



Appeal Decision

Site visit made on 1 September 2021

by **Diane Lewis BA(Hons) MCD MA LLM MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 01 November 2021

Appeal Ref: APP/A5270/C/20/3244602

Land at Wyncote Farm, Trumpers Way, Hanwell, London W7 2QA

- 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 Kashmir Tack (Easycraft Limited) against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice, numbered 19EN0806(1), was issued on 21 November 2019.
- The breach of planning control as alleged in the notice is **Without planning permission**: The material change in use of the land to a use for the importation, deposit and disposal of waste including mixed waste soils, concrete and rubble and the raising and re-grading of land levels.
- The requirements of the notice are:
 - 1) Cease the use of the land for the importation, deposit and disposal of waste including mixed waste soils, concrete and rubble;
 - 2) Remove from the land and dispose of in a lawful manner 6601 m³ of waste material which has been imported and deposited on the land; and
 - 3) Re-grade the land levels within the site to those existing in 2010 as shown on attached plan 2;
 - 4) Submit to the Council, all waste transfer notes confirming waste has been removed from the site and disposed of in a lawful manner;
 - 5) Submit to the Council, a LiDAR survey which has been undertaken following the completion of the works to evidence removal of the unauthorised waste and re-grading of the land.
- The period for compliance with the requirements is twelve months.
- The appeal is proceeding on the grounds set out in section 174(2) (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and a variation.

Procedural matters

1. The appeal was made on grounds (d), (f) and (g) and was due to be heard at a public inquiry in February 2021. The appellant's statement of case dated 3 November 2020 also indicated:
 - a) a ground (b) appeal, that the alleged breach of planning control had not occurred, and
 - b) the notice had not been properly served on everyone with an interest in the land, which would be a ground (e) appeal.
2. During the lead-in period to the inquiry the main parties worked on a draft statement of common ground and it appeared that a certain amount of

common ground was established. The Council proposed a correction to the wording of the alleged breach of planning control and at the time it was understood that this correction would address the main issue in dispute in the ground (d) appeal. Following consultation with the appellant and the Council, the Planning Inspectorate confirmed on 3 February 2021 that the inquiry was cancelled and the procedure for determination of the appeal would be by written representations.

3. Subsequently, the Council made Final Written Submissions on 5 March 2021 (the CFS). The appellant submitted Written Representations on 17 February 2021 (AWR) and Further Written Representations dated 19 March 2021 (FWR).
4. I was appointed as the Inspector to determine the appeal under the written procedure. I had no previous involvement with the appeal and I sought to clarify and confirm various matters through a note dated 20 August 2021. The appellant's response stated that there are no surviving parts of the draft statement of common ground exchanged in January 2021. The Council confirmed that, notwithstanding the notice refers to section 171B(4)(b) in paragraph 1, the notice was not issued under the second bite provision.
5. The appeal form and other appeal documentation was directed at one enforcement notice issued on 21 November 2019 with reference 19EN0806(1). The AWR referred to two enforcement notices issued by the Council in November 2019. The appellant subsequently explained that the Council issued two enforcement notices because the land is split by a stream running through the site. The appellant did not provide a copy of a second enforcement notice. The Council confirmed that only one enforcement notice was issued in November 2019.
6. In the absence of a specific document and having regard to the other relevant indicators, I conclude that this appeal concerns a single notice and there is not a second enforcement notice issued in November 2019 to take into account.

Reasons

The Land

7. The Land identified on the plan attached to the enforcement notice is an area of about 12.8 hectares. The Land is irregular in shape and is bounded by the River Brent to the north and east, the M4 motorway to the south and a railway line to the west. The site is open land, although there is a derelict single storey building close to the site access. Access for vehicles and pedestrians is from Trumpers Way at the north western end of the site.
8. At the time of the site visit the ground levels varied considerably. The relatively flat areas were near the access and alongside the railway, whereas high mounds were present in the central area and towards the River. The land was covered in variable amounts and types of vegetation, although worn pathways allowed access by foot across the site.

Summary of planning history

9. The appellant, Mr Tack, acquired Wyncote Farm (the Land) from the Council in 1990. In 1997 a large amount of demolition material was deposited on the site. In October 1997 planning permission was granted for restoration of the site to

an agreed scheme for open space use¹. There is no evidence that the permission was carried out. Between 1999 and 2013 no relevant planning issues arose and the land was designated Metropolitan Open Land in 2012.

10. In 2013 the appellant allowed a plant hire company to establish a base near the site entrance and instructed the company to move rubble into one section of the site.
11. The Council issued an enforcement notice on 15 March 2017 alleging without planning permission the material change of use of the land to plant and vehicle hire and other operations involving the importation and deposition of fill and other material to raise the level of the land. The notice required the use for the purposes of plant and vehicle hire to cease and the removal from the land of all plant, vehicles, equipment and other items associated with the use. In addition, the fill and other material that resulted in the raising of the land had to be removed and the land restored to its original level and condition before the unauthorised development occurred. No appeal was made and the enforcement notice took effect on 17 April 2017. The Council considered that the notice was partially complied with in that the plant and vehicle hire use ceased. The Council also has confirmed that the 2017 notice has not been withdrawn.

Enforcement notice

Alleged breach of planning control

12. The Council explained that the inclusion of the importation, deposit and disposal of waste in the allegation was based on a report it commissioned in 2019 from Terra Drone Europe that concluded from the analysis there had been a constant volume increase in the site. More specifically, although the change between 2010 and 2015 had not been significant, the volume increase after the year 2015 had been rapid, and especially between 2018 and 2019.
13. Subsequently, the appellant's statement of case included a survey report dated 2 November 2020² by Sterling Surveys Limited that concluded there had been no new importation onto the site and nothing of substance had been removed or brought onto the site within the last ten years.
14. The Council's surveyors, having reviewed both reports, concluded that both site surveys appeared accurate and considered the discrepancy in volume could be due to recent disturbance of heavily compacted material and weather conditions around the time of the raising and regrading works.
15. Against that background, the Council proposed amending the wording of the alleged breach of planning control to read "Without planning permission, the raising and re-grading of land levels".
16. The Council also proposed associated amendments to the Reasons, to remove reference to the unauthorised use of the land for the importation, deposit and disposal of waste, and also to the Requirements, by the deletion of requirements 1, 2 and 4.

¹ Planning permission for remodelling of landfill and provision of clay cap and associated landscaping for open space use granted on 30 October 1997 subject to conditions (ref P/1997/2243).

² The appellant later confirmed that the final version of the report was dated 27 October 2020 and I accepted the submission of this document.

17. Therefore the notice would be directed solely at operational development consisting of the raising and regrading of land levels, alleged to have occurred within 4 years of the date of the notice. The alleged material change of use would be deleted.
18. Section 176 of the 1990 Act provides that on appeal the Secretary of State (or the Inspector) may (a) correct any defect, error or misdescription in the enforcement notice; or (b) vary the terms of the enforcement notice, provided that the correction or variation will not cause injustice to the appellant or the local planning authority.
19. The Council's proposed correction was based on new information that came forward as a result of the appeal. There is now no technical or factual basis for including a material change of use within the description of the alleged breach of planning control. To delete this element of development from the allegation would reduce, not increase, the scope of the notice. The appellant made no specific objections to such a correction or identified any potential injustice. My view is that the misdescription is able to be corrected without injustice. The correction addresses the appellant's putative appeal on ground (b).

Service of the notice

20. Despite the claim in the appellant's statement there is no evidence submitted to support a case that the notice was not properly served on everyone with an interest in the land. The list of people served with the notice is consistent with the appellant's own evidence on land ownership. In the absence of any evidence to the contrary, I conclude that the notice was served as required by section 172 of the 1990 Act.

Appeal on ground (d)

21. The documentation indicates that in January/February 2021 the appellant did not dispute that the raising and regrading of land levels took place and all the indications were that the appeal on ground (d) was no longer being pursued. That being so, an inquiry was not necessary to explore matters of fact and immunity from enforcement action and the appeal procedure was changed. However, in the more recent representations the appellant has sought to distance himself from a previously submitted draft statement of common ground.
22. The main issue is whether on the balance of probability works to regrade and raise land levels were substantially completed by 21 November 2015³. The onus is on the appellant to prove his case.
23. The appellant in his statutory declaration dated 2 November 2020 stated that in 2013 he hired a contractor to shift the rubble in the site to create two levels to enable an application for planning permission to be made and for development to take place. The contractor vacated the land in 2017. The appellant also stated that in 2018 he wished to keep working on the land to even it out and to create two levels. The same contractor was hired again and as there was so much material the process took a long time. According to the

³ Section 171B of the 1990 Act provides that where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which operations are substantially completed.

