



Appeal Decisions

Inquiry Held on 19 and 20 January 2021

Site visit made on 31 December 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 02 March 2021

Appeal Ref: APP/L2250/X/19/3234216 (Appeal A)

**Fairfield Court Farm, Brack Lane, Brookland, Romney Marsh, Kent
TN29 9RX**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Scott Balcomb against Folkestone & Hythe District Council.
 - The application Ref Y19/0592/FH is dated 16 May 2019.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is for the construction of an earth screening & containment bund around raw material stockpile.
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Appeal Ref: APP/L2250/X/20/3256814 (Appeal B)

**Fairfield Court Farm, Brack Lane, Brookland, Romney Marsh, Kent
TN29 9RX**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Scott Balcomb against Folkestone & Hythe District Council.
 - The application Ref Y19/1339/FH is dated 20 November 2019.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is for the construction of an earth screening & containment bund around raw material stockpile.
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Decisions

1. The appeals are dismissed.

Application for costs

2. An application for costs was made by Scott Balcomb against Folkestone & Hythe District Council. This application is the subject of a separate decision.

Preliminary Matters

3. Appeals A and B are identical. The Council did not validate the former, considering it a matter for Kent County Council (KCC) as the development involved the working of minerals. Although an appeal was then lodged, a second LDC application was submitted to the Council later in 2019. In this

instance the Council chose to validate this application due to KCC's position, but failed to reach a decision within the prescribed period.

4. It is not a matter for my decision to determine which authority could have potentially made such an assessment and reached a particular view. Both appeals now fall to be determined.
5. KCC, in considering that the applications were a district matter, took no part in this Inquiry. My decision will be based strictly on the evidential facts and on relevant planning law. The test of the evidence is one of balance of probability and the burden of proof is upon the appellant.

Background

6. A planning permission (ref 95/0046/SH) was granted in 1995 which confirmed the permitted use of the land for the grading and distribution of topsoil and sand. There was no requirement for bunding associated with that permission. There is no dispute between the parties that the development for which a certificate is sought is operational development; a bund or earth embankment, constructed as an engineering operation, constitutes development under s55 of the 1990 Act.
7. S171B of the 1990 Act as amended says that where there has been a breach of planning control involving, amongst other things, operations in, on, or over the land, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
8. On this basis the appellant must successfully demonstrate, on the balance of probability, that any breach of control commenced four years before, ie prior to 16 May 2015 (in respect of Appeal A) and 20 November 2015 (Appeal B). These will be referred to as "*the material dates*" and to be successful the appellant must convincingly show the development has remained in situ since.

The Development

9. The Environment Agency (EA) describes a bund as being a permanent structure that is built around a specific area for a certain purpose. In this particular case the bund, as illustrated on the plan submitted with both applications (drawing no FC1), was to contain the raw material stockpiles resulting from Fairfield Soils Ltd's operations at the site. The bund, hatched in green, has a clear horseshoe shape, its positioning is clear from the plan, and this must constitute the development for which the LDC is sought.
10. There is no dispute between the parties that the development would not enjoy permitted development rights granted under Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended as it exceeds 2m in height. A level survey of the site was commissioned in 2015, undertaken by JC White Geomatics Ltd with a plan produced, dated August 2015 that gives height measurement readings across the site at that time. Also, an amendment to drawing FC1, with height annotations at various points along the 'horseshoe' was requested by the Council in 2019, when dealing with Appeal B. The points measured heights of between 1.69m and 3.1m, with an average measurement of 2.62m.
11. The bund, as described, therefore requires the benefit of planning permission.

12. In the judgement of *Sage v SSETR & Maidstone BC* [2003] JPL 1299 it was held that the time limit of four years does not begin to run until the whole process of creating the operation is substantially completed using a holistic approach. Accordingly, it must be shown that the development at issue has a certain permanence and has remained in this state for at least the four year period.

Main Issue

13. The main issue in these appeals is whether, on the balance of probability, the development was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990.

