



Appeal Decision

Site visit made on 5 January 2023

by Sarah Dyer BA BTP MRTPI MCMI

an Inspector appointed by the Secretary of State

Decision date: 9 January 2023

Appeal Ref: APP/E9505/C/21/3269284

Land east of Brograve Mill, Coast Road, Waxham, Norfolk NR12 0EB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Henry Harvey against an enforcement notice issued by the Broads Authority.
 - The notice was issued on 29 January 2021.
 - The breach of planning control as alleged in the notice is the excavation of a scrape without planning permission.
 - The requirements of the notice are:
 - 5.1 Using the previously excavated material, infill the scrape to return the site to the original ground level.
 - 5.2 The works are required to be undertaken in accordance with the following process in order to minimise damage to the soil structure:
 - (a) A water-tight bund shall be constructed between the scrape and the feeder dyke to enable the scrape to be emptied of water prior to the commencement of ground work;
 - (b) The water within the scrape shall be pumped into the feeder dyke. This shall take place at a low rate and volume to ensure surrounding marshes are not flooded. The pump intake should also be kept floating where possible and screened to prevent large amounts of bottom sediment from being fluidised and transferred;
 - (c) When the majority of the water has been transferred, the pump can be removed and ground moving machinery shall be used to move the sediment that was originally excavated back into the scrape using a combination of lifting and pushing with an excavator bucket;
 - (d) The infilling shall be undertaken in 3 phases with a break of 1-2 weeks (depending on weather conditions) between phases to allow sediment to dry to some extent before tracking over;
 - (e) The scrape should be completely infilled with the site returned to original ground level;
 - (f) When original ground level is attained, the surface should be left in a level condition and re-seeded with a seed mix appropriate to the surrounding sward in the following spring season.
 - 5.3 The type and size of machinery used should take account of ground conditions; operating mats may be needed to avoid damaging substrate.
 - The period for compliance with the requirement is by 31 August 2021.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. It is directed that the enforcement notice is corrected by the deletion of 5.2 (f) and its substitution by:

(f) When the original ground level is attained, restore the land to its condition before the breach took place.
2. It is further directed that the enforcement notice is varied by the substitution of 9 months as the time for compliance.
3. Subject to the correction and variation, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Ground (d)

4. An appeal on ground (d) is on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. This is a legal ground of appeal, and the onus of proof lies with the appellant. The evidence must be sufficiently precise and unambiguous, and the standard of proof is the balance of probabilities.
5. This ground of appeal accepts that at some stage there has been a breach of planning control, but that it is immune from enforcement action, having subsisted for a four-year period in the case of engineering operations, being the excavation of the scrape as described in the notice.
6. The appellant has to demonstrate that the engineering works were carried out more than four years before the notice was issued (29 January 2017). The appellant argues that a scrape has been in existence and has been maintained for over 40 years. The appellant has submitted a number of witness statements to support this argument.
7. The witness statements are signed documents entitled 'Statement of Truth in support of the Appellant', but they are not formal statements made under the provisions of the Statutory Declarations Act 1935. As such, in the absence of any sanctions, they carry less weight than a statutory declaration.
8. Witness A is the appellant. He says his family are the owners of the land, that he has been going onto the land for 60 years and that he recalls the marsh flooding at what he describes as the flash/scrape in the winter. He refers to shooting wildfowl there in around 1971 when he was a teenager and intermittently with his son, Witness B, because he also pursued game shooting on other land. He recalls that the water was knee high over most of the flash which he describes as a larger area than the current scrape. Witness A also refers to the flash being maintained every year.
9. Witness B is the son of Witness A. He says that he has been going onto the land all of his life (39 years) and that the scrape floods in winter. He recalls shooting on the scrape with Witnesses A, C, D and E. Witness B says that foot drains used to be cleared with hand tools but when he was involved four years ago machines were used for digging.

