed to undertake.

Interpretation of the planning permission – the datum level

13. The planning permission was issued on 25 November 1997. It is agreed that the approved plans were the site location plan (ref 97061), the revised layout plan (ref 97063A) and the drawing showing typical cross-sections of tees and greens (ref 97062).
14. It is noticeable that the planning permission lacked precise measurable detail. Plan '97061' is the broad site location plan showing existing contours but otherwise its main purposes is to indicate the site boundaries and the adjoining land within the existing golf course, at that time in the same ownership. Plan '97063A' shows the positions of the proposed 5 new holes with tees and greens with proposed heights on each of those features. Otherwise annotations refer to proposed and recent planting, to keeping the final level of 2 of the greens "such that players on the green can be seen from the approach shot position" and wavy lines to illustrate that there would be slopes up to the tees and greens from surrounding land.
15. There are also notes near to the title and around the margin of plan '97063A'. These state that "all disturbed surfaces to be blended into adjoining greens, tees and undisturbed areas to provide gently rolling appearance". There are apparent attempts at more precise terms such as "All slopes on the site to be less than 15%", "All sections of proposed holes to be kept clear of overhead electricity cables and pylons", "Hedge to western boundary to be infilled as indicated", "Reference levels specified relative to survey dated April 1997" and "This sketch to be read in conjunction with sketch 97062". Approved plan '97062' also provides typical cross sections through tees and greens which includes minimum and maximum height changes, slope gradients for banks around those features and other annotations. These references are of little assistance however unless the datum point is known.
16. Soon after the decision was issued, on 4 December 1997, the Council wrote to the then owner of the appeal site advising on the information required to satisfy condition 6. This had been in response to the owner's request for clarification regarding the requirements of that condition. The Council at that time drew attention to the levels shown on the plans approved to that point, saying that they do not tally "with those on the Ordnance Survey based plan you submitted with the application".
17. Further plans were then submitted pursuant to the planning conditions. In particular, condition 6 requires the submission of "fully detailed plans showing ground level alterations involved with each tee and green". The plans then approved were a further revision to the layout plan, referenced '97063B' and labelled in the margin with "Rev B Dec '97 existing ground levels". The levels for tees and greens were as per previous revision A but spot heights were included next to each of these and it is agreed between the parties that these spot heights represent the existing ground levels at that time. Shortly after the submission of '97063B', further plans were submitted. Plan '9022' shows cross-sections through proposed tee 4 and green 3. Plan '9021' shows the

locations of those cross-sections. These plans were each stamped approved as 'details' by the Council on 26 February 1998.

18. The planning permission therefore included the decision notice, the originally approved plans as well as the details submitted pursuant to conditions. No survey was issued with the approved documents. The cross sections shown on plan '9021' show the first indication of any datum point by which the proposed levels could potentially be judged. Whilst there is no key to explain what 'AOD' means, it is a broadly recognised term within the surveying profession and also by others involved in the production and understanding of plans. It means 'Above Ordnance (Survey) Datum' and there is no dispute between the parties regarding how this term should be understood. There is no suggestion by the Council that the plans approved on 26 February 1998 were insufficient to satisfy condition 6.
19. The AOD annotation on plan '9021' is only shown specifically in relation to tee 4 and green 3 but it is understandable that this should generally be taken at face value as applying to the whole of the approved development. Read in combination with the typical sections on plan '97062', the subsequently approved plan provides some potential clarification. Existing spot height levels on '97063B' is another clue to how to interpret the overall planning permission as is the marginal information on plans '97063A' and '97063B' which suggests that the reader should consider those spot heights with reference to a survey dated April 1997. If these indications are consistent with each other, there would be no ambiguity regarding the interpretation of the planning permission.
20. Although a planning permission should be understandable by the man or woman in the street, there is clearly a degree of technical knowledge and expertise required to assess ground levels. Assessing a planning permission such as this will inevitably therefore require the assistance of professionals with expertise in surveying as has happened in this case.
21. Mr Baker who gave evidence for the appellant, undertook a level survey of the site prior to their purchase of it in order to assess the form of the land and what further fill could be brought in to complete the development. Mr Baker's evidence sets out what considerations he took into account before deciding upon the datum being AOD. Another survey firm (Mitcham Surveys) had previously reached a different conclusion in producing a survey which Mr Baker refers to as having been part based upon an "arbitrary grid" but also referencing a global positioning system (GPS) station. Mr Thunhurst for the Council suggests that the Ordnance Survey datum (not the same as GPS) was used initially for the Mitcham Survey however in his view the surveyors must have realised that an arbitrary datum had been used for the proposed plans. Mitcham Surveys then used the level of tee 2 as another arbitrary point to base their survey on. These knowledgeable, experienced professionals have not universally agreed on how the proposed plans should be interpreted. Mr Thunhurst has had the benefit of the subsequently discovered 1997 Brunel Survey to which I return below, but which was not apparently available when Mr Baker or Mitcham Surveys carried out their work.
22. Looking at the planning permission as a whole therefore, although AOD is stated on one plan there are other parameters to set out the context of what was approved which should not be disregarded. As I set out above, plan '97062' shows typical cross sections of tees and greens. This illustrates that