The Evidence

The Appellant's case

14. The Inquiry heard that Michael Balcomb was the proprietor of 'Fairfield Turf Ltd' which, from 1992 until 2002, supplied manufactured topsoil produced at the site. Mr Balcomb confirmed, in evidence, that the 1995 planning permission enabled the site's enlargement for the storage of unprocessed soil and manufactured soil. He mentioned that on, or around, 1995, the soil storage area was enclosed with an earth bund, and it has been in place since. The aerial photographs from 2007 and 2008, attached to Michael Balcomb's statutory declaration (Exhibit 4), both show a horseshoe-shaped mound of earth surrounding and containing earth stockpiles in the area behind.
15. Mr Balcomb explained that in 2002 his company was sold to John Ransley, operating as 'Ransley Turf', a landscaping contracting company. This, in turn, was bought out by Scott Balcomb (Michael Balcomb's son) in May 2017. Operating under the name of 'Fairfield Soils Ltd' Scott Balcomb has carried on a soil processing business from the site since this date.
16. As part of the appellant's evidence a statutory declaration, dated 13 May 2019, has been submitted by Andrew Abrey, which stated that he had worked at the site for over the past 25 years, during which time the unprocessed soil was surrounded by a bund in order to provide protection to the environment. It has remained in situ.
17. Scott Balcomb (SB), mentioned that, following an application made to the Environment Agency (EA) in June 2017, the EA issued a Permit to Fairfield Soils Ltd on 15 November 2018 (ref EPR/GB3301TH) allowing the operator to treat excavated materials for the production of soil and aggregates.
18. In his Statutory Declaration, dated 21 December 2020, SB recalls the EA subsequently visiting the site on 15 January 2019 following which, after surveying the operation, it issued a 'Compliance Assessment Report' (CAR1), dated 25 January 2019, which has been provided by Jon Griffin of the EA as Appendix JRG03 to his proof of evidence.
19. CAR1 contains a series of photographs taken at the time of the above site visit. Photographs 2-7 show aggregates, earth and soil, of varying grades stored at the site. Photographs 7-10, looking across to the field beyond and the boundary rail fencing, were apparently taken by SB, and he said that these were taken with his back to the bund and, as a result, the structure is not seen on these photographs.

20. In cross examination SB was asked why, with reference to photograph 7, there was a digger on the stockpile. He responded that it was moving earth around. It was then pointed out that, as the field could be seen, the bund should have been evident. When asked whether the piles were the stockpiles or the bund itself SB responded that it is difficult to say. However, when referred to photograph 2, and, attempting to draw a distinction between the earth mounds, he remarked that the bund was the soil stored towards the trees, and was approximately 3m in height.
21. SB was referred to a photograph (GWS9) provided by George Staple, a local resident. Taken on 2 January 2019, and looking across the field towards the site, it was put to him that there was a lot more soil now evident. SB responded that the EA permit allowed for up to 75,000 tonnes of material to be accepted at the site, per annum. Indeed, this is correct and compares favourably with the 8,000 tonnes/annum conditioned by way of the 1995 planning permission.
22. Cliff Thurlow (CT), a planning consultant who provided technical evidence in support of the appellant's case, when asked whether the bund structure would be to a constant height responded that the height could change. He disputed that a bund should necessarily be a separate identifiable structure from the stockpiles saying that these could abut one another and the situation could be misinterpreted as the stockpiles of raw materials were constantly waxing and waning.
23. CT referred to a letter dated 6 June 2016 received from the EA subsequent to the site meeting between its representatives and John Ransley on 25 May 2016. The letter specifically mentions a "vegetated bund". It would appear, though, from the general evidence put to the inquiry that, following the permit being issued in November 2018, there was a significant increase in materials brought onto the site. Interested parties giving evidence suggested that the furthestmost earth mound or mounds rose up to 5m in height. CT disputed this, saying that the photographic evidence does not suggest that the bund was more than 3m in height at its highest point.
24. In essence, the thrust of the appellant's case is that the bund, as originally created in the mid 1990's, has largely remained in situ and the LDCs applied for should be granted as the development at issue satisfies the legal requirements to this end.

