

Appeal Decision

Site visit made on 16 January 2023

by S A Hanson BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 March 2023

Appeal Ref: APP/Y3940/X/22/3292675

Land adjacent to Waitrose, Malmesbury By-Pass, Malmesbury, Wiltshire SN16 9FS

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development.
 - The appeal is made by Ms Orysa Lyvchanyn against the decision of Wiltshire Council.
 - The application ref PL/2021/04555, dated 25 April 2021, was refused by notice dated 28 July 2021.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended (the Act)
 - The development for which a certificate of lawful use or development is sought is the construction of a 2m high gabion wall as an enclosure.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. Section 192(2) of the 1990 Act indicates that if, on an application under that section, the Council is provided with information satisfying it that the use or operations described in the application would be lawful, if instituted or begun at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. The onus is firmly on the applicant to demonstrate on the balance of probabilities that the proposed development would be lawful.
3. The planning merits, such as the effect of the development on the character and appearance of the area and the conservation area along with the necessity for the development as raised by third parties, do not fall to be considered. The decision will be based strictly on factual evidence, the history and planning status of the site in question and the application of relevant law or judicial authority to the circumstances of the case.

Main Issue

4. This is whether the council's decision not to issue a certificate of lawful use or development (LDC) was well-founded. The decision turns on whether the proposal would, at the date of the application, be lawful.

Reasons

Appeal site

5. The appeal site is a large parcel of pastureland located adjacent to the elevated Malmesbury by-pass to the south-east of the town. The land slopes down towards the river and flood plain in the north and west and borders Waitrose to the south. The appeal site is within the Malmesbury Conservation Area and the lower part of the site is within Flood Zone 2 and 3.
6. The gabion wall as proposed would be just over 100m in length and extend in an east-west direction across the centre of the field in an arc formation. The wall would be constructed using individual metal cages, or gabion baskets, filled with soil, clay and stone, and each would measure 1 cubic metre. To fill the baskets, the appellant estimates that they would import between 80-100 cubic metres of material. The bottom layer of cages would be placed on excavated land between 300mm–500mm deep and 1m wide. One further row would be placed atop so that the finished structure would measure between 1.5m and 1.7m above ground level. I understand this to be the height as measured from the higher ground level.
7. According to the appeal decision¹ for the application which sought planning permission for the same structure, it was proposed to backfill the land to the south of the gabion wall. This filled area would extend back from the wall by around 5m - 8m so that the field would be level with the top of the gabion wall. However, the submissions in this appeal submissions make no reference to land behind the gabion wall on the upper slopes being raised by back filling. Furthermore, the application drawing ref. 733/02b for the existing and proposed sections through the site shows a 2m high wall with no backfilling. Accordingly, my decision is made on that basis.
8. Section 55(1) of the 1990 Act defines “development” as “the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of buildings or other land”. Section 55(1A) defines “building operations” as including: (a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder. Section 57 of the 1990 Act provides that planning permission is required for carrying out any development of land.
9. Article 3(1) of the GPDO provides that planning permission is granted for the classes of development described as permitted development in Schedule 2. The appellant considers that their proposal would be granted by virtue of Part 2 of Schedule 2 which addresses minor operations. Class A records as permitted development the erection, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure subject to various limitations. Class A.1 (a) (ii) restricts the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic to 1m above ground level. A.1 (b) restricts the height of any other gate, fence, wall or means of enclosure erected or constructed to 2m above ground level.

¹ APP/Y3940/W/21/3280036 dated 10 February 2022

10. The appellant describes the reason for the wall “to simply make an enclosure between the flood plain and the land above the flood plain”. They say that the gabion wall is in preference to a post and rail fence or stone/concrete wall because the gabion wall could be seeded and become a green feature in the landscape. They explain that the wall would form an enclosure at the top of the field, which is out of the flood plain, and this would allow for safe grazing when the land below is in flood.
11. However, while the proposal may provide a means of enclosure, I consider that the works involve considerable engineering operations which go well beyond what might be considered as a minor operation, as a matter of fact and degree. The construction of the wall would involve a considerable amount of excavation, importation of soil and stone, and would be likely to require the use of large mechanical equipment. It is an operation that would be likely to require supervision by an engineer.
12. The appellant has suggested that, viewed as an engineering operation, the proposed development would be permitted by Schedule 6 Part 2 of the GPDO, which provides, under Class A, that any excavation or engineering operations which are reasonably necessary for the purposes of agriculture within the unit is permitted development. However, that Class relates to agricultural development on units of 5 ha or more and is subject to limitations and conditions which have not been addressed in the evidence before me. Furthermore, while the relevant agricultural unit is claimed to be more than 5 hectares, this is not supported by evidence, so it is unclear whether the land benefits from Class A development rights.

Conclusion

13. For the reasons given above and having regard to all other matters raised, I conclude that the Council’s deemed refusal to grant an LDC in respect of the proposed 2m high gabion wall as an enclosure was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

S A Hanson

INSPECTOR