
Appeal Decisions

Site visit made on 8 November 2022

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 16 November 2022

Appeal A: Ref APP/C1435/C/21/3287244

Appeal B: Ref APP/C1435/C/21/3287246

Land at Little Marklye, Marklye Lane, Heathfield, East Sussex shown edged red on the plan attached to the notice ("the Land")

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mr John Bushnell (Deceased) and Appeal B is made by Mrs Sarah Bushnell against an enforcement notice issued by Wealden District Council.
 - The enforcement notice was issued on 20 October 2021.
 - The breach of planning control as alleged in the notice is:
Without planning permission, the importation of materials to form an elevated bank ("the Bank") and the erection on the elevated bank of a fence in excess of 2 metres in height from the original ground level ("the Fence"), in the approximate position shown coloured green on the plan attached to the notice.
 - The requirements of the notice are to:
(i) Demolish, dismantle and remove the Fence from the Land. (ii) Remove the imported materials used to form the Bank from the Land, using an un-toothed bucket to expose the level of the pre-existing natural contours of the ground, and level the area from where the imported materials have been removed to marry in with the contours of undisturbed land in the adjacent paddock. (iii) Remove from the Land all materials, tools, rubbish, debris and equipment arising from compliance with the above requirements.
 - The period for compliance with the requirements is 2 months.
 - The appeals are proceeding on the grounds set out in section 174(2) (c) and (f) of the Town and Country Planning Act 1990 as amended (the Act).
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Decisions

1. Appeals A and B are allowed and the enforcement notice is quashed.

Applications for costs

2. Applications for costs were made by Mr and Mrs Bushnell against Wealden District Council. These applications are the subject of separate Decisions.

Procedural Matter – "Hidden ground"

3. Although the appeals were started on grounds (c) and (f), it is clear from the appellants' submissions that the main argument is essentially that the matters as stated in the notice have not occurred as a matter of fact (Ground (b) as set out in section 174(2) of the Act). I have a duty to be alert to any such "hidden grounds" of appeal and to deal with them, which I have accordingly done so within these Decisions. Since the ground (b) argument has been transparent to the Council and interested third parties throughout the appeals, I am satisfied that they have had a fair opportunity to respond to and comment upon it.

Ground (b)

4. It is not in dispute that the fence itself does not exceed 2 metres in height. Rather, the issue in dispute is whether an elevated bank has been created (from imported materials) upon which the fence has been erected so that its top is greater than 2 metres from the original ground level.
5. Put simply, the appellants' position is that the matters stated in the notice have not occurred as the fence has been erected upon the same ground level as before (resulting in an overall boundary treatment height that does not exceed 2 metres). It is said that the imported soil was used to grade the appeal site, including up to the pre-existing level adjacent to the boundary with Old Marklye Cottage where the fence has been erected. Further, that the new soil was used to fill the void that had been created by the removal of a hedgerow (together with its roots for re-planting) but that this had not amounted in any way to raising the ground level. This set of asserted facts is not undermined by any of the photographs or other substantive evidence I have seen. Further, it is supported by the Statutory Declaration of Mr Humphries who as a Landscape Gardener carried out the above work.
6. A Statutory Declaration is a formal statement made under the Statutory Declarations Act 1835 to affirm that something is true to the best knowledge of the person making the declaration. A Statutory Declaration must be witnessed by and signed in the presence of a solicitor, commissioner for oaths or notary public – as is the case with Mr Humphries' declaration. Accordingly, it represents sworn first-hand evidence. When this factor is taken together with its precise and unambiguous contents, and consistency with all the photographs I have seen, I give it significant weight.
7. I have seen and read the submissions of the parties opposed to the development, which I have considered carefully. Much of it provides limited evidence of any great substance as to the height of the relevant section of ground prior to the appeal works. Of substantial weight in my decision, however, is a photograph¹ provided by the Council of the site taken in October 2018 before the development. When this is compared to a photograph taken by Mr Bushnell on 10 January 2022, it appears to show that the bottom of the hedgerow is essentially at the same level of horizontal alignment with the adjacent fence (enclosing the sewage treatment plant of Old Marklye Cottage) as is the bottom of the new fence.
8. For all of the above reasons, I find on the balance of probabilities that the matters stated in the notice have not occurred.

Conclusions

9. For the reasons given above I conclude that the appeals should succeed on ground (b). Accordingly the enforcement notice will be quashed. In these circumstances the appeals under the various grounds set out in section 174(2) to the 1990 Act as amended do not need to be considered.

Andrew Walker

INSPECTOR

¹ Photo A in Appendix 2 of the Council's appeal statement and also identified as Photo 1 in its Enforcement Report.