



Appeal Decision

Site visit made on 15 February 2023

by M Madge Dip TP MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 March 2023

Appeal Ref: APP/M2270/C/21/3280613

All that land known as Former PF Skeet Yard, Talbot Road, Hawkhurst, Kent TN18 4NB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Simon Gillespie against an enforcement notice issued by Tunbridge Wells Borough Council.
- The notice was issued on 26 July 2021.
- The breach of planning control as alleged in the notice is without planning permission the unauthorised construction of a wooden and metal "retaining mechanism" on the Land adjacent to the boundary of the neighbouring property to the north-east known as The Hollies (A photograph showing the "retaining mechanism" is attached to this Notice).
- The requirements of the notice are to:
 - 5.1 Dismantle and remove the wooden and metal "retaining mechanism" adjacent to the boundary of the neighbouring property to the north-east known as Lawnsend. (For clarity a photograph showing the "retaining mechanism" is attached to this Notice)
 - 5.2 Construct the north-easterly wall of the basement as shown on approved plan YR5/4/18/11/2014 (received 26 November 2014) of Planning permission 14/505904 granted 4 March 2015 on the Land.
 - 5.3 Backfill the area between the wall constructed in 5.2 (above) and the adjacent boundary with a suitable inert material (such as compacted aggregate, soil, (or similar) with the upper section of at least 0.3m depth to comprise top soil) to the levels shown on approved plan YR5/6/18/11/2014 of Planning Permission 14/505904 granted 4 March 2015.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal succeeds in part on ground (f) and the enforcement notice is upheld with correction and variations in the terms set out below in the Formal Decision.

Matters concerning the notice

1. Normally, a 'mechanism' is defined as either a system of parts working together in a machine or a natural or established process by which something takes place or is brought about. Systems of parts in a machine or processes do not fall within the definition of development. The notice does not therefore accurately identify the development that is alleged to have taken place.
2. Following the excavation of the site, a metal framework, with bracing bars, fastened to wood boards was erected to provide a means of retaining the adjacent earth. There is no doubt that the notice was directed at the erection of this structure, which is confirmed by the photograph. An accurate description of the development would therefore be '*the erection of a wood and metal retaining structure*'. This correction would not fundamentally change the

allegation and it would not cause injustice to either of the appeal parties. The steps required to be taken will be varied to reflect the corrected allegation, if necessary.

3. The allegation also identifies the neighbouring property to the north-east as 'Lawnsend', which is the appeal property. The plan attached to the notice shows the property to the north-east to be known as 'The Hollies'. This is an administrative error, and I will correct it accordingly.

Preliminary Matters

4. The land level drops steeply down through the site. Planning permission was granted for the erection of a 2-storey, 3 bedroomed dwelling with attached garage in March 2015. The approved scheme included a basement below the residential accommodation, but not below the garage. Approved plan YR5/3/18/11/2014 shows the nearest part of the basement wall being over 4 metres away from the boundary with the property known as The Hollies.
5. Development began and the land was excavated. The excavations however extended beyond where the approved basement would have been positioned, up to the boundary with The Hollies. The excavations facilitated the need for a retaining structure to be provided adjacent to the boundary with The Hollies.
6. Since the retaining structure was erected and the notice issued, the basement has been extended into the resultant area, but it stops short of the boundary. Planning permission has been refused to regularise the basement extension.
7. I saw that a dwelling is under construction and the walls are approximately up to ground floor window heads. The area between the unauthorised basement extension wall and the boundary with The Hollies has been backfilled. At my site visit, the appellant verbally verified that part of the retaining structure had been removed before the land was backfilled. Approximately 5 wooden boards and the bottom metal rail of the structure remains in situ, along with the uprights to which the bracing bars were attached.
8. I understand that there is a High Court injunction in place that requires inter alia *"...save for the purposes of carrying out the installation of the permanent stabilising solution, [the developer] be restrained from carrying out any further work of excavation or other works within 3 meters of the temporary retaining wall and the line extending North-west and South-east therefrom"*. My decision is issued in respect of the appeal made under s174 of the 1990 Act¹, it does not supersede, or otherwise affect, the injunction issued by the High Court.

Appeal on ground (b)

9. An appeal on this ground is that the corrected matters alleged have not occurred. It is for the appellant to show that, on the balance of probability, the wood and metal retaining structure has not been erected as a matter of fact.
10. The photograph attached to the notice clearly shows a wood and metal structure being used to support the earth forming the north-east boundary of the land. There is no dispute that this wood and metal structure was intended to retain the earth below the adjoining property known as The Hollies. The wood and metal retaining structure was therefore erected as a matter of fact.

¹ Town and Country Planning Act 1990 as amended

11. Whether the wood and metal retaining structure was to be buried or removed after some point in time, does not change the fact that it was erected.
12. For these reasons, the appeal on ground (b) fails.

Appeal on ground (c)

13. An appeal on this ground is that the corrected matters alleged do not constitute a breach of planning control. It is for the appellant to show, on the balance of probability, that the matters alleged either benefit from planning permission or are not development.
14. The evidence provided by the appellant consists of a copy of the Party Wall etc Act 1996 agreement and a copy of the photograph attached to the notice. While the document does demonstrate that the provision of a retaining structure was agreed, this does not represent a planning permission.
15. Furthermore, the wood and metal retaining structure was always intended to be retained, either in whole or in part. Development includes the carrying out of building, engineering, mining or other operations in, on, over or under land. While the development, or part of it, would eventually be buried, it remains to be development requiring planning permission. No planning permission has been granted and it is therefore a breach of planning control.
16. For these reasons, the appeal on ground (c) fails.