10. Witness C refers to being invited to go shooting over what he says was referred to as 'the flood' on marsh land at Horsey Corner. Based on his date of birth and his age when he went to the site, this would have been in the early 2000s. He says that he was accompanied by Witness B and Witness D on occasion.
11. Witness C provides a detailed description of how he accessed the land and the wildlife which he encountered. However, he also says that he moved away from the area in 2013 and he provides no information about the condition of the land between January 2017 and January 2021 which is the relevant time period in this case.
12. Witness D says that he has been visiting the site for 17 years both for shooting with Witnesses A, B and C and to carry out agricultural work. He also describes the wide variety of wildlife using the site and states that all of those species have been seen at the flash since it was modified to become the scrape.
13. Witness E has knowledge of the site through shooting there and because in his capacity as a plumbing and heating engineer, he has worked for the land owners.
14. Witness E says that he has shot wildfowl in many places in North Norfolk and refers to a long tradition of numerous flashes along the coast and inland marshes. He confirms that he has shot on the flash which he says is now called the scrape, since about 1995 to the present day.
15. Witness E refers to the landowners maintaining the foot-drains and dykes which serve the flash. He says that the 'old' flash area was much bigger than the scrape that is shown on the plan and that as a consequence of changes in water levels in surrounding dykes a pipe has been installed to balance the dyke water and the scrape.
16. Witness E refers to the 'Waxham Flash' as he calls it being shot for decades and being unique as a result of the absence of blinds/fixed shooting stations.
17. Witness F, who is also the agent acting for the appellant, lived close to the site for 12 years in the 1970/80s. He describes returning to Horsey on a recent visit and says that little has changed since he lived there. He does, however, acknowledge that the latest machine maintenance of the flash relates to a much smaller area than in the past but of a much more man/machine made nature.
18. Witnesses A to F do not make any comment regarding the features described on the site by the Authority or observed by me on the site visit.
19. Neither do they provide any specific information about any changes to the site between January 2017 and January 2021. However, Witness B refers to machines being used for digging four years before his statement, so around 12 February 2017 and Witness A, Witness D and Witness E refer to changes and differentiate between the previous flash and the current scrape. Witness F particularly references the man/machine made changes to the flash/scrape.
20. The Authority accepts that there may have been a historic depression in the land which provides a historic flash and that this provided the opportunity for wildfowling. However, it argues that what is currently on the site constitutes engineering works involving heavy plant and machinery.

21. In support of their arguments the Authority has provided aerial photos dated 2010, 2014, 2017 and 2020. The Authority says that the photos show that there is no scrape/flash on the land in 2010, 2014 or 2017 and that there is no sign of seasonal flooding. However, the aerial photos are undated which limits their value in terms of demonstrating when seasonal flooding took place. Nevertheless, the 2020 photograph shows a large feature in the field of a rectangular form which is a darker shade than the surrounding land and which, as the Authority note, could indicate water with three islands.
22. At the site visit I was able to confirm that there is a roughly rectangular feature on the land. There is a bund around the edge which the appellant confirmed is a result of soil being moved and there are raised areas within the water feature which have the appearance of islands. The appellant says that the water level within the bunded area varies in depth and the bunds have naturally reduced in height since they were formed.
23. The witnesses make reference to the maintenance of the flash using hand tools and later machinery. However, the evidence provided by the Authority indicates that what has happened on the site goes beyond what could reasonably be described as maintenance and amounts to development.
24. In November 2018 the appellant sought planning permission to 'retain a scrape which has already been dug on land...' (Authority Ref. BA/2018/0643/FUL). This undermines the appellant's argument that no enforcement action could be taken in respect of the works which have been carried out because it demonstrates that he was aware that planning permission was required.
25. The evidence provided by the appellant does not establish when the works which have been carried out took place and does not demonstrate that on the balance of probability the engineering works which have been carried out on the land were completed by 29 January 2017.
26. For the reasons given above, I conclude that the appeal under ground (d) should not succeed.

Ground (a) and the Deemed Planning Application (DPA)

27. An appeal under ground (a) is on the basis that in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted.

Main Issue

28. The main issue is the effect of the development on the landscape character of the area.

Reasons

29. The site lies within the Broads which the Authority describes as of international importance in terms of wetland and is also within the North Norfolk Area of Outstanding Natural Beauty (AONB). Policy SP7 of the Local Plan for the Broads (2015-2036) (2019) (the Local Plan) seeks to ensure that development is appropriate to landscape character and Policy DM16 requires that development proposals are informed by the Broads Landscape Character Assessment (2017) and appropriate site-based investigations. The Planning Policy Framework (the