- appellant the contractor finished the work of shifting the material on 14 November 2018. No new material was imported, the process was focused on achieving improved levels.
24. The appellant added in the AWR that the contractor was employed to make the site safe and was instructed to move the rubble (deposited in 1997) into one pile. The rubble was moved into one section of the property close to the motorway and the canal. There was so much rubble that it took the contractor years to complete the task, the result of which can be seen today.
25. The Council submitted a series of aerial photographs of the land. The images indicate that in 2014 work took place towards the west and on the southern parts of the land that, at the least, removed vegetation. By April 2017 the work covered a more extensive area. The 2017 enforcement notice was issued. In January 2018 the Council reported that the Council's Park Rangers visited the site and noticed extensive land disturbance. The submitted photographs show mounds of earth on that part of the land close to the River Brent, extensive vehicle tracks and a stretch of levelled ground and mounding adjacent. The Council also stated that by November 2018 further changes appeared to have occurred. An aerial photograph dated May 2018 indicates large scale change across the site.
26. The evidence from the appellant described engineering operations taking place on the land over the period 2013 into 2018, with a pause in 2017. The operational development over the extended period was to achieve the same purposes. The probability is that the work would involve raising the land levels in places and regrading. The Council's evidence on the timescale of the works generally is consistent with that of the appellant. My site visit confirmed that the existing topography is dominated by raised ground near the canal, as described by the appellant.
27. I conclude that on the balance of probability that engineering works to regrade and raise land levels were not substantially completed by 21 November 2015. The operational development is not immune from enforcement action and the appeal on ground (d) does not succeed.

Appeal on ground (f)

28. I have already explained that the misdescription in the alleged breach of planning control will be corrected to delete reference to the material change in the use of the land. It follows that the notice will have to be corrected to delete steps 1, 2 and 4 which are directed at remedying that element of the alleged breach of planning control.
29. The main issue is whether the requirements of the notice, as proposed to be corrected, would be excessive, taking into account the purpose of the notice.
30. The requirements specific to the raising and regrading of land levels are to regrade the land levels within the site to those existing in 2010 as shown on Plan 2 attached to the notice and to submit to the Council a LiDAR survey undertaken after completion of the work to evidence regrading of the land.
31. The appellant's final position as expressed in the AWR and FWR is that the requirement to regrade to the 2010 levels is not possible because of the uncertainties of proving the 2010 levels and their inappropriateness as a long-term restoration scheme. To regrade the land levels to those existing

previously would mean scattering the rubble all over the site again, making the situation worse.

32. Section 173(3) of the 1990 Act states that an enforcement notice shall specify the steps which the authority require to be taken or the activities which the authority require to cease in order to achieve wholly or partly any of the purposes set out in section 173(4). These purposes are remedying the breach or remedying any injury to amenity which has been caused by the breach.
33. In order to remedy a breach of planning control section 173(4)(a) provides for making any development comply with the terms of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place.
34. In this case, there is no relevant extant planning permission and so restoration of the land is an appropriate remedy. I concluded on the balance of probability in considering the ground (d) appeal that engineering operations involving the regrading of land date back to around 2013 and were essentially a single operation with a pause in 2017. That being so the operation started in around 2013 was not substantially completed within a four year period and falls within the scope of the 2019 enforcement notice. Both the appellant and the Council used 2010 as a baseline date, as seen in the Sterling Surveys Report submitted by the appellant and in the Terra Drone report relied on by the Council. The appellant in the context of ground (f) did not dispute a base date of 2010.
35. The requirement to regrade the land levels to those existing in 2010, that is before the operational development took place, indicates that the purpose of the notice is to remedy the breach and overcome the harm identified. To require the land to be restored to its condition before the breach took place is in accordance with the statutory provision. In general terms, a requirement worded in this way is sufficient for validity purposes because the appellant as the landowner should have the knowledge as to what that previous condition was. In this instance the Council decided that the requirement should be more specific and Plan 2 was attached in order to provide details of the original, pre-existing levels. The appellant challenged the reliability of Plan 2, prompted by the claimed unreliability of the Terra Drone aerial photos and resultant figures that underpinned the alleged importation of waste materials.
36. Plan 2 is derived from LiDAR data from the Environment Agency on land levels in 2010. The same data source was used in the Sterling Surveys report, relied on by the appellant. The Terra Drone report acknowledged uncertainties in the data used in the overall analysis but pointed out that many LiDAR systems do penetrate through vegetation and are able to provide 3D points associated with the ground level. The 0.5m resolution of the 2010 data from the Environment Agency was highlighted. A report produced for the Council by GN Surveys also used a base date of 2010 and the LiDAR data. The analysis in this later report showed a near balance in total volume of material across the site through a comparison between the 2010 and 2018 LiDAR data sets and between the 2018 data and the Sterling survey data in 2020. This consistency is a further indicator that the base data is reasonably reliable. I attach very little weight to the lack of a specific rebuttal by the Council's surveyors to the comment by Sterling Surveys on the Terra Drone figures⁴, given the brief for the GN Surveys report.

⁴ FWR at paragraph 9

37. The Sterling Surveys report conclusion about the accuracy of the Terra Drone figures (which was not accepted by the Council) is not a robust reason for doubting the reliability of the 2010 base. The identified failings were directed at the later survey information, attributed to the presence and size of vegetation on the ground. No assessment was provided by the appellant's consultants specific to the 2010 base information. The appellant did not identify or explain any particular inaccuracies or misrepresentation demonstrated by Plan 2. The appellant failed to produce an alternative plan.
38. Having regard to the technical reports and with the factors above in mind, my overall conclusion is that Plan 2 is the best available evidence of the pre-existing condition of the land.
39. The appellant also submitted that the 2010 land levels are inappropriate as a long term restoration scheme but that is not the test as to whether the requirement is excessive. The requirement does not preclude the appellant coming forward with a proposal for a long term restoration scheme through the submission of a planning application. To introduce the words "generally in accordance with" would introduce an unacceptable element of uncertainty.

Proposed new requirement

40. In January 2021 the main parties also proposed an additional requirement stating: Submit, within 7 months, a full planning application for the re-grading of the land. If approved, carry out and complete the re-grading of the land in line with the terms and conditions of the planning consent. The works to comply with either provision of 3 & 5 of section 5 are to be carried out within 14 months⁵.
41. The FWR explains that this proposal was included in the draft statement of common ground because there is no ground (a) appeal and the parties were unable to agree what would be an appropriate restoration scheme. The appellant, through a variation to the requirements, is seeking to allow for the submission of a planning application, which can be lawfully validated or resolved at appeal, to regrade land levels in a form that would create a suitable outcome. A specific request is that the varied requirement includes a list of the necessary submission documents to enable an application to be validated. Provision for EIA screening is suggested also.
42. I have concerns about this proposed requirement, related to the need to specify what the recipient of the notice has to do, whether it fulfils the purpose of the notice and whether a period for compliance is or can be stated.
43. In situations where there is a possibility of addressing unauthorised development through a new scheme of development the usual approach is to extend the compliance period in order to allow time for a planning application to be made and to rely on section 180(1), whereby the requirements of the upheld notice will cease to have effect so far as inconsistent with any permission granted. As the parties will be aware the local planning authority has the discretionary power under section 173A to extend a compliance period. Case law indicates that to impose a requirement that relies on a scheme to be agreed with the local planning authority introduces uncertainty, the notice becomes unclear and could be rendered a nullity.

⁵ The wording of the alternative requirement is taken from the draft statement of common ground at Appendix 4 to the CFS.

44. With these considerations in mind, the appellant has confirmed that he is committed to carrying out regrading and remodelling works to achieve an appropriate long term restoration scheme. Such a restoration scheme would require planning permission, whether or not an enforcement notice had been issued against the unauthorised development. In these terms a requirement to submit a planning application is excessive.
45. A time scale of seven months is stated for submitting a planning application. However, reliance is being placed on 'the terms and conditions of the planning consent' as a time period for carrying out an approved scheme as a means of remedying the breach of planning control. The appellant would only know what that time period would be through a planning permission, if granted. Furthermore, to impose a time period to complete an approved scheme via the planning permission may well be held to be unreasonable. In my view to introduce such a level of uncertainty into the enforcement notice is unacceptable.
46. The appellant's proposal to ensure a planning application is validated goes beyond the scope of an enforcement notice. There are nationally prescribed requirements that are set out in article 7 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 and in the section in the Planning Practice Guidance on Making an Application.
47. I conclude that in order to avoid uncertainty and duplication of procedures the notice should not be varied to include the proposed new requirement. The new requirement is unnecessary and excessive. To introduce such a requirement could make the notice a nullity.

Conclusions on ground (f)

48. Step 3 is not excessive and it provides a necessary remedy for the breach of planning control. There is no extant planning permission that could provide an alternative way of remedying the breach. Furthermore, the notice will not be varied to include a proposed new requirement for the submission of a planning application. The appellant is not precluded from pursuing an acceptable long term restoration scheme through the normal planning process.
49. The amendments to the requirements will be confined the deletion of steps 1, 2 and 4 as a result of the correction to the description of the alleged breach of planning control.

Appeal on ground (g)

50. The issue is whether the compliance period of twelve months is reasonable.
51. With reference to national planning policy and guidance, effective enforcement is important to maintain public confidence in the planning system and to tackle breaches of planning control which would otherwise have unacceptable impact on the amenity of the area. As a general rule, extending a period beyond 12 months requires some exceptional circumstances to justify doing so. It is in the public interest to ensure compliance with a notice expeditiously.
52. At the outset the appellant identified a minimum period of 16 months, based on a programme to remove approximately 6,601 m³ of material from the land and supported by a consultant's programme of works letter. The appellant in the statement of case dated 3 November 2020 requested a period of twenty

four months. No supplementary evidence to justify this period was included in either the AWR or the FWR. The Council has suggested that the period for compliance with steps 3 and 5 be increased to 14 months.

53. In this case the length of the compliance period should take into account what has to be done to carry out the remedial steps, the need to remedy the identified harms as soon as reasonably possible and the possibility of an alternative remedial scheme coming forward through the submission of a planning application.
54. The corrected notice would no longer require removal of material from the land, which reduces the scale of the works that would have to be carried out. Nevertheless, to regrade the land to the levels existing in 2010 still would require movement of material within the site. Provision needs to be made for preliminary investigations and assessment of the works involved, invitation to tender for groundworks, a lead in time to start work, the duration of groundworks, a final survey and validation report. There is no evidence to show that compliance would impact on a person's home or business that would justify a shorter or longer period for compliance respectively. In terms of proposals for an alternative scheme, a certain amount of survey work has been carried out and consideration given to appropriate land levels by both parties. Due process would need to be followed should a planning application come forward.
55. Weighing these various considerations, I conclude that a period of 15 months strikes the right balance. The appeal on ground (g) succeeds to this extent.

Conclusion

56. For the reasons given above the appeal should not succeed. I shall uphold the enforcement notice with corrections and a variation.

DECISION

57. It is directed that the enforcement notice be corrected by:
- a) Delete the final sentence of paragraph 1.
 - b) In paragraph 3 delete the wording of the alleged breach of planning control and substitute the wording: "Without planning permission, the raising and re-grading of land levels."
 - c) In paragraph 4 delete the wording of reason 1 and substitute the wording: "The alleged breach of planning control has occurred within the last 4 years."
 - d) In paragraph 4 reason 2 first sentence, delete the words "unauthorised use of the land for the importation, deposit and disposal of waste and the"
 - e) In paragraph 4 reason 3 first sentence delete the words "importation, deposit and disposal of waste and"
 - f) In paragraph 5 delete steps 1, 2 and 4; renumber step 3 as step 1 and renumber step 5 as step 2.

g) In the renumbered step 2 delete the words "removal of the unauthorised waste and".

58. It is directed that the enforcement notice be varied by in paragraph 5 by the deletion of twelve months and the substitution of fifteen months as the period for compliance.

59. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Diane Lewis

Inspector