greens should be formed relative to an unspecified "reference level" and that the increase in height should be a minimum of 1m and a maximum of 2m relative to that. This is replicated on plan '9021' which also refers to "exg ground level" in a similar position to where, previously on '97062', there had been reference to "fairway". However, in evidence for the appellant from both Mr Baker and Mr Hearn, there was agreement that the increases in greens based upon Mr Baker's survey in most cases would far exceed the maximum height relative to fairways. Taking Mr Baker's survey into account all other greens, apart from green 1, would require raising by between 4m and 7m far, greater than shown on the approved plans. Additionally, in at least one case the tee would be too high to enable a 15% gradient down to the fairway. Furthermore, it was agreed that apart from remedial repairs, no increases in land levels where fairways are shown on the plans, was proposed. As such, the reference to AOD conflicts with the other clear parameters of the planning permission. There is clear ambiguity in my view within the planning permission and it is therefore reasonable to consider extraneous information when interpreting it.

23. Plans '97063A' and '97063B' both refer to levels being specified relative to a survey dated April 1997 but that survey for many years appears to have eluded all involved including the Council and the landowners. Even the letter from the Council to Mr Fiducia as early as December 1997 refers to levels not tallying with the Ordnance Survey location plan in apparent ignorance of any other survey.
24. Notwithstanding this however, the Council made contact with Mr Winchcombe of Brook Consultants who was believed to have prepared the drawings for the planning submission in 1997. Mr Winchcombe has provided a detailed letter addressed to Earthline Ltd, original contractors instructed to carry out the earthworks, setting out the process and events leading to the submissions. This confirms that having discussed the proposed project with Mr Fiducia, the then owner of the site, he directed Brunel Surveys Ltd to carry out a topographical survey of the site and its surroundings. He sets out that the survey, as was common practice in those times, used a temporary bench mark which I understand to also mean an "arbitrary datum". Mr Winchcombe then prepared the planning application "drawings/sketches" using "only the Brunel Surveys Ltd Drawing dated April 1997 as reference". Furthermore, he states that "no Ordnance Survey levels were used at any time nor should they have been."
25. A sworn statement has been provided by Mr Winchcombe cross referring to his letter. Although he was not available for cross-examination under oath, I can give this evidence significant weight as I can the sworn statement from Mr Albinson, director of Brunel Surveys Ltd confirming that Mr Winchcombe's letter is truthful. Earthline Ltd have also provided written evidence from a director of the company that indicates that they used the Brunel Survey to set out levels. There is no evidence on behalf of the appellant that questions the validity of Mr Winchcombe's evidence or that makes it less than probable.
26. Circumstantially, in 1996 a few months before the planning application, another survey was undertaken by Brunel Surveys Ltd relating to the adjoining, existing golf course for "additional 4 holes and protective bunding around driving range" which was also submitted by Mr Fiducia. As owner at that time of the current appeal site as well as the existing golf club Mr Fiducia had a clear

business relationship with Brunel Surveys Ltd. On its own this may not be clear confirmation of the use of the Brunel Survey to formulate the planning permission but it does point in the same direction as the other evidence that I have referred to above.

27. The evidence clearly indicates to me, on the balance of probabilities, that the Brunel Survey was the "April 1997 survey" referred to on both plan '97063A' and plan '97063B'. Whilst there remains ambiguity due to the reference to AOD on another plan, I also find it probable that this was an error which is a point accepted in evidence for the appellant. The Brunel Survey is therefore relevant extrinsic material which may not have been submitted with the planning application but helps to resolve the ambiguity with the planning permission. It is a vital piece of the jigsaw that brings a degree of clarity to the understanding of the planning permission as a whole.

Breach of planning control

28. There is no dispute that the difference between the arbitrary datum point used in the Brunel Survey and the Ordnance Survey datum is 5.92m. This makes a significant difference to the levels across the site although this has been close enough to cause confusion. It was agreed by both Mr Thunhurst for the Council and Mr Baker for the appellant that factoring in the 5.92m difference makes the IKB survey closely correlate to the levels measured by Mr Thunhurst.
29. The evidence from Mr Thunhurst indicates that the levels on the plans approved through the planning permission, when looked at with reference to the Brunel Survey have been exceeded in places. The appellant's evidence does not demonstrate otherwise. As such, the development has breached the requirements of conditions 2 and 6 of the planning permission as alleged. The appeal on ground (c) therefore fails.