Evidence of Interested parties

25. Local residents, Mr and Mrs Fry moved to a nearby house, some 140m from the site, in 2017. In view of such proximity they indicated that they were able to view a progressive increase in the degree of open storage at the site. Chris Fry (CF) produced a Witness Statement and Zita Fry (ZF) produced a Statutory Declaration and a Proof of Evidence, all accompanied by a series of illustrative photographs.
26. CF referred to what he considered to be the distinct change that took place in November 2018 when he noted that 30 tonne lorries would arrive at the site daily to deposit waste. The waste piles were gaining in area and height from this time, with mechanical diggers frequently working on top of the mounds. He produced three photographs, one of which he said dated from January 2019, with the others from May 2019. The earlier image, taken from near to

where Kennards Lane meets Brack Lane, shows a dramatic change of land levels into the site from the field in the foreground due to a wide expanse of earth materials which he estimated reach up to 5m in height. A mechanical digger is present working on top of the heightened land.

27. In cross-examination reference was made to CF's use of the term "natural boundary" in previous correspondence sent to the Council, and it was put to him that this would have been the bund. CF's recollections as to when exactly Ransley Turf ceased operating were also disputed.
28. ZF's evidence was largely consistent with the above account and her photographs taken in 2019, dated 11 January, 4 February, 7 April and 1 May, taken from various vantage points, all show perimeter earth mounds being worked upon by the mechanical digger.
29. George Staple (GS) produced both a Statutory Declaration and a Proof of Evidence along with a series of photographs, taken from different vantage points, to show how the waste materials openly stored at the site had changed over the past few years. He also produced an aerial photograph (GWS1) which he said showed that the bund constructed to the west of the yard "was in the process of demolition." He could not, though, accurately date this image but believes it to have been taken subsequent to the autumn of 2009. Whilst I noted the clarity of this photograph, given that it cannot be accurately dated I must afford this only limited weight.
30. GS referred to the present construction or "new bund" differing markedly, in extent, height and position from the structure which was developed at the site in the mid 1990s. In essence, he asserts that the original bund no longer exists as it has been replaced by a new bund which has only been in place since the autumn of 2018.

Other representations

31. Letters were provided by other interested parties. These representations, received from Amanda Skinner, Vicky Lynch, Miss Lowe and also Jacqui and John Moore, also dispute the appellant's claims.

The Council's case

32. Jon Griffin (JG), who works as a team leader for the EA, in his proof of evidence, explained he was not present at the EA's site visit on 15 January 2019, but he did conduct a follow-up, unannounced, site inspection on 25 February 2019. His analysis of the photographs within CAR1 is at odds with the appellant's interpretation in that he says there is no discernible bund.
33. The Permit's condition S8.2 requires that the storage of processing materials to the western and southern areas of the site shall be carried out within the extent of a bund. In CAR1, under the heading 'Bund' on page 2 of the report it is stated:

"A bund is a permanent structure that is built around a specific area for a particular purpose. A stockpile is not a permanent structure, so that the materials that form the stockpile can only be stored for a specific amount of time. At the time of the visit it was considered that all waste material stored on the site at the time was part of a stockpile, as a bund was not clearly

defined. The original bund could not be differentiated, as other materials had been placed on top."

34. CAR1 says that all materials must be stored within a bund in the designated area and with a height not exceeding 3m, as stated in the operator's Dust and Emission Management Plan.
35. Following JG's visit on 25 February 2019, a second Compliance Assessment Report (CAR 2), dated 11 March 2019, was issued. Under the heading 'Permit Breaches' on page 2 of CAR2 the stipulated requirement of the containment bund is referred to, but it is stated:

"At the time of the visit the only clearly differentiated bund was located to the north west of the site boundary. The rest of the waste material was considered to be part of a big stockpile, without a differentiated bund."

