The Planning Inspectorate

Appeal Decisions

Hearing Held on 16 March 2022
Site visit made on 16 March 2022

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 25 April 2022

Appeal Ref: APP/C3240/C/21/3273954 ('Appeal A')
Land North of Haygate Road, Wellington, Telford, Shropshire TF1 2FP

- 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 Vistry Homes Mercia Region and Anwyl Homes against an enforcement notice issued by Telford and Wrekin Council.
- The enforcement notice was issued on 29 March 2021.
- The breach of planning control as alleged in the notice is *Without planning permission, the unauthorised construction of a raised earth mound in an area of open space*.
- The requirements of the notice are to: (1) remove from the land all earth and material deposited in order to create the raised earth mound, and return the land to its original levels and contours as shown on Drawing No. 17038/02/1 approved under conditions 9 and 10 of outline planning permission TWC/2013/1033; and (ii) seed the area with a EllyWrenhard wearing grass so that it complies with the landscaping scheme approved under reserved matters planning permission TWC/2017/0643, as shown on Drawing No. 2818 101 Rev I.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary Decision: the appeal succeeds in part and the enforcement notice is upheld as varied in the terms set out below in the Formal Decision.

Appeal Ref: APP/C3240/W/21/3274024 ('Appeal B')
Land North of Haygate Road, Wellington, Telford, Shropshire TF1 2FP

- 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 Vistry Homes Mercia Region and Anwyl Homes against the decision of Telford and Wrekin Council.
- The application Ref TWC/2021/0110, dated 22 December 2020, was refused by notice dated 29 March 2021.
- The development (retrospectively) proposed is described in the application form as raising of levels in the open space area within the south-western corner of a residential development.

Summary Decision: the appeal is dismissed.

Main Issues

1. The appellants' preliminary submission in respect of the enforcement notice is that it is uncertain and vague, and is therefore a nullity. If that is the case, no further consideration would be given to the notice but the section 78 appeal would remain to be considered. If however the notice is not a nullity then the appellant raises several grounds of appeal against the notice. The first of these

arises under section 174(2)(c), which is to say that the matters alleged by the notice do not constitute a breach of planning control. If that succeeds then the notice would be quashed. Although it would be quashed on the basis that permission is not required (or has already been given) the section 78 appeal would nonetheless remain for consideration.

2. The main issues arising in the section 78 appeal are identified by the Council's reasons for issuing the notice, which are commensurate with their reasons for refusing planning permission. They relate to the effects of the proposal on the significance of the adjoining heritage asset, Orleton Park; the effects on the provision of public open space; and the effects on trees. If the proposal is found to conflict with the development plan, then whether or not any environmental or other benefits of the proposal are of sufficient weight to indicate a decision other than in accordance with the development plan will be a further issue to be considered.

3. If permission is not granted then the remaining grounds of appeal against the notice raise the questions of whether the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control or, as the case may be, to remedy any injury to amenity (ground f); and whether the period specified for compliance in the notice falls short of what should reasonably be allowed (ground g).

Reasons

Appeal A: Nullity

4. The appellants contend that the notice's reference to the 'raised earth mound' or, in places, to 'the mound' is insufficiently clear about what it comprises or where it is.

5. Section 173(1) of the 1990 Act requires a notice to state the matters which appear to the local planning authority to constitute the breach of planning control. Section 173(2) provides that a notice complies with that requirement if it enables any person on whom a copy of it is served to know what those matters are. Here, the notice was served on the two appellants (or related companies) as well as one other person. Section 172 provides that a copy of a notice shall be served on the owner and occupier of the land to which it relates, and on any other person having an interest in the land materially affected by the notice.

6. Thus the recipients of any enforcement notice are envisaged by the relevant legislation to be those persons with some familiarity with the land involved, and the requirement to 'state the matters' is to be interpreted in that context. The question arising in respect of nullity is whether the notice tells the recipient fairly what he has done wrong and what he must do to remedy it. A notice must be fundamentally defective in order to be found a nullity. The appropriate test is whether the notice is hopelessly ambiguous and uncertain, either as regards the description of the breach or the necessary remedial steps, as set out in *Miller-Mead v MHLG* [1963] 2 WLR 225 and considered in a number of subsequent cases.

