



Appeal Decisions

Hearing Held on 12 January 2021

by Brian Cook BA (Hons) DipTP MRTPI

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

Decision date: 19 January 2021

Appeal A: Appeal Ref: APP/C4615/C/18/3219487 & Appeal B: Appeal Ref: APP/C4615/C/18/3219488

Land at Junction of Oak Lane and Holbeache Lane, Kingswinford, West Midlands DY6 7JS

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Renney Davies (Appeal A) and Mrs Julie Davies (Appeal B) against an enforcement notice issued by Dudley Metropolitan Borough Council.
 - The enforcement notice was issued on 29 November 2018.
 - The breach of planning control as alleged in the notice is without planning permission and within the last four years, the undertaking of engineering operations on the Land to alter its land levels and to create a substantial earth bund along its northern and western boundaries as shown on the photographs labelled "Photographs of the Site AFTER Development".
 - The requirements of the notice are return the Land to its previous appearance as shown on photographs labelled "Photographs of the site BEFORE development" attached to the notice, restoring its ground levels and removing all materials which have been used to create the earth bund to the northern and western boundaries.
 - The period for compliance with the requirements is three months.
 - Appeal A is proceeding on the grounds set out in section 174(2) (b), (f) and (g) of the Town and Country Planning Act 1990 as amended.
 - Appeal B is proceeding on the grounds set out in section 174(2) (a), (b), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decisions

Appeal A: Appeal Ref: APP/C4615/C/18/3219487 & Appeal B: Appeal Ref: APP/C4615/C/18/3219488

1. Since the notice is found to be a nullity no further action will be taken in connection with these appeals. In the light of this finding the Local Planning Authority should consider reviewing the register kept under section 188 of the Act.

Application for costs

2. At the Hearing an application for costs was made by the appellants against the Council. This application is the subject of a separate Decision.

The Notice

Introduction

3. In their appeal statement dated October 2020 the appellants made submissions that the notice was either a nullity or invalid and put forward three grounds. In effect a ruling on each was requested. In my 'pre-hearing note and agenda' I gave a preliminary view on each. My conclusion was that, subject to a discussion about the third point at the hearing, the notice was not a nullity.
4. First, it was argued that the notice was issued without the correct authority. After some discussion around the further submissions made on this ground it is fair to say that the appellants agreed to disagree with my view and not pursue this further in the interests of trying to secure a planning permission by way of the appeal on ground (a). The second ground which concerned the provision of the information required by Regulation 5 of the Town and Country Planning (Enforcement Notices and Appeals) Regulations 2002 was, in effect, withdrawn.
5. The third ground, citing *Miller-Mead v Minister of Housing and Local Government* [1963] 2 Q.B. 196, 232, was that the requirements of the notice arguably do not tell the appellants fairly what they must do to remedy the breach of planning control because the Council has not been able to fully establish what they allege the breach of planning control to be. This ground succeeds and the notice is either a nullity or invalid and incapable of correction without injustice to either the Council or the appellants.
6. To explain why and determine which requires some consideration of the context within which the notice was issued. The following is drawn from the evidence including the Statement of Common Ground (SOCG) dated January 2021 and the undated Council's 'report to chairperson of development control committee seeking authority for enforcement action' (expediency report). This report appears to have been prepared in the summer of 2017. There are a number of inconsistencies in the evidence which would have been explored had the grounds of appeal been discussed at the hearing. Therefore, where appropriate, they are simply recorded as such.

History

7. The expediency report states that in August 2011 the Council received a planning enforcement complaint which alleged that the land had been levelled and laid with hardcore, with a number of skips having also been deposited upon it. Although a site inspection confirmed that this was the case, a contour plan of the site said to be based on 2012 data submitted by the Council shows a large mound of material over most of this area. The SOCG also says 'there are earth bunds...which were created in 2012'.
8. A retrospective planning application¹ was made in May 2012 and refused planning permission. An enforcement notice requiring the storage use to cease and the land to be restored to its previous appearance was issued in February 2013 and proceedings to prosecute non-compliance were initiated. The 2013 notice has not been submitted in evidence.