36. Photographs taken at the visit, and illustrating the above, are attached to CAR2.
37. In his examination-in-chief JG described some of the earth formations at the site constituting, at best, a bund-shaped stockpile, and commented that if material is being frequently taken away from the bund and then replaced it cannot be considered as a permanent structure, and will not achieve its desired effect. He indicated that for a bund to be operated effectively it needs to be separate from the stockpile or, at least, easily distinguishable, adding that this is often achieved by the presence of a concrete structure between. However, he said that such measures are not usually prescribed, but are, instead, left to the operator.
38. In cross-examination it was put to JG that there was no plan attached to CAR2 showing where its photographs had been taken from, and that his evidence was therefore incomplete. JG was also asked whether there was anything to stop persons or diggers working on the top of a bund. He responded that this would represent a breach of the permit granted.
39. David Campbell (DC), a team leader in the Development Management section of the Council, explained that he visited the site on 12 March 2019 along with a planning enforcement officer in response to an alleged breach of the 1995 planning permission, regarding the amount of earth material being stored at the site.
40. In his examination-in-chief he mentioned that, at the site visit, he saw indistinguishable piles of waste materials but no containment in the form of any horseshoe-shaped bund. He commented that he had requested that the appellant provide amendments to drawing FC1 but said that nothing could be deduced from the height annotations shown as, from his interpretation, the plan does not distinguish between any bund and soil heaps. Indeed, from his site visit observations, he considered these to be the same thing.
41. In cross-examination DC was referred to the letter from the EA to John Ransley, dated 6 June 2016, which followed a previous site meeting. This informed Mr Ransley that breaches of operating regulations had been identified at the site which could not be carried out under a T5 exemption. To remedy this, an option was suggested of clearing the waste within the vegetated bund and it was stated:

"Whilst we may consider any request to retain the vegetated bund this would be subject to the suitability of the waste within the structure."

42. In response, DC indicated that a lot of waste material was apparently brought onto the site subsequently, and the situation at that time had likely been overtaken by events.

My Findings

43. Crucial to this case are the definitions of a bund and a stockpile. Whilst, as mentioned, a bund is a permanent structure that is built around an area for a particular purpose, the EA says that a stockpile is comprised of materials that are only stored for a particular amount of time and is therefore not permanent.
44. Michael Balcomb and John Ransley both assert that a containment bund was formed in the mid 1990's, and the application forms for both appeals say that it was substantially complete by 1 January 1996. The aerial photographs of 2007 and 2008 show a horseshoe-shaped structure, one which is depicted on the submitted plan FC1. However, from the photographic evidence produced, these are the only images that reasonably relate to the development at issue.
45. As mentioned, for the LDCs to be successful, it must be demonstrated that the development has been in situ since the material dates in 2015, and case law has held that the time limit of four years does not begin to run until the whole process of creating the operation is substantially completed. However, the aerial photographs of 2017, 2018 and 2019 show no such bund structure. Instead, a wide expanse of earth mounds are evident.
46. When examining the aerial photographs provided by the Council (David Campbell's Appendices 16 & 17), which show the site on dates in 2015, 2017, 2018 and 2019, and comparing these with the 2007 and 2008 aerial images, there are notable contrasts; firstly between the earlier and the later photographs, and secondly due to a progressive change that appears to have taken place between 2015 and 2019.
47. As mentioned, the photographs from 2007 and 2008 clearly show the horseshoe-shaped bund, the footprint of which appears to almost abut the field. This structure is no longer clearly evident in any of the later photographs, although Mr Thurlow indicated that it was still present, but was not as easily identifiable due to greenery, apparent in the earlier two photographs, being later regularly scraped off the top of the bund. Further, and of particular importance, the earth stored appears to have transgressed considerably between 2015 and 2019, almost reaching the site's western boundary.
48. In view of the above the evidence of interested parties which indicates a considerable increase in the number of heavy vehicles attending the site following the permit's issue in 2018, and a consequent increase in the height of the stockpiles, holds weight. Also, particularly telling is the content of CAR1 which, under Schedule 8 'Extra Conditions' imposes a condition (S8.2), states:
- 'Storage of processing of materials to the western and southern areas of the site shall be carried out within the extent of a bund.'*

49. The operative word here is 'a' not 'the' which, it seems to me, confirms that no identifiable bund had been witnessed by the EA representatives who visited the site on 15 January 2019.
50. Jon Griffin did identify a small bund in the north western section on 25 February 2019, but David Campbell witnessed no distinct containment structure during his visit on 12 March 2019. Mr Thurlow's comment as to the earth stockpiles waxing and waning are relevant here but, instead, it serves to show that the stockpiles and any partial bund that might have been evident to Mr Griffin would later, due to the frequent workings of the mechanical diggers, soon become as one. The form, height and extent of the stockpiles thereby fluctuate.
51. The appellant says that this is not meaningful in planning terms, but the LDC applied for relates to a "containment bund" which would relate to a single, permanent structure, and one designed for facilitating a particular purpose.
52. I find from the evidence that any earth structure which could be considered as a containment bund, and which might periodically appear, will later disappear as it has been mixed in with the earth stockpiles. The appellant's claim that greenery is regularly scraped off 'the bund' to make it less identifiable is of no consequence given that there is no permanence involved.
53. The appellant argues that the Council's evidence is open to interpretation and is largely based on the views of Mr Campbell and Mr Griffin who visited the site on only one occasion each. Importantly, though, the officials' visits were both carried out during the relevant four year period and their findings were clearly communicated. Also, when Scott Balcomb was referred to an aerial photograph, dated 16 May 2019, one of several provided by the Council in David Campbell's Appendices 16 and 17, and was asked where the bund was, he again indicated that it was difficult to say.
54. The appellant disputes the recollections of an interested party as to when Mr Ransley ceased working at the site, and also cited contradictory evidence from local witnesses. It seems to me, though, that the latter is more to do with the terminology used. Neither does it alter the fact that the appellant's case is relatively unconvincing and is not supported by the photographic evidence that has been provided by interested parties and also as integral parts of the EA's two Compliance Assessment Reports.
55. In a nutshell, contrary to the appellant's evidence, the horseshoe shaped bund structure, apparently erected in the mid 1990s and shown on plan FC1, no longer exists, and seems to have ceased to exist between 2008 and 2015. FC1, therefore, either in its original form or with the subsequent height annotations, did not accurately reflect, or was representative of, the reality of the situation throughout the relevant four year period.

Conclusion

56. The onus of proof in establishing on balance of probabilities that a period of immunity has accrued falls on the appellant. I have found that the appellant's evidence in this case is neither sufficiently precise nor unambiguous and the development's lawfulness has not, on the balance of probability, been satisfactorily demonstrated.

57. For the reasons given above I conclude that, on the balance of probability, the development was not lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990. Accordingly, the appeals fail and I will exercise the powers transferred to me in section 195(3) of the 1990 Act, as amended.

Timothy C King

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Cliff Thurlow BA(Hons) Dip TP MRTPI Planning Consultant

He called:

Scott Balcomb (appellant, and owner of 'Fairfield Soils Ltd')

Michael Balcomb (former owner of 'Fairfield Turf Ltd')

FOR THE LOCAL PLANNING AUTHORITY

Emmaline Lambert of counsel

Instructed by Llywelyn Lloyd
of Folkestone & Hythe District Council

She called:

David Campbell BA(Hons) Dip TP MRTPI

Planning Team Leader, Folkestone &
Hythe DC

Jon Griffin
George Staple

Team Leader, Environment Agency
Local resident

Chris Fry

Local resident

Zita Fry

Local resident

DOCUMENTS SUBMITTED AT THE INQUIRY

1. Notice of Inquiry
2. Council's Opening Submission
4. Appellants Closing Submission
5. Council's Closing Submission