Appeal on ground (f)

17. An appeal on this ground is that the steps required to be taken exceed what is necessary to remedy the breach of planning control which may be constituted by the matters or, as the case may be, any injury to amenity which has been caused by any such breach. In this case, the notice is seeking to remedy the breach of planning control.
18. Remedying the breach could be achieved by making the development comply with the terms (including any conditions and limitations) of any planning permission which has been granted in respect of the land. The steps to be taken require the development to comply with the conditions and limitations imposed on Planning Permission 14/505904. This would allow the appellant to retain the authorised elements of works undertaken. This is less onerous than requiring the reinstatement of the land to its condition before the breach took place. This does not exceed what is necessary to remedy the breach.
19. The wood and metal retaining structure is located a significant distance below the original ground level. The steps required to be taken include backfilling the area between the approved basement wall and the boundary with The Hollies, in effect, reinstating the original ground level. Once the attached garage is completed and the ground level is reinstated, there would be no way to determine whether the wood and metal retaining structure is present or not.
20. The Council accept that once the original ground level is reinstated, any visual impact of the development would be addressed. Any concerns relating to land instability would also be addressed through the reinstatement of the original ground level with compacted inert material and topsoil. There is no evidence before me to show that the retention, or part thereof, of the wood and metal retaining structure has caused or will cause any instability issues.

21. Hurst Peirce and Malcolm LLP ('HMP') inspected the wood and metal retaining structure and reported on it to the High Court. Their letter of 18 August 2021 confirms that the removal of any of the wood and metal retaining structure would potentially be dangerous for those undertaking the work and would render the ground upon which The Hollies lies unstable. They go on to advise that the methodology whereby part of the structure is buried in the ground was agreed between the party wall surveyors and that this is not necessarily unusual. They also state that the structure "*could not be removed in any event without some further temporary retaining structure being erected*".
22. In the absence of any information to contradict that provided by HMP, I find that requiring the wood and metal retaining structure to be dismantled and removed goes beyond what is required to remedy the breach of planning control, which would be adequately addressed by carrying out steps 5.2 and 5.3. Step 5.1 will be deleted and steps 5.2 and 5.3 shall be renumbered accordingly.
23. The appeal on ground (f) succeeds to this limited extent.

Appeal on ground (g)

24. The appellant claims that a period of 3 months falls short of what should reasonably be allowed due to the amount of work associated with the construction of the north-easterly wall of the approved basement, the time required for the concrete to cure, the gas membrane and dimple installation and the area to be backfilled. The appellant claims that all work is by hand, except the concrete pour. A period of 18 months is requested.
25. Since the appeal was lodged, the north-easterly wall of the approved basement has been constructed, albeit that this is not currently the outer basement wall with the gas membrane and dimple installed. Considerable building work would be required to comply with the requirements. Also, given the constrained nature of the site and that this is a self-build development, 3 months is unreasonably short. Given the harm arising from the development, a period of 18 months is however too long.
26. A period of 9 months would be reasonable. Should it transpire that the appellant encounters unexpected delays, the Council may extend the period specified².
27. The appeal on ground (g) succeeds to this limited extent.

Conclusion

28. For the reasons given above, I conclude that the appeal on grounds (b) and (c) shall be dismissed. I further conclude that the requirements of the notice are excessive to remedy the breach of planning control and the period for compliance with the notice falls short of what is reasonable. The appeal on grounds (f) and (g) succeed to this limited extent. I shall vary the enforcement notice prior to upholding it.

Formal Decision

29. It is directed that the notice shall be corrected by:

² Section 173A (1) (b) of the Town and Country Planning Act 1990 as amended

In section 3, THE BREACH OF PLANNING CONTROL ALLEGED, the deletion of all the words and their substitution with the words 'Without planning permission, the erection of a wood and metal retaining structure adjacent to the boundary of the property to the north-east known as The Hollies (A photograph showing the "retaining structure" is attached to this Notice).'

In section 5, WHAT YOU ARE REQUIRED TO DO, delete step 5.1 and vary steps 5.2 and 5.3 as follows:

- 5.1 Construct the north-easterly wall of the basement as shown on approved plan YR5/4/18/11/2014 (received 26 November 2014) of Planning permission 14/505904 granted 4 March 2015 on the Land.*
- 5.2 Backfill the area between the wall constructed in 5.1 (above) and the adjacent boundary with a suitable inert material (such as compacted aggregate, soil, (or similar) with the upper section of at least 0.3m depth to comprise top soil) to the levels shown on approved plan YR5/6/18/11/2014 of Planning Permission 14/505904 granted 4 March 2015.*

In section 6, TIME FOR COMPLIANCE, the deletion of the words 'Three (3)' and their substitution with the words 'Nine (9)'.

Subject to the corrections and the variations, the appeal is dismissed, and the enforcement notice is upheld.

M Madge

INSPECTOR