¹ P12/0111

9. Prior to a summons being issued, in October 2013 a further planning application² was submitted, supported by ecological information and including landscaping and other on-site measures intended to protect residents from disturbance. Prosecution proceedings were therefore held in abeyance whilst the application was under consideration. That application was refused planning permission and an appeal against that decision was dismissed in July 2014. Surprisingly, neither party, but particularly the Council, submitted that appeal decision in evidence.
10. Prior to that appeal being determined prosecution proceedings were again initiated. In what, by this time, had become a pattern, yet a further retrospective planning application³ was submitted in May 2014. This contained amendments to the 2013 scheme and was supported by additional information relating to nature conservation and a noise survey. This application was approved in August 2014 (the 2014 permission).
11. Given the particulars of the proposed development, it would appear that s180(1) of the Act was thus engaged and the 2013 notice ceased to have effect upon the grant of the 2014 permission.
12. Plan RD.3238/11 Rev B is an approved drawing and is dated December 2011. The 'revision date' box on the drawing is not filled in. However, even if Revision B post-dates December 2011, the latest it could be dated is August 2014. It shows an earth mound approximately 2.5m high along the western boundary and a part of the northern boundary of the site with an acoustic barrier on the external side of the mound facing the public right of way to the west and the permissive path to the north.
13. The 2014 permission is subject to 11 conditions. The Council considers those which start with the words 'no further use shall take place until...' to be conditions precedent. The relevant conditions are 2, 4, 5, 6 and 10. It is common ground that these conditions have never been discharged by the Council.
14. In October 2014 it was brought to the attention of the Council that a 'large amount of soil and rubble had been imported onto the site' and used to create very large bunds along the western and northern boundaries of the site. It was also noted that the bunds were encroaching onto Council-owned land in both cases.
15. This is partly at odds with what is an agreed matter in the SOCG, namely that the bunds were created using the central mound of material referred to above. What is beyond doubt is that the mounds are different in shape, height and extent to that shown on the approved drawing. Moreover, the appellants state in the SOCG that the bunds were 'constituted' in 'late' 2014. As no appeal has been made on ground (d), it is reasonable to assume that 'late' means sometime during December, some 6 months after the 2014 permission was approved.
16. A further retrospective application⁴ was submitted in September 2015 and refused planning permission in January 2017. This prompted the expediency report. This identified the breach of planning control as:

² P13/1341

³ P14/0637

⁴ P15/1409

- (a) Without planning permission, and within the last ten years, the change of use of the land for the storage of skips.
- (b) Without planning permission, and in the last four years, undertaking of engineering operations on the site to alter its land levels and to create a substantial earth bund along its northern and western boundaries

17. The notice that is the subject of these appeals was then issued. This prompted yet a further planning application⁵; this remains to be determined.

Appraisal

18. The breach identified in the expediency report and set out above is consistent with the Council's approach to this matter. In short, it considers that since what it regards as the conditions precedent have not been discharged, the development carried out is unlawful and the 2014 permission is therefore no longer extant.
19. This approach is wrong for the reasons set out in detail in an Addendum to the pre-hearing note and agenda. Briefly, the planning application was for retrospective planning permission for development already carried out, namely 'change of use of vacant land to land for open storage of empty skips and lorry parking with concrete hardstanding, 2m high boundary fencing and new vehicular access with entrance gates'. The standard commencement condition has not been included (correctly) and therefore, even if the development is unlawful as the Council contends, the permission does not and cannot lapse.
20. While it is possible to frame conditions on a retrospective planning permission to, in effect, bring the permitted use (in this case) to an end if the required schemes and details are not submitted in accordance with the timetable set out in the condition, those imposed by the Council do not achieve that. The use never ceased and no condition of the 2014 permission required it to do so. The conditions which set the timetable for submission of the required schemes as 'no further use shall take place until...' cannot therefore be construed as conditions precedent.
21. In the event, the issued notice does not reflect the expediency report since it attacks only the engineering operations. The breach of planning control alleged and the requirements are set out in the summary details above. The breach refers to the operations on the land to alter its levels and create a substantial earth bund (emphasis added). The bund is identified by a series of 'after' photographs taken from the two paths outside the appeal site rather than by delineation on the notice plan. The requirements are to restore the land to its previous appearance (note: not 'condition') as shown on a series of 'before' photographs, restoring its ground levels and removing all materials used to create the earth bunds (emphasis added). Again, the photographs are taken from the paths external to the appeal site and show only the areas where the bunds now are.
22. In my view the use of the 'before' photographs, which are quite unclear and, strictly, would require replanting of trees and shrubs, do not unambiguously tell the recipients of the notice how they are required to remedy the breach. It also emerged that the northern bund extends beyond the land edged red on the notice plan and so this bund could not be required to be removed in its