7. I was referred at the hearing to a dictionary definition of a 'mound' as meaning a heaped pile of earth. Whilst other dictionary definitions are available, on observing the site it is eminently clear at what the notice is directed. One is

confronted with an obviously artificial construction of raised earthworks. Topographical features such as the residual root protection areas of the retained trees further evidence the artificial nature of the works that have been carried out.

8. The consequences of failing to comply with an enforcement notice are potentially severe, so a notice must be drafted so as fairly to tell the recipient what has been done wrong and what is required. Nonetheless it is in the public interest not to set the nullity test too low. I do not consider that there is room for any real doubt about what the notice alleges or about what it requires, whether to a disinterested observer or, especially, to those familiar with the site upon whom the notice has been served. I do not find the notice to be a nullity and hence turn to consider the grounds of appeal.

Appeal A: The appeal on ground (c)

9. The appellants' contention on ground (c) is that changes in site levels are not prohibited because the existing planning permission contains no specific conditions that require the submission of any specific levels information for what is shown on plans as the 'open grass area'. It is not contended that the works to construct the mound were not in themselves operations on land falling within section 55(1) of the 1990 Act; rather the contention is that the works are authorised by the relevant permission. The size of the mound, agreed to cover an area measuring around 110m by 880m, with levels raised by around 2m to a high point of 105.30m above OD (Newlyn) and its profiling is such that I am satisfied that its construction was the result of engineering or other operations comprising development for which permission was required.

10. Outline planning permission was granted in April 2016 for up to 330 dwellings (limited to 290 by condition), including associated landscaping, site access and public open space relating to a wider site than (but including) the area the subject of the notice. Two planning conditions did make specific reference to ground levels; a scheme for the provision of sports and equipped play areas to include finished levels; and a prohibition on raising ground levels within the root protection areas of retained trees and hedgerows.

11. There is no express authority in the permission to carry out the operations resulting in the mound. The condition requiring the approval of levels for the sports and play areas stems from the recognition that the levels would require alteration as a consequence of carrying out those aspects of the development: the approved scheme includes a skate park, which would inevitably require changes to contouring. The prohibition on raising the ground levels in the trees' RPAs stems from a recognition that any alterations to ground levels, even if not in themselves constituting operations amounting to development falling within section 55(1) for which permission is required, could be harmful to the trees or hedgerows concerned.

12. The lack of a condition prohibiting the alteration of ground levels in the public open space area does not equate to a permission to do so, unless those operations can be said to be authorised by the permission either expressly or by implication. There is nothing in the grant of the outline permission or in any of the approved drawings or other documents brought to my attention to suggest that there is any such express authorisation. The 'levels' drawing brought to my attention related to the requirement to discharge conditions

requiring drainage schemes. The landscaping plan, whilst anticipating the open space area to be re-seeded with a different type of grass, is silent as to levels.

13. The lack of any express authorisation and the absence of any conditions on the matter do not assist the appellants. The question then remains whether the works are authorised by implication. The appellant referred at the Hearing to having elevated the floor levels of the houses as necessary so that they are not sitting below the level of Haygate Road, without any express authority to do so. Whether those levels are authorised by the permission is not a matter before me, but the difference is that, in respect of the houses, the appellants claim the changes to levels to have been necessary in order to carry out the permission. In respect of the mound it is not contended, still less demonstrated, that its construction was necessary in order to implement the planning permission. Its construction was at the developer's choice; and it is not contended, whether under the appeal on ground (f) or elsewhere, that to remove the mound would in any way upset the efficacy of the permission. It may in some cases be appropriate to construe a planning permission so as to authorise operations that are not mentioned in the permission but which are reasonably necessary to enable its implementation. However, construing the relevant permission here in this way does not assist the appellants because the operations to construct the mound were not necessary for that purpose.

14. Therefore I find the construction of the raised earth mound to have amounted to development for which planning permission was required but was not given, either expressly or by implication. The appeal on ground (c) fails.

Appeal B: the section 78 appeal

Orleton Hall

15. Although the inclusion of an historic park or garden on the register ('RPGs') brings no additional statutory controls, such a registration is a material planning consideration. Specifically, such RPGs are 'designated heritage assets' for the purposes of the National Planning Policy Framework ('the Framework'). Policy BE7 of the Telford & Wrekin Local Plan requires the preservation and enhancement of such sites including their settings.

16. The RPG adjoins Haygate Road and the site to its south-western side, with some cottages and a hedgerow separating the two, together with a lane leading north-west from Haygate road to the cricket pitch and beyond to the Hall. The cricket facilities were established after the war, prior to the RPG's listing in 1986. Imparkment appears, from the list description, to have taken place at some stage between 1752 and 1792.

17. The parties agree that the primary issue is whether, and if so in what way, do the earthworks impact on the significance of the RPG. Any consideration of harm should be undertaken in relationship to the significance of the heritage asset, and with regard to how its setting contributes to that significance.

18. The principal access to the Park is taken from Watling Street, where a drive leads northwards to the Hall, with views recorded on the list description as being available across the Park to the Wrekin and the Ercall some 2 km to the south. The Hall itself stands in an elevated position surrounded by dense woodland, below which the parkland opens out towards Watling Street below. Views up to the Hall's woodland belt are available from several public vantage

points around the base of the parkland, from Drummery Lane to the west and along Watling Street (Holyhead Road) to the south.

19. As one travels south-west on Haygate Road away from the centre of Wellington, the appeal site is encountered on the right hand side after passing some of the new houses for which permission was granted in 2016 which lie to the north of the new Lesley Drive (separating them from the appeal site). The driveway leading to the cricket club and then the parkland then adjoins Haygate Road up to its junction with Holyhead Road. Notwithstanding the existence of well-established hedgerows and other vegetation on both the south-eastern and south-western boundaries of the appeal site, the earth mound serves to obscure views of the parkland from Haygate Road when approaching and passing the appeal site. As well as physically obscuring the views across in part, it also creates a different relationship, by severing the topography by its evidently artificial construction from the parkland beyond. Whilst there are existing extensive boundary treatments (due to be added to as part of the landscaping scheme) in the form of trees and hedgerows, these do not prevent the observer from acquiring a sense of what lies beyond. By contrast the earth mound is a barrier to that, and is qualitatively very different from the natural boundary features.

20. Like the 2016 Inspector, I do not find it possible to discern the original design intention for the Park; whether to allow views out from the Hall to the Wrekin (as contended for by the appellant) or to allow views out from the parkland over the low boundary walls to the surrounding countryside (as say the Council). Nonetheless the setting in which the asset is currently experienced includes those locations with longer open views into and across the parkland such as from Haygate Road and from Lesley Drive which the 2016 Inspector found it necessary to preserve in order for the development then proposed to attract the support of the Framework (112, 126, 142). The landscaping scheme for the site involves further tree planting to the boundary adjacent to the RPG, but even with that in place I consider that those longer open views would remain available.

21. The Framework points out that elements of the setting of a heritage asset may contribute to the significance of the asset, or affect the ability to appreciate the significance of it. By divorcing the RPG from the approach out of Wellington, I find that the ability to appreciate the significance of the parkland is diminished from vantage points on Haygate Road and Lesley Drive, and also that the significance of the asset itself is partly lost as a result of the resulting barrier to those open views to and across it. I find that 'less than substantial harm' to the significance of the asset results.

22. It may be appropriate to consider whether a 'net' or 'internal' heritage balance should be undertaken when deciding harm to or loss of significance. Here, it is contended that the earth mound itself positively affects the ability to appreciate the asset, by providing a raised vantage point from which more of the parkland can be discerned than would otherwise be the case.

23. Although designated as 'public open space', the appeal site is not obviously inviting to people who are not resident on the new estate, although I appreciate that may change over time as Lesley Drive becomes adopted into the maintainable highway network. Nonetheless I do not consider that the number of people ascending the mound to view the parkland will be

commensurate with those who would otherwise appreciate it from Haygate Road. The mound is not said to have been purposely designed to allow this, it has no legibility and any benefit is incidental. Nonetheless it is the case that ascending the mound allows some long views over the parkland. This limited benefit does go some way to mitigating the loss of the ability otherwise to appreciate the asset, but I do not find that it mitigates (or overcomes) the loss to the setting of the asset itself where the long open views over the natural topography are important to the setting and thus significance of the asset. Therefore even after accounting for this benefit I still conclude that less than substantial harm arises, which is to be weighed against any remaining public benefits of the proposal.

24. I do not consider the provision of the public open space in itself to be a public benefit for these purposes, because it is already a requirement of the existing planning permission. The Council agreed at the hearing that the environmental benefits claimed by the appellants are 'public benefits' for the purpose of conducting the overall heritage balance required by the Framework. Those environmental benefits consist of complying with the appellants' policies to design out waste and minimise the amount of waste going to landfill by recovering and recycling existing material on the site.

25. I am not prepared to give this acknowledged benefit significant weight in the heritage balance because there is no information before me as to the magnitude of the environmental benefit accrued or of whether that benefit could be obtained on the development site in a different way that would have avoided the harm to the significance of the heritage asset. As I am required to attribute considerable importance and weight to any harm to the significance of the asset then, although the harm is 'less than substantial', the weight I attribute to it is not overcome by the identified benefits of the development. Accordingly I find that it does not attract support from the Framework on this issue and that it is contrary to the development plan for the area and specifically to policy BE7.

Provision of public open space

26. The issue arising here is whether, by altering the topography of the appeal site in the way that has been carried out, the functionality of the area is changed or reduced and if so whether that is contrary to the provisions of the development plan. Policy NE4 sets out that the Council requires major development to provide and/or contribute to the provision of multi-functional open space which serves and meets the needs of the development as well as local and wider needs. It is said in the supporting text that proposals will be expected to address the type and quality of public open space as well as the amount.

27. The Road and Main Drainage drawing (17038/02/01) submitted with the application shows the former topography of the appeal site to have been gently undulating, falling away initially quite steeply from Haygate Road at around 104m above OD (Newlyn) to around 102m in the middle of the site and slightly less than 101.5m at the site's lowest point. The parties are agreed that the mound as constructed is 105.30m at its highest. It has a generally flat and level plateau, approximately rectangular, with relatively steep sides to reach it.

28. By opening up a substantial part of the overall application site to public access, by creating new footpaths, green infrastructure and recreation areas, the 2016 Inspector found that the appeal proposal would deliver net recreational and

biodiversity gains. The particular quality of the open space to be provided did not attract discussion in his decision, which is not surprising because there appear to have been no plans before him suggesting any alterations to the topography. A Landscape Layout drawing (2818 no. 101 rev I) shows an (uncontoured) Open Grass Area containing the two retained oak trees and otherwise surrounded by trees and a wildflower meadow mix to the edges. This approved plan shows the grass within the open space area "to be seeded with hard wearing grass", as distinct from the neutral grassland shown in other 'public' areas and the general amenity grass to be used to turf the residential properties' front gardens. From this 'hard wearing grass' requirement I accept that the open space area was envisaged to be used for multi-functional children's and family activities including kickabouts, with its purpose being primarily to serve the recreational needs of the residents of the development's mostly family houses.

29. The Council drew attention to the quality of the grass cover on the mound, and I saw at my site visit that it was yellowing and unlikely to withstand sustained physical activities such as football. However that is a matter that could potentially be remedied by the requirements of planning conditions. The Council also raised the absence of natural surveillance of the far side of the mound as a concern; however, this was raised at a very late stage and from the information before me I do not consider that the topography of the mound reduces its functionality as a result of the lack of surveillance opportunities. The open space area is, although visible from some of the dwellings, sufficiently far away from them anyway to warrant adult attendance to supervise any children requiring it.

30. I do however accept the Council's primary point, which is that the altered topography of the mound seriously reduces its efficacy as a multi-functional open space area serving the needs of this particular development of family housing, as the relevant policy requires. Although it remains an 'open grass area', the policy plainly requires that it be useable for recreational activities, and the changes to the topography have seriously reduced its effectiveness for this function. The 'plateau' is not large enough to accommodate comfortably informal games of football, cricket or rounders, and the loss of balls down the sides would discourage its use.

31. I acknowledge that there are other elements of recreational provision within the development, including the ball court, but I do not consider these to serve the same functions as this area. Although access to the site itself may be made more convenient from Lesley Drive as a result of the works, this will not affect most residents of the development and does not overcome the accessibility concerns when within the site. I note that no residents have raised any accessibility or usability issues, but this lack of complaint (of an as yet uncompleted development) does not overcome my concerns.

32. Therefore I accept the Council's case on this issue and find that the mound as constructed does not comply with the development plan requirements to provide multi-functional open space that adequately meets the needs of the development, contrary to the provisions of the development plan and specifically to policy NE4.

Trees

33. The Council's third reason for issuing the notice and refusing permission relates to the effects on what are described as 'veteran' trees. Two substantial oak trees are retained within the site, T1 and T5 (referred to in some documents as T3 and T9). The Council subsequently conceded that T5 is not appropriately described as 'veteran' but consider it nonetheless attracts the support of Policy NE2 as an 'aged' tree. The policy indicates resistance to proposals that would result in demonstrable harm. Paragraph 180 of the Framework advises that development resulting in the loss or deterioration of irreplaceable habitats such as veteran trees should be refused in the absence of wholly exceptional reasons and a suitable compensation strategy. Both trees are subject to a Preservation Order made in April 2021.

34. An arboricultural assessment was carried out in 2013, assessing the structural condition of the trees to be, respectively, category A (iii) (mainly cultural or conservation value) and category A (i) (mainly arboricultural value). The present condition has been assessed by the appellants to be respectively categories U and B, according to the BS5837 criteria, although not as a result of any recorded deterioration since the 2013 assessment. Accordingly the appellants question the wisdom of retaining T1 in an area of public open space given the risk of damage or serious injury resulting from structural failure which may be imminent.

35. Be that as it may, there are potentially other ways of avoiding personal injury than by felling the tree and, notwithstanding the BS 5837 categorisation, the Framework seeks to protect all veteran trees whatever their condition. Although the question of material deposition in the tree's root protection area has been raised as a concern, the reasons for refusing permission and issuing the notice related only to alleged harm resulting from the pooling of water within and adjacent to the RPA.

36. In the case of T1, the appellants consider that any such pooling of water is more likely to result from run-off from the bank supporting the new access road (Lesley Drive) than from the earth mound. The proposed solution is to construct French drains by converting the existing drainage ditches. The Council dispute the efficacy of this because pooling of water has been observed elsewhere in the RPA of T1 than would be resolvable by such a construction. A similar solution is suggested in respect of T5; the formation of a French drain around the southern quadrant of the perimeter of the tree's RPA, in order to accelerate permeation and dispersal of the run-off.

37. The Council have not explained how any pooling of water is expected to harm the trees. One contributory factor to the pooling around T1 is acknowledged to be the remnants of a tarmacked car park underneath part of the mound close to T1, for which no remedy is sought by the notice. The appellants contend that English Oaks are relatively tolerant of temporary waterlogging or flooding, and further that there is no evidence of any deterioration in the health of either tree since the earth mound was constructed in summer 2020.

38. Overall I accept the appellants' case in relation to the trees. Although I have been shown a number of photographs of water pooling in the trees' RPAs, the Council have not adequately explained how this results in demonstrable harm to either tree or why the construction of French drains (or drilling through the tarmac, as suggested at the Hearing) could not avert the problem. It is also

conceded that the pooling around T1 is partly caused by a factor the Council do not presently seek to address. On this issue therefore I find that the mischief could be adequately averted by the imposition of relevant planning conditions that would avoid the harm identified, and consequently no breach of the development plan or the requirements of the Framework would arise.

Conclusions on section 78 appeal

39. Notwithstanding my findings on the third issue, overall I have found there to be conflict with the development plan for the area in respect of the effects on designated heritage assets and on the provision of public open space. Other material considerations include the environmental benefits identified by the appellants, as well as the potential heritage benefit arising from being able to view the RPG from atop the mound.