- Framework) sets out that great weight should be given to conserving and enhancing landscape and scenic beauty in the Broads and AONBs.
30. As I have referred to above a planning application was submitted to retain the scrape in November 2018. This application was subsequently refused by the Authority in February 2020 and a planning appeal was dismissed in November 2020 (Appeal Ref. APP/E9505/W/20/3256122). Following this decision, the enforcement notice was served to which the current appeal relates. The breach is in respect of development, which on the basis of what is before me, is identical to that which the previous Inspector considered.
31. The appellant's case is simply that planning permission should be granted. He has not submitted any supporting information in respect of his appeal under ground (a) and consequently he has provided no substantive reasons for departing from the earlier appeal decision. Furthermore, it is clear from the previous Inspectors decision that the relevant national and local planning policy context which he considered is the same as is before me.
32. At the site visit I observed that there is an extensive roughly rectangular feature surrounded by bunding. The scrape is concave in section and the bunding does not rise significantly above the level of the surrounding land. As such the feature is not visually prominent and, in any event, it is positioned in a secluded, inaccessible location.
33. Nevertheless, the scrape is not compatible with the surrounding landscape, essentially because it is a man-made feature in an otherwise natural environment.
34. When I visited the site, the marsh was flooded and there were areas of standing water in the surrounding fields. However, these were within natural depressions in the topography of the land and their edges were defined by the land levels. By contrast, the edges of the scrape have a straight alignment and the bunds visually contain the space. The Landscape Character Assessment (LCA) document provided by the Authority emphasises the wild and natural character of this part of the Broads. By virtue of its scale, design and appearance the scrape is at odds with the character of the landscape as described in the LCA. Drawing these points together, I find that the scrape is an alien feature in the wider site context and is not appropriate to landscape character.
35. The appellant refers to flashes as being a landscape feature of the coastal marshes in the Broads, and he refers to them as being part of North Norfolk's rural history. However, he has not identified any flashes in the vicinity of the site, nor has he demonstrated that scrapes of the type which is currently on the land are a characteristic feature of the landscape. Furthermore, I have established in my consideration of the appeal under ground (d) that the flash/scrape in its current form has not been present for more than four years which undermines any historical value it may have had.
36. My observations are consistent with those of the previous Inspector, and I concur with his conclusion that the scrape is an unnatural, engineered feature which causes a significant degree of harm to the intrinsic character of the Broads landscape. The development is therefore contrary to Policies SP7 and DM16 of the Local Plan and to the Framework.

37. An interested party says that the appellant could be offered a grant to create a reservoir on the land. However, there is no evidence to substantiate this or to indicate that the appellant intends to apply for such funding. Therefore, the potential for such a fall-back position attracts no weight.
38. The development does not accord with the development plan and there are no other considerations to indicate that the appeal should be determined otherwise. Therefore, for the reasons given above, the appeal under ground (a) shall not succeed and planning permission on the application made under section 177(5) of the 1990 Act as amended is not granted.

Ground (f)

39. An appeal under ground (f) is on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
40. The appellant considers that the requirements of the notice exceed what is necessary to remedy any injury to amenity. However, in this case the notice requires works to return the ground level of the site to its original level which are to remedy a breach of planning control. In this context the appellant's suggestion that reasonable amelioration works could be carried out to allow retention of the flash in a visually acceptable form would not remedy the breach.
41. The appellant also considers the 'reparations section of the notice', which it is assumed are the requirements, to be unnecessarily heavy handed and could be viewed as 'an expensive penalty for non-compliance with the Authority's wishes'. The Authority considers that the detailed nature of the requirements is necessary to achieve restoration without damaging the soil structure and in a safe manner.
42. The development is on private land and the issue of safe implementation of any works is a matter for the landowner who is the appellant in this case.
43. However, in respect of impact on soil structure, the Authority recognises the importance of this in its Planning Committee Report. It is also clear from the photographs attached to the email from the Water Management Alliance that the works to infill the scrape have the potential to affect surrounding land if not carried out with care. I do not find the requirements to be excessive in order to achieve this.
44. The appellant says that the changes to the scrape could be brought about relatively simply and cheaply. However, he provides no details about how this could be achieved, nor does he suggest alternative requirements.
45. The appellant submitted evidence as part of his appeal under ground (d) to argue that the site has been used as a flash in the past and witness statements indicate that there was a depression in the land which facilitated this. Requirement 5.1 refers to the land being returned to the original ground level and requirement 5.2 (e) sets out that the scrape should be completely infilled with the site returned to original ground level. This would allow any previous depression in the land to be retained following compliance with the notice.

46. However, requirement 5.2 (f) refers to the site being left in 'a level condition' which is at odds with the witness statements. I shall therefore correct the notice to replace requirement 5.2 (f) with a requirement to restore the land to its condition before the breach took place and the appeal succeeds to that extent.

Ground (g)

47. Ground (g) is that the period specified for compliance with the notice falls short of what should reasonably be allowed.
48. The notice requires the works which are set out in the requirements to be completed by 31 August 2021. This was approximately 7 months from the date the notice was issued. The Authority has suggested that the date could be amended to the end of September which would equate to 8 months from the date of the notice.
49. The appellant considers that this compliance period is too short because the land is flooded for most of the year. He requests a compliance period of 12 months. In response the Authority say that it has considered local conditions and the seasonal variation of the water table, which preclude winter working. It also says that it has had regard for the bird breeding season which prevents work taking place before July.
50. I am satisfied on the basis of the Council's explanation that the works necessary to comply with the notice can only be carried out in the summer months. Given the time of year when I am determining this appeal a 12 month compliance period would include the wetter winter months when the works could not be carried out. For that reason, I shall vary the compliance period to 9 months, which would be by the beginning of October 2023 and the appeal succeeds to that extent.

Sarah Dyer

Inspector