⁵ P19/1007

- entirety by the notice. Nevertheless, s176(1) confers very wide powers of correction and variation subject only to there being no injustice to either party. I initially considered that it would be possible to put the notice in order if both parties had the same understanding of what was alleged and what was required to put it right.
23. Having regard to the reasons for issuing the notice and the evidence, I understood it to be concerned only with the bunds themselves and the land on which they stand. I took references to restoration of land levels to be to the land on which they have been built.
24. That, however, was not how the appellants understood it. Given the use and positioning of the word 'and' in the breach they understood the references to the levels of the land to mean the whole of the land edged red. That therefore created uncertainty as to the levels that they were required to return the land to in the absence of any survey drawings. In their hearing statement the appellants gave notice that they did not accept that there had been any change in land levels save for the bunds themselves.
25. When asked, Mr Stevenson agreed broadly with my interpretation while Mr Benbow inclined more to the appellants' understanding. He explained that it was not the intention of the Council to have the central mound of material reinstated and that is consistent with paragraph 2.7 of the SOCG. Paragraph 2.10 of the SOCG confirms that it is agreed that the land was not lowered or excavated. His concern was that the land had, in fact, been raised. As a consequence, it was no longer clear that the mound approved in general terms by the 2014 permission would achieve the noise attenuation required to protect residents of Kilburn Drive. It would therefore be inappropriate to require the mound on the western and northern boundaries to be reinstated to that shown on the approved plan, notwithstanding the failure to comply with the conditions relevant to that part of the 2014 permission.
26. That the Council officers themselves understood the notice differently confirms that it is ambiguous. The hearing was adjourned for about 30 minutes to enable the Council to consider and propose an alternative form of words for the requirements and, as necessary, the breach to better reflect their intentions.
27. They were unable to propose any redraft of the notice. In any event, had they proposed a variation that reflected Mr Benbow's view about the levels having been raised on at least part of the land, the appellants would have wished to challenge that as they had already given notice would be the case. Most likely the appeal on ground (b) would have been put differently. Not being able to do so would have been a clear injustice to the appellants.
28. There is little doubt in my mind that there has been a breach of planning control. The boundary bunds bear no resemblance to that for which permission was sought and given through the 2014 permission. Moreover, their construction was begun and possibly completed only a matter of months after the permission was granted and several months before the submission of any schemes to discharge conditions 2, 4, 5, 6, 7, 8 and 10.
29. I did consider various ways in which the requirements could be varied. However, as the appellants put it in their application for an award of costs, it is not for me to design the notice for the Council and it would not have resolved the ambiguity inherent in the breach alleged in any event.

30. The simplest variation would have been to require the land to be restored to its condition before the breach of planning control took place. However, that would require reinstating the central mound which is not what either party considered desirable or necessary.
31. It may have been possible to require restoration of the land to levels shown on a plan. While no such plan exists, it could have been derived from the contour plan based on 2012 data. However, while the evidence is not wholly clear, it would seem that the 2012 data reflects what the Council considers to be a general raising of site levels. As this is disputed by the appellants it is likely that they would have sought to challenge the levels required. As they would have been unable to do so, that would have amounted to injustice.
32. Finally, I considered if it would be possible to specify restoration to the scheme permitted by the 2014 permission. However, as explained above, the Council does not consider this would now provide effective noise attenuation for local residents given the, disputed, raising of levels across the site. That variation could have caused injustice to the Council.
33. It is a fine point as to whether the notice is invalid and incapable of correction or a nullity. Since the outcome of each is the same, it is, perhaps, immaterial. Nevertheless, in this case I consider the notice to be fundamentally flawed. It fails to tell the recipients clearly what they are required to do to remedy the breach which, in itself, is ambiguous. Following the principles established in *Miller-Mead* the notice is therefore a nullity.

Conclusion

34. I have concluded that the notice is a nullity and in these circumstances the appeal under the various grounds set out in section 174(2) to the 1990 Act as amended and, with respect to Appeal B only, the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered.

Brian Cook

Inspector

APPEARANCES

FOR THE APPELLANT:

Sarah Clover of Counsel
Philip Woodhams

Barrister, Kings Chambers
Planning Consultant

FOR THE LOCAL PLANNING AUTHORITY:

Gail Breakwell
Luke Benbow
Richard Stevenson
Nicholas Howell

Solicitor with the Council
Planning Enforcement Officer
Senior Planning Officer
Senior Planning Officer

DOCUMENTS

- 1 Application for costs submitted by the appellants