Appeal A) Conclusion

30. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

Appeal B

Ground (c)

31. The appellant considers that a hardstanding pre-existed the issuing of the enforcement notice. Mr Nelson, of the appellant company, also stated that this had been uncovered and that 600 tonnes of crushed concrete and rubble was imported to improve the surface. Mr Nelson confirmed that there were no bunds when the site was purchased by the appellant company in April 2017. These were formed from the scraping back of the material that was over the hardstanding. The presence of a hardstanding is confirmed in a written statement from Mr Pike who had been a plant operator and foreman for the appellant and the previous operator of the site.
32. Substantial amounts of material were however brought in to consolidate the hardstanding that does appear to have existed, possibly as part of or at the end of the track that leads from the entrance to the site. The substantial amount of material that has been spread out and compacted across a modest

- area relative to the overall site area, as a matter of fact and degree, constitutes operational development.
33. Some material that can be seen in the aerial photographs including that from 2008 which shows some piled up material but it is not clear whether this is imported material in the process of being redistributed or whether they form bunds. The IKB survey however does not show bunds in place at that time. Piles of material may well at times appear like bunds but could be in the process of awaiting redistribution to form the development.
34. I recognise that the work on site has been put on hold to await the outcome of this appeal but the evidence and what I saw on site indicates that these current large banks of material have a strong degree of permanence. The banks in part surround the compound where portakabins, containers and plant have been positioned and help to enclose that area. Although this material may eventually be spread, as a matter of fact and degree, the formation of the bunds in my view from the evidence available appears to have involved operational development.
35. Mr Hearn confirmed when giving his evidence that the bunds and hardstanding had constituted development albeit that they are necessary to deliver the planning permission for the new golf holes. For this ground of appeal to be successful it would be necessary for these operational developments to be permitted by Article 3 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (the GPDO).
36. The appropriate class within Schedule 2 of the GPDO is Part 4, Class A which provides permitted development rights for "the provision on land of buildings, moveable structures, works, plant or machinery required temporarily in connection with and for the duration of operations being or to be carried out on, in under or over land or on land adjoining that land".
37. The principal effect of this class of permitted development is in relation to structures whose provision would itself amount to an engineering or building operation, but which will not form part of the development that has been permitted. It has been held that there is no reason to adopt a restrictive interpretation of Class A, because it only grants a temporary planning permission for the duration of the operations, after which the buildings and moveable structures would have to be removed.
38. It is however necessary to consider whether the operational developments are reasonably required temporarily as a matter of fact and degree. I have reached a view within my decision on Appeal A that the planning conditions referred to in the alleged breach of planning control set out on that notice have been breached. However, it does not follow that all of the work in carrying out the planning permission has been completed or exceeded and there will be levelling works that will clearly require the use of plant and machinery. Mr Thunhurst in giving his evidence confirmed that there was still some headroom with respect to material and levels to be created. The process of complying with the planning permission and also the reinstatement of the land where the bund and hardstanding are, which will form part of margins and fairway for the fifth hole, will require further ground-works. Notwithstanding the breach of planning control in relation to Appeal A therefore, the development has not been substantially completed.

39. The size of the hardstanding and the bunds themselves do not appear to me to be disproportionate to the activity given the size of machines that are required for such work. There are also health and safety requirements of personnel undertaking the processes involved and other office and security necessities.
40. I therefore consider that the developments are reasonably necessary to complete what has been approved. As such they are permitted under the provisions of Article 3 of the GPDO by reason of compliance with Schedule 2, Part 4, Class A. As such the appeal on ground (c) succeeds.

Appeal B) Conclusion

41. For the reasons given above, I conclude that the appeal should succeed on ground (c). The enforcement notice will be quashed. In these circumstances, the appeal on ground (f) does not fall to be considered.

A Harwood

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr R Kimblin QC

Instructed by Mr S Hearn

He called:

Mr S Hearn Dip TP, MRTPI

Mr I Baker

Mr S Nelson

Planning consultant, Concept Town Planning Ltd
of IKB Surveys Ltd
of the appellant company

FOR THE LOCAL PLANNING AUTHORITY:

Mr R Williams of counsel

Instructed by the Solicitor of Test Valley Borough
Council

He called:

Ms S Dutfield BA(Hons), DipTP,
MSc, MRTPI

Planning Consultant, Turley Associates Ltd

Mr A Thunhurst FRICS

Chartered Surveyor

DOCUMENTS

- 1 Signed declaration of Peter Albinson, Brunel Surveys Ltd
- 2 Signed declaration of Peter John Winchcombe
- 3 Aerial photographs illustrating positions from where photographs were taken from Council site visits on 5 April 2018 and 13 March 2018 as reproduced in Ms Dutfield's Appendix 24
- 4 Mr Thunhurst's re-ordered appendices
- 5 E-mail trail submitted by the appellant from May 2019
- 6 Opening submissions by Mr Kimblin QC
- 7 Opening submissions by Mr Williams
- 8 Full copy of Enforcement Notice from the Council register
- 9 Chronology – Statement of Common Ground
- 10 Chronology – Letters and plans 2019
- 11 Closing Submissions by Mr Williams
- 12 Closing Submissions by Mr Kimblin QC

Plans

- 1 Enforcement Plan Hampshire Golf Club, Andover