40. I have explained above why these benefits do not outweigh my findings as to the heritage harm; it follows that I do not find them to outweigh the conflict with the development plan overall in respect of these two main issues. The conclusion I have reached in relation to the trees, namely that harm to those could be avoided by taking certain drainage measures, is not itself a benefit of the proposal.

41. Therefore I conclude that the section 78 appeal should be dismissed.

Appeal A: further grounds

The appeal on ground (f)

42. Whilst the proposed French drains could overcome the concerns in relation to the trees on the site, they would not address the concerns as to heritage and the public open space. It is suggested that, in relation to the open space, the regrading or surface improvement rather than complete removal of the material would achieve a satisfactory outcome. The same suggestion is not made in respect of heritage matters, but in any event without a particular scheme before me I do not consider that such regrading would remedy the breach of planning control (in whole or part) but would amount to a different proposal going beyond the scope of my powers on this appeal. Accordingly, the appeal on ground (f) does not succeed in this regard.

43. It does however succeed in respect of the requirement to seed the area with a hard wearing grass 'so that it complies with the landscaping scheme approved under… TWC/2017/0643'. Although such seeding is a requirement of the planning permission, it does not properly fall within the scope of this particular notice, as the Council conceded at the Hearing. Whilst the appellant may wish to seed the restored ground in accordance with that scheme (and may in due course be required to do so) I shall vary the second requirement of the notice so as to require only the seeding with grass.

The appeal on ground (g)

44. Given the likely date of my decision relative to appropriate seeding periods, the parties agreed at the Hearing that the compliance period should be extended to six months, and I allow the appeal on ground (g) accordingly.

Conclusions and Formal Decisions

Appeal A

Conclusion

45. For the reasons given above I conclude that the appeal should not succeed on ground (c). As a result of my findings on grounds (f) and (g) I conclude that the requirements are excessive and a reasonable period for compliance would be six months. I am varying the enforcement notice accordingly, prior to upholding it. The appeal under grounds (f) and (g) succeeds to that extent.

Formal Decision

46. The appeal is allowed on grounds (f) and (g) and it is directed that the enforcement notice be varied by:

    - Deleting all text from requirement 5(2) save for 'Seed the area with […] grass'; and
    - Deleting 'three' and replacing it with 'six' in paragraph 6.

47. Subject to these variations the enforcement notice is upheld.

Appeal B

48. The appeal is dismissed.

Laura Renaudon

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Philip Rawle – Greenlight Developments Limited, PDR Planning Limited
Mark Mackworth-Praed – David Archer Associates
Duncan Coe – Cotswold Archaeology
Rob Ellam – Vistry Homes Mercia Region & Anwyl Homes
Ben Graham – Vistry Homes Mercia Region & Anwyl Homes

FOR THE LOCAL PLANNING AUTHORITY:

Andrew Gittins – Area Team Planning Manager
Derek Owen – Healthy Spaces Design Specialist
Gavin Onions – Tree and Woodland Officer
Paul Johnson – Consultant Planning Enforcement Officer
Penny McKnight – Senior Built Heritage Specialist
Richard Walmsley – Principal Planning Enforcement Officer
Vanessa Walton – Planning Validation Officer

INTERESTED PERSONS:

Cllr Jacquie Seymour
John Treherne
Diane Treherne
Hugh Rodger
John Pattinson MRTPI (Ret'd) Haygate Fields Group
Rod Lake

DOCUMENTS

1. Aerial photographs of site: 2010, June 2018, May 2020, April 2021
2. Haygate Road preapplication document, January 2017
3. Written copy of statement made to hearing by Cllr Seymour
4. Plans of Play Area, MUGA and Skate Park
5. Landscape Layout (Sheet 3 of 3) Drawing No. 2818 103 Rev P
6. Photographs of October 2018 and February 2022 (Mr Lake)
7. Photographs of February 2022 (Mr Treherne) (T5)
8. Photographs of December 2013, March 2018, October 2018 (the Council) (T1)
9. Photographs (Haygate Fields Group) of April 2019, January 2021 and December 2021
10. Enlarged FCPR photograph of 'T3' (appellant)