The Planning Inspectorate

Appeal Decisions

Site visit made on 13 January 2020

by Hilary Orr MSc, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 February 2020

Appeal A Ref: APP/U1430/C/19/3235727
Appeal B Ref: APP/U1430/C/19/3235729
Land at 9 Eatenden Lane, Mountfield, Robertsbridge TN32 5LT

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- Appeal A is made by Mark Coates and Appeal B is made by Louise Coates against an enforcement notice issued by Rother District Council.
- The enforcement notice, numbered MKN239, was issued on 12 August 2019.
- The breach of planning control as alleged in the notice is engineering works by the excavation of a verge and earth bank and the removal of earth and any associated engineering or building operations.
- The requirements of the notice are;
  5.1 Cease the unlawful development.
  5.2 Reinstate the excavated bank to its original soil profile by undertaking the following steps, which must be overseen and certified by a specialist Geotechnical Engineer (CEng), with relevant experience of earthwork operations, or an Engineering Geologist (chartered geologist by the Geological Society of London) with relevant experience of earthwork operations (Accredited Body).
  5.2.1 Cap off/and or re-instate the drains/pipework exposed during the unlawful development, as directed by the "Accredited Body".
  5.2.2 The original soil profile to be reinstated using earthworks fill complying with Class 1A (well graded granular material, other than chalk and having a minimum Ø' of 35 degrees. The proposed new material fill must be free from any chemical contamination (including asbestos). The Accredited Body to verify the new material is suitable prior to the works being carried out and evidence of such verification to be provided as part of the validation report referred to in paragraph 5.2.7.
  5.2.3 The new material fill to be placed and suitably compacted in layers to a method specification (as laid out within table 6/4 a copy of which is annexed hereto). Benching (being the process of creating a stepped profile into the remaining back slope to the excavated bank), will be required to allow the new material fill to be placed and compacted to tie in with the existing materials. Each of the benches should not exceed one metre in height and 0.5 metres in width, with the bench surface having a slope of less than 10 degrees to allow free draining of water.
  5.2.4 Sufficient new material fill to be placed, compacted and trimmed to allow the original ground profile to be re-established.
  5.2.5 The application of chemically suitable topsoil to the reinstated slope in conjunction with applying an erosion control product such as Enkamat or a similar product.
  5.2.6 Reseed topsoil with a mix of grasses and re-plant top soil with a mix of native shrubs in keeping with those in the immediate location, in order to further stabilize the top soil and allow for natural regeneration.
  5.2.7 Provide to the Council a validation report prepared by the Accredited Body upon completion of the works confirming their accreditation as an Accredited Body and that the works have been undertaken as specified above in paragraphs 5.2.1 to 5.2.6.

- The period given for compliance with step: 5.1 Immediately upon the notice taking effect; Steps 5.2.1 to 5.2.4 Three months; Steps 5.2.5 and 5.2.6 Two months; and step 5.2.7 One month after completion of steps 5.2.5 and 5.2.6.
- The appeals are proceeding on the grounds set out in section 174(2) (c) and (f) of the Town and Country Planning Act 1990 as amended.

Summary decisions: The appeals succeed in part and the enforcement notice is upheld with variations in the terms set out below in the Formal Decision.

This decision is issued in accordance with section 56 (2) of the Planning and Compulsory Purchase Act 2004 as amended and supersedes that issued on 30 January 2020.

Decisions for Appeal A and Appeal B

1. It is directed that the enforcement notice be varied by: the deletion of steps 5.1 to 5.2.7 in full and the substitution of:

    1. Re-instate the excavated bank to its original profile following ground engineering best practice.

    2. Replant the re-instated bank with grass seed and shrubs the same as or similar to those existing previously.

    in paragraph 5 of the notice, and the consequential deletion of steps 5.1 to 5.2.7 in paragraph 6 of the notice and the substitution of:

    Step 1. Within three months of the notice taking effect

    Step 2. Within five months of the notice taking effect

2. Subject to the variations, the enforcement notice is upheld.

Background and procedural matters

3. The site is located within a line of semi-detached dwellings on the east side of Eatenden Lane. The properties are sited considerably above the carriageway with a steep slope leading down to the highway. The dwellings are set within modest front gardens, with long rear gardens that back onto a rear access road. The slope to the road is generally naturally vegetated but interspersed with some trees of varying species and quality. There is an area of land at the bottom of the slope that has highway furniture and signage, although there does not appear to be any formal boundary between the highway and the privately owned slope up to the dwellings.

4. The allegation in the notice relates to the slope to the front of No 9, that has been excavated and cleared of vegetation. Prior to the issue of the notice the Council served a temporary stop notice on 17 July 2019 and this was followed by the issue of the enforcement notice and a stop notice subject to this appeal.

5. My attention has been drawn to concerns about the service of the notice and whether it has been correctly served on all of those with an interest in the Land, including that understood to be in the ownership of East Sussex County Council (ESCC). This is a matter that would normally be considered under an appeal made on ground(e). Whilst no appeal has been lodged under this ground, I have nonetheless given this due consideration.

6. I have no evidence to confirm that ESCC were served with a copy of the notice at the same time as the appellant's and note that ESCC do not appear on the Council's list of those served with copies. However, S176(5) gives the Inspector the power to disregard non-service, provided that, that person has not been substantially prejudiced by the failure to serve him or her. In this instance it is clear from the evidence that ESCC attended the site with officers from the Council on 15 July 2019, which predates the issue of the notice. There is also an email dated 23 July 2019 from East Sussex Highways that outlines the nature of the works carried out. I find therefore, that ESCC were fully aware of the works throughout and have not been substantially prejudiced by any failure to serve a copy of the notice upon them. Accordingly, had there been an appeal under ground (e) it would have failed.

Reasons

The appeals on ground (c)

7. The appeals are proceeding on ground (c), that the matter alleged in the notice does not constitute a breach of planning control. This is a legal ground where the onus of proof is on the appellant, to make out the case that there has not been a breach of planning control.

8. It is the appellants case that the works carried out do not constitute a breach of planning control, as they are landscaping works carried out to safeguard the safety of pedestrians and road users. They contend that as the works did not result in material gain and they enhance the appearance of the garden no planning permission is required.

9. Section 55(1) of the Town and Country Planning Act 1990 defines the two limbs of development, namely operational development, which means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change of use. The first comprises activities which result in some physical alteration to the land with some degree of permanence, whilst the second comprises activities which are carried out in, alongside or on the land, but do not interfere with the actual physical characteristics of it. In this instance I acknowledge the reason why the works may have been carried out. However, it is the scale of the works that determines whether they constitute engineering works, that represents development for which planning permission is required.

10. It is clear from the evidence and my site visit, that very significant works have been carried out to the bank. A substantial quantity of vegetation and material has been removed. The excavated area extends some 11 metres in width and some 4 metres back from the edge of the carriageway. The height of the resultant sheer bank is generally some 3 metres high. I could see that there had been some additional and localised soil slippage to one area.

11. I have taken into consideration the scale of the works and the machinery used to excavate the bank and remove the spoil. I find that these works are not insignificant in scale and comprise an engineering operation requiring planning permission. The appeals on ground (c) therefore fail.

The appeals on ground (f)

12. The appeals on ground (f) are that the requirements of the notice exceed what is necessary to achieve the purpose of the notice. The purposes of an

enforcement notice are set out in section 173 of the 1990 Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). In this case the notice requires that the works cease and specific steps are taken to restore the land. I therefore consider that the purpose of the notice is to remedy the breach of planning control.

13. It is the appellants view that the steps specified by the Council are not required, and are therefore excessive, as the slope would in time regress to about 30 degrees. I have had regard to the report provided by Southern Testing dated 7 August 2019. The report acknowledges that in time the slope would regress naturally. However, it goes on to set out specific steps for the restoration of the bank. These have been brought forward by the Council into the requirements of the notice. Other than, allowing the bank to regress in time, I have not been provided by detailed lesser steps by the appellants. Nonetheless, I consider that the nature of the requirements set out in the notice are highly detailed, very specific and rely on the involvement of a third party (The Accredited Body) to verify material and prepare a report. As such this leads to uncertainty for the appellants. Moreover, they impose more onerous requirements than to restore the land to its previous condition. I therefore consider them to be excessive.

14. As operational development is involved, and a stop notice remains extant, step 5.1 does not serve any identified purpose. Therefore, in my view the requirements of the notice should be varied by their deletion in full and their replacement with the following:

    1. Re-instate the excavated bank to its original profile following ground engineering best practice.

    2. Replant the re-instated bank with grass seed and shrubs the same as or similar to those existing previously.

15. As a consequence of this change the time for compliance will also need to be varied. Accordingly, the time for compliance should be varied by their deletion in full and replacement with the following:

    Step 1. Within three months of the notice taking effect;

    Step 2. Within five months of the notice taking effect.

16. I therefore find, for the reasons given, that the steps required by the notice exceed what is necessary to remedy the breach of planning control and the appeals, on ground (f) therefore succeed to this extent.

Conclusion for Appeal A and Appeal B

17. I have had regard to all of the matters raised, including the removal of trees to protect overhead cables, but these do not lead me to a different decision.

18. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall vary the enforcement notice prior to upholding it. The appeals on ground (f) succeed to that extent.

Hilary Orr

INSPECTOR