



Appeal Decision

Site visit made on 12 April 2023

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 14/08/2023

Appeal Ref: APP/X4725/C/22/3310157

Land to the rear of 63 Front Street, Castleford

- 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 1990 Act as amended).
- The appeal is made by Mr Shukran Riaz against an enforcement notice issued by Wakefield Metropolitan District Council.
- The notice was issued on 10 October 2022.
- The breach of planning control as alleged in the notice is, without planning permission, unauthorised excavation operations on the Land.
- The requirements of the notice are to: a) Back fill the excavated area of Land with appropriate soil material, such that the previous ground levels are reinstated as near as is practicable to the same levels before the breach took place, and b) evenly grade out the surface of the land to form a stable slope.
- The period for compliance with the requirements is: two months.
- The appeal is proceeding on the ground set out in section 174(2) (a) 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.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with a correction in the terms set out below in the Formal Decision.

Procedural Matters

1. An application for costs was submitted by the appellant, but later withdrawn¹.
2. At the request of a neighbour and with the agreement of the main parties, I viewed the appeal site (the site) from adjacent land on an access required basis.
3. The matters which appear to constitute the breach of planning control as set out in Paragraph 3 of the enforcement notice (the notice) are 'unauthorised excavation operations on the Land'. I consider that, in this context, the use of the word 'unauthorised' is superfluous. Accordingly, I will correct the wording of the matters at Paragraph 3 in this respect. The power under section 176(1)(a) of the 1990 Act as amended allows that a notice may be corrected provided that no injustice would be caused by doing so. I am satisfied that no injustice would be caused by correcting the notice in the above respect.
4. Section 173(3) of the 1990 Act as amended sets out that an enforcement notice shall specify steps in order to achieve wholly or partly, any of the purposes set out in section 173(4). The appellant submits that the step to

¹ Email from the appellant dated 28 November 2022.

remedy the alleged breach set out in sub-paragraph 5(a) of the notice² is 'fundamentally flawed'. This is because, as the land has been excavated, it is difficult to determine what the previous land levels were. Accordingly, I have considered whether this requirement is sufficiently precise and, if not, whether the notice is a nullity.

5. The modern approach to the question of nullity is to be found in the judgment of the High Court in *Oates v SoCLG and Canterbury* [2017] EWHC 2, which drew extensively upon the preceding case law on the subject. A number of principles emerge from this judgment, including that the test in relation to nullity is best understood not as one of 'hopeless ambiguity' but rather as a failure to tell the recipient with 'reasonable certainty' what the breach of planning control is and what must be done to remedy it. The judgment in *Oates* also indicates that a degree of uncertainty does not necessarily render it non-compliant with statute and that the notice should be read as a whole. Overall, the judgment in *Oates* indicates that the question of nullity should not be approached in a way which is unduly technical or formalistic.
6. The notice clearly and concisely sets out the alleged breach of planning control. I acknowledge that the requirements are not exact in terms of the quantity of appropriate soil material for the back fill and/or the required levels of the land. However, given the specifics and circumstances of the development, they provide a pragmatic flexibility to achieve the purpose of the notice, namely remedying the breach by restoring the land to its condition before the breach took place. I consider that the notice fairly tells the appellant, as the recipient, what they are alleged to have done wrong and what they must do to remedy this. Therefore, I find no fundamental unreasonable uncertainty in these regards to cause the notice to be a nullity, particularly when it is read as a whole.
7. The appellant also declares that no evidence has been provided by the Council that the step set out in sub-paragraph 5(a) of the notice would achieve stability of the land. Additionally, that if the appeal is dismissed and planning permission is not granted for the retention of the excavation and the proposed installation of retaining walls, which is addressed below, then the requirements of the notice should be varied to incorporate the proposed scheme. I have taken this submission as a hidden ground (f), in that the steps required by the notice to be taken, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters, and determined it below.
8. In the appeal form the appellant has stated that they are the owner of the land. However, this is questioned by the Council and an interested party. No additional evidence has been submitted by any of the parties on this matter. However, an applicant/appellant does not have to own a site to seek planning permission. Planning permission may be sought for development of land outside the control of the applicant, subject to the requirements of section 65 of the 1990 Act as amended as to notifying owners. Given my conclusions on the main issues, I have not pursued this matter with the parties.

² Back fill the excavated area of Land with appropriate soil material, such that the previous ground levels are reinstated as near as is practicable to the same levels before the breach took place.

Background

9. The site is a largely enclosed, roughly square, parcel of land located at the rear of Nos 63/65 Front Street. It is accessed via a gated arched entrance between No 63 Front Street and No 2 School Lane. The sides of the site are bound by a tall, stepped, stone wall to the east and a lower, stepped, block wall to the west. To the east lies a public house beer garden, to the west lies the rear curtilage of No 2 School Lane and to the north-east lies a grassed area which is stated to be owned by a neighbour. The wider area is of mixed use, being predominantly residential with some commercial and retail use which mostly fronts the main road.
10. The appellant confirms that, prior to the development to clear the site, the land was overgrown, unsightly and unusable. They decided to clear the site and lower the land levels to remove the hazardous vegetation and nuisance and prepare the site so it could accommodate some form of development in the future. The Council's evidence sets out that complaints about the excavation were first received in June 2022, following which there was some dialogue between the Council and the appellant. However, given the extent of the operations, that the existing rock face and slopes have not been proven to be able to support the land behind the existing features, and the proximity of residential and commercial properties to the site, the notice and a stop notice were issued to the appellant on 10 October 2022.
11. My site visit confirmed that the existing land levels within the site rise gently up from the south until the rockface at the back of the site is reached. From here the land rises up very steeply, comprising an approximately 3-4m tall rock face where it levels off slightly and then steps up again to the aforementioned grassed area.
12. Whilst no images of the former landscape and land levels within the site have been provided by any of the main or interested parties, the previous land levels can be approximately gauged by the markings on the boundary wall to the east, the existing land level to the north-east and the markings on the upper part of the boundary wall to the west. From these, it is reasonable to conclude that there has been a considerable degree of excavation within the site to create the existing open area.

The appeal on ground (a)

13. The appeal on ground (a) is 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.
14. The appellant has requested that as part of the appeal, in addition to consideration of the retention of the excavated land, I should also consider the proposed installation of retaining walls and has submitted plans and information in this regard. At the time of my site visit I noted that no work had commenced on this aspect of the proposal.
15. Section 177(1)(a) of the 1990 Act as amended sets out that on the determination of an appeal under section 174, the decision maker may grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or

any part of those matters or in relation to the whole or any part of the land to which the notice relates.

16. Having regard to the correction set out above, the notice alleges 'excavation operations on the Land'. Whilst the proposal to install retaining walls was informally submitted to the Council and have been considered as part of the Council's appeal statement, it forms no part of the matters alleged in the notice. As such, I cannot consider them in the determination of this appeal on ground (a).

Main issue

17. In the context of the above and having regard to the Council's principal reason for issuing the notice, I consider the main issue to be the effect of the development on the land stability of the site.

Reasons

Land stability

18. The excavation of the land to the rear of Nos 63/65 Front Street has created an open area which, at the time of my site visit, had vehicles parked and materials placed within it. More importantly, it has left exposed a rock face of sandstone with some soil above at the rear of the site, which has not been proven to be able to support the land behind it. It is on this basis, that the Council has concerns about the stability of the land within the site, particularly given its proximity to residential and commercial properties.
19. Prior to the issue of the notice, the appellant commissioned a 'Slope Assessment'³. Additionally, following the issue of the notice, the Council commissioned another 'Slope Assessment' by the same company, which also considered the proposed installation of retaining walls⁴. I have had regard to the findings of the assessments in my determination of the appeal.
20. The most recent assessment submits that, at the date of that visual examination of the rock face, no obvious visual signs of incipient instability or lines of weaknesses such as geological faulting were identified, and no signs of water seepages or past issuing of water were noted on the exposed rock face⁵.
21. The assessment goes on to say that for the sandstone rock faces, the most likely geotechnical issue would be spalling due to weathering of the exposed faces, which could cause localised rock falls. However, this is unlikely to occur in the short-term, and were this to occur it is unlikely to be on a large scale or unlikely to affect the global stability of the plateau area on top of the rock face, or higher retained ground to the north. With the rock face being cut back from a vertical angle, this will also reduce the potential risk of any associated rock fall or block failure from occurring⁶.
22. Nonetheless, the assessment concludes that it is considered prudent to provide permanent support to the unsupported faces as soon as possible to ensure the

³ Commissioned by Appellant: Abbeydale Building Environmental Consultants Report, dated 3 October 2022. Slope assessment for land to the rear of 63 Front Street, Glasshoughton, Castleford, West Yorkshire.

⁴ Commissioned by Council: Abbeydale Building Environmental Consultants Report, dated 6 January 2023. Slope assessment for land to the rear of 63 Front Street, Glasshoughton, Castleford, West Yorkshire.

⁵ Section 5 Visual Slope Assessment p 7.

⁶ Section 6 Geotechnical Considerations p 8.

long-term stability of the excavations and protect against the potential for deterioration due to weathering⁷.

23. I note the appellant's submission that the Council's objections relating to this matter would be addressed by the grant of planning permission, subject to conditions, requiring the proposed installation of retaining walls to be fully implemented within a defined timeframe. I am also mindful that the Slope Assessment commissioned by the Council sets out that the reinstatement of the previous ground levels, as required by the notice, would require further earthworks and excavations, whilst the proposed installation of retaining walls could be constructed directly in front of the existing excavation faces. Nevertheless, as set out above, given that the installation of retaining walls does not form any part of the matters stated in the notice, I am unable to consider this proposal as part of my determination of the appeal on ground (a).
24. Drawing the above together, I conclