The Planning Inspectorate

Appeal Decisions

Hearing Held on 11 May 2021

Site visit made on 12 May 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 July 2021

Appeal A Ref: APP/Q2371/C/19/3243448
Land off Chatburn Old Road, Chatburn, Lancashire

- 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 Ronald Jackson against an enforcement notice issued by Lancashire County Council.
- The enforcement notice was issued on 19 November 2019.
- The breach of planning control as alleged in the notice is without planning permission the tipping of waste soils within the land edged red on the attached plan.
- The requirements of the notice are (i) Remove all imported soil from within the land edged red on the plan attached to this notice to expose the original ground surface. All imported soils shall be exported from the site for disposal at an authorised facility.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Appeal B Ref: APP/Q2371/W/20/3264309
Former grazing land adjacent to Hare Hill Croft, Land off Old Road, Chatburn

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr Ronald Jackson of JJ Construction (NW) Ltd against the decision of Lancashire County Council.
- The application Ref LCC/2019/0066, dated 20 November 2019, was refused by notice dated 3 June 2020.
- The development proposed is the importation of soils for use in ground stabilisation and landscaping works associated with the consented residential development.

Summary of Decision: The appeal is allowed, and planning permission granted subject to the condition set out below in the Formal Decision.

Procedural Matters

1. The appellant initially appealed on ground (e) which is made on the basis that copies of the enforcement notice were not served as required by section 172 of the Town and Country Planning Act 1990 (as amended)('the Act'). During the hearing the appellant accepted that, at the date the notice was served the Council had complied with the requirements of the Act by serving those individuals who were lawfully registered. Consequently, the appellant withdrew the appeal under ground (e) and I have therefore not considered this matter further.

2. An application for permission in principle (PiP) for 9 houses was granted on appeal, reference APP/T2350/W/19/3223816 and includes land which has been subject to the deposition of material. Although PiP has been granted, I cannot be sure that the appellant will seek to proceed to the next stage. I am unable, therefore, to give it weight when determining the above appeals.

3. Concerns have been raised by interested parties regarding additional stockpiles and excavation works which have taken place since the enforcement notice was issued, as well as other earthworks which have taken place outside the appeal site. These works do not form part of the breach, nor are they part of the planning application and so they do not form part of my consideration of these appeals.

Appeal A : Ground (c)

4. An appeal on ground (c) is made on the basis that those matters (if they occurred) do not constitute a breach of planning control. The main thrust of the appellant's case under this ground is that the importation of material to create a reasonable supporting structure for the adjacent Hare Hill Croft development was included within the scope of the planning permission, which consents all necessary and reasonable works needed to carry out the development. My consideration under this ground is limited to the importation of material within the appeal site, not the HHC development site.

5. The appellant contends that approved levels within Hare Hill Croft could not practicably be achieved without a supporting structure for the land. Given the height differential between the proposed level of the houses and the pre-existing ground level, notwithstanding the limestone bedrock, I agree some sort of supporting structure is likely to have been required. The Council suggest it is not apparent the imported materials were engineered in any way to support the land, however, the use of a batter[1] is not unusual where there is a height differential.

6. My attention has been drawn to *R v Basildon DC, Ex Parte Martin Grant Homes* [1987] JPL 863 which concerned a site with planning permission for nine houses and associated garages, roads and footpaths. The Council, in that case, had previously granted building regulations consent and so it was held that the planning authority must have had knowledge of the proposed changes to the levels and must have intended that all necessary and reasonable works for the implementation of the permission were being incorporated within the general grant of consent.

7. The appeal scheme before me is fundamentally different to the case above, since the land is entirely outside the planning application boundary. The area of deposition is, in my view, significant, as is the volume of material which has been imported. Since the land is outside the planning permission boundary, its development would plainly not have been considered by the Council when the planning application was determined.

8. My attention has also been drawn to *West Bowers Farm Products v Essex County Council (*1985), which considered whether the construction of a reservoir, which would also involve the extraction of gravel would constitute a separate use requiring planning permission. The Court of Appeal held that

[1] An inclined plane.

whether a single process amounted for planning purposes to two activities was a question of fact and degree; that if it involved two activities, each of substance, so that one was not merely ancillary to the other, both required permission.

9. Even if I were to conclude that the works were essential to provide a supporting structure for Hare Hill Croft, the works which have been undertaken, in my view, constitute an engineering operation and are not merely ancillary to the development of Hare Hill Croft and are therefore development for the purpose of S55(1) of the Act[2].

10. My attention has been drawn to appeal decision APP/C4235/C/18/3199560, however this concerned the construction of a mound of material which had been constructed within part of site with planning permission for residential use. The appeal decision is therefore not particularly instructive in this case.

11. Thus, as a matter of fact and degree, given the location of the works outside the red line boundary of the planning permission and the scale of the works, which has significantly altered the topography of the land, it is an operation that requires planning permission in its own right.

12. The ground (c) appeal therefore fails.

Appeal A: Ground (a) and Appeal B: The S78 Appeal

13. An appeal under ground (a) is made on the basis that planning permission ought to be granted for the matters stated in the breach. Although the enforcement notice plan and the planning application boundary are different, the deposition of material within the site is generally similar. The reason for refusal and the reason for taking enforcement action are also broadly similar and so I shall consider the planning merits together.

Main Issue

14. The main issue in relation to the appeals is the effect of the appeal scheme on biodiversity, with particular regard to unimproved calcareous grassland.

Reasons

15. The appeal site comprises an area of land off Chatburn Old Road, which has been subject to the importation of soils. The land is adjacent to a residential development known as 'Hare Hill Croft' (HHC). The land has historically been subject to mineral working which resulted in an uneven landform, as indicated by a topographical survey carried out in 2010. The appellant states that he imported the soil to provide support to the HHC development and remove any hazards posed by the former mineral working.

16. It is not disputed that the depositing of the soils in the appeal site has resulted in the loss of unimproved calcareous grassland (UCG). A number of surveys were carried out prior to the development, which show that UCG was generally located within the HHC site, outside the application boundary, and on land to the east, within the appeal site. The remainder of the site generally comprised semi-improved calcareous grassland, with an area of trees and shrubs to the

[2] Although the deposit of waste materials involves a material change of use, the appellant advises the materials were imported under the Contaminated Land: Applications in Real Environments (CL:AIRE) Protocol, which enables the reuse of excavated material without it being classified as a waste.

south of the HHC site. Despite the presence of UCG within the HHC site, no ecological mitigation measures were required within the planning permission and since this is outside the application boundary, this is not pertinent to my decision.

17. Policy EN4 of the Ribble Valley Core Strategy (RVCS) 2008-2028 seeks to conserve and enhance the area's biodiversity and states that proposals that adversely affect a site of ecological importance will only be permitted where a developer can demonstrate that the negative effects of a proposed development can be mitigated, or as a last resort, compensated for. Policy DME3 of the RVCS also seeks to protect priority habitats identified in the Lancashire Biodiversity Action Plan, amongst other things and Policy DM2 of the Joint Lancashire Minerals and Waste Local Plan (MWLP)(2013) seeks to ensure that development for minerals or waste management operations make a positive contribution to biodiversity and eliminate or reduce to acceptable levels environmental impacts.

18. Whilst I am not persuaded it would have been necessary to restore the mineral works within the appeal site to address hazards, because other means of addressing hazards would be possible, such as securing the site, I accept that support for the adjacent HHC development would have been necessary. There are therefore clear benefits arising from the support provided to the HHC development. Removal of the material would be likely to necessitate the provision of alternative support, such as a retaining wall.

19. The appellant advises that he considered the potential for a retaining wall to provide support to HHC. There was some discussion at the hearing as to whether such an option has been fully considered by the appellant. The Council confirmed during the hearing that an engineer's report has previously been submitted and whilst no report is before me, the appellant confirmed that the engineering report calculated a retaining wall of around 5.85m would be required. Given the height differential between the Hare Hill Croft site and the appeal site, I consider this estimate is reasonable.

20. Although I do not have full details before me and cannot therefore consider the full implications of a retaining wall, a 5.85m high wall in this location would appear a dominant feature which, in my view, is likely to have an adverse impact on the character and appearance of the area. Furthermore, since the appellant no longer has control over Hare Hill Croft, the works would need to be carried out entirely within the appeal site. Land within the appeal site would therefore be required to accommodate the construction of the retaining wall and wider disturbance would be likely during its construction. Both solutions are therefore likely to have an adverse impact on UCG.

21. Section 40(1) of the Natural Environment and Rural Communities Act 2006, requires a public authority in exercising its functions to have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity. The Secretary of State has published lists under section 41(1) of living organisms and types of habitat which, in the Secretary of State's opinion, are of principal importance for the purpose of conserving diversity. Calcareous grassland is a UK and Lancashire BAP Priority Habitat and the unimproved calcareous grassland within the site is confirmed as being indicative of the UK BAP priority habitat. The remainder of the grassland was not considered indicative of any UK BAP priority habitat.

22. Paragraph 175 of the National Planning Policy Framework ('the Framework') (2019) states that when determining planning applications the following principles should apply: a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.

23. Since the UCG which has been lost was a priority habitat, the importation of soils has, in my view, caused significant harm to biodiversity. Areas of semi-improved grassland and other vegetation affected by the deposition would also have had ecological value. Although both parties accept that there are alternative options to the appeal scheme, harm to biodiversity has already occurred. It is therefore not possible to avoid harm to biodiversity resulting from the development or to mitigate it. I will therefore consider whether harm to biodiversity can be compensated for.

24. The appellant submitted a Calcareous Grassland Establishment and Management Plan (ERAP Plan), dated January 2020, which set out the establishment and management of an area of around 900 metres squared compensatory area of calcareous grassland, to the south west of the appeal site. The ERAP Plan proposes a compensation area to the south west of the application site. Details of soil tests and ground preparation, seeding of the compensation area and on-going management to ensure successful establishment are provided. To address concerns regarding shading, the 2020 ERAP Plan provides spacing between the nearby trees and the mitigation area. Its location ensures the area would be unaffected by the public footpath and to prevent public access to it, fencing is proposed.

25. The appellant suggests that the precise area of UCG which has been affected by the development is around 300 metres squared, a figure which is not disputed by the Council. Interested parties have disputed the accuracy of the ecological surveys which have been carried out at the site, in part because of the presence of species not identified at the site. However, I have no substantive evidence to indicate that estimates of the UCG affected by the development are not accurate or that the ecological surveys carried out were flawed. Furthermore, the size compensatory area of UCG, which is much larger than the 300 metres squared estimated to have been lost, would, in my view, address any uncertainties regarding the amount lost.

26. The ecologist for the Council advised during the hearing that whether the habitat is of sufficient size will depend upon the area, good species mix and topography. Although the compensation land would not be provided on a like-for-like basis, and so may be less diverse than the UCG which has been lost, the area that would be provided would be much greater than the amount lost and would be managed over a period of 25 years.

27. There is no requirement for management or reseeding on the enforcement notice. Whilst I have wide powers of correction under S176 of the Act, expanding the requirements would inevitably cause the appellant injustice. It is therefore not open to me to impose such a requirement on the notice. Were I to refuse the planning application and the ground (a) appeal, the appellant would be under no obligation to address the loss of the UCG. Whilst UCG could colonise naturally following removal of the deposited material, given the likely degradation of the seed bank and the absence of any management regime, as

confirmed by the Council's ecologist during the hearing, this is unlikely to occur.

28. During the appeal, the appellant submitted a Unilateral Undertaking (UU) which covenants to create and maintain an area of calcareous grassland to the south west of the site for a period of 25 years, in accordance with the ERAP Plan. Paragraph 56 of the Framework states that planning obligations should only be sought where they meet the following tests:

    - necessary to make the development acceptable in planning terms
    - directly related to the development; and
    - fairly and reasonably related in scale and kind to the development.

29. The development has resulted in significant harm to biodiversity through the loss of UCG, I consider it is necessary for the loss to be compensated for through the provision of an alternative area of UCG. The provision of hedge planting around the perimeter on the north of the site would also compensate for the loss of other vegetation within the site.

30. Although the area of UCG which is proposed is greater than the area that was lost as a result of the works, given the likely difficulty in ensuring the successful establishment of UCG and the difference in topography, which would not be like-for-like and so would be less diverse, providing a larger area is, in my view reasonable and necessary.

31. Maintaining the site over a period of 25 years is, in my view, also reasonable, since it would give the UCG sufficient time to ensure that the establishment of the UCG is successful. Consequently, the planning obligation would meet the tests set out in paragraph 56 of the Framework as it is necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development.

32. Although there are benefits from the appeal scheme from the support it provides to the HHC development, the loss of the BAP priority UCG, which has significant ecological value, is such that the economic and social benefits arising from the HHC, are insufficient to justify the development in the absence of compensatory UCG. Whilst I note concerns raised by interested parties regarding the enforcement of the UCG, I am satisfied that there are mechanisms for the Council to enforce the obligation under S106(5) and (6) of the Act.

33. I am therefore satisfied that the UU meets the above tests and that the planning obligation is necessary to ensure that the development does not cause significant harm to biodiversity and to ensure that there is no conflict with policies EN4 or DME3 of the RVCS or Policy DM2 of the MWLP, the requirements of which are set out above, or Paragraph 175 of the Framework.

Other Matters

34. Concern has been raised by interested parties regarding the length of time the appellant has been allowed to appeal. Although the enforcement notice set out a three month period for compliance, the notice has not taken effect because an appeal was made beforehand. The right of appeal and associated timescales

are set out in legislation. The time taken to determine the appeals is not in the appellant's control and has been impacted by the Covid-19 pandemic.

35. Whilst I have found the works were undertaken without the benefit of planning permission, the enforcement procedure is intended to be remedial rather than punitive. I have no reason to believe that the appellant's actions would encourage others to develop land without planning permission or set a precedent for future unlawful development.

36. I note concerns raised by interested parties that the appellant may seek to build another house or houses on the appeal site. However, such matters are beyond the scope of these appeals and are therefore not relevant to my decisions.

37. Concerns have been raised regarding surface water drainage and differences between the proposed final levels and the finished levels of the HHC development. The soils have been deposited above limestone and generally fall away from the HHC development. Although it is possible some compaction may have occurred when the soils were placed, I consider it highly unlikely that the works carried out would prevent water from draining through the soils to the limestone below. Given the above, I consider it is highly unlikely that rainwater falling onto the appeal site would flow across the southern boundary of plots 3, 4, 5 and 6 of the HHC development so as to cause surface water flooding.

38. Concerns have been raised regarding alleged non-compliance at the HHC site, health and safety practices at the site and burning. However, such matters are not relevant to the appeals before me.

39. Although a slope has been created within the site, the soils have been used to fill depressions which were created by past mineral working. The soils had been in situ for a number of years by the time of my site visit, with vegetation well established on much of the site, which is likely to help protect soils from the effects of erosion. I saw no evidence of instability during my visit and have no reason to suspect the slope created would be unstable. The stability of the buildings at Hare Hill Croft would have been considered through Building Regulations and I note that the Council did not raise concern regarding slope stability during its determination of the application or through this appeal.

Conditions

40. The proposed conditions were discussed during the hearing. With the exception of a plans condition, the remaining conditions suggested by the parties related to the creation and management of the compensation land. Given that the land is off-site and the period of management proposed is 25 years, the parties agreed during the hearing that these should be dealt with by the planning obligation and not by condition. Since the ground (a) appeal sought planning permission for works already carried out, it is unnecessary for me to include a plans condition.

Ground (a) Conclusion

41. For the reasons given above, I conclude that the appeal should succeed on ground (a) and planning permission will be granted. The appeals on grounds (f) and (g) do not therefore fall to be considered.

S78 Appeal (Appeal B) conclusion

42. For the reasons given above, the appeal is allowed subject to the condition set out in the decision.

Decisions:

Appeal A reference APP/Q2371/C/19/3243448:

43. The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the tipping of waste soils within the land edged red on the attached plan at Land off Chatburn Old Road, Chatburn, Lancashire as shown on the plan attached to the notice.

Appeal B reference APP/Q2371/W/20/3264309:

44. The appeal is allowed and planning permission is granted for the importation of soils for use in ground stabilisation and landscaping works associated with the consented residential development at Former grazing land adjacent to Hare Hill Croft, Land off Old Road, Chatburn, dated 20 November 2019 subject to the following condition:

    1) The development hereby permitted shall be carried out in accordance with the following approved plans: Site Location Plan, drawing number 0724-3-14 Revision C, Proposed Final Levels, drawing number 0724-3-16, Sections, drawing reference 0724-3-17.

M Savage

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Hugh Richards	Counsel
Oliver Craven	Agent
Ronald Jackson	Appellant
Brian Robinson	Ecologist
Ben Pycroft	Emery Planning

FOR THE LOCAL PLANNING AUTHORITY

Freddie Humphreys	Counsel
Kerian Hayes	Solicitor
Faiyaz Laly	Senior Planner
Ryan Knight	Jacobs
Jonathan Haine	

INTERESTED PARTIES

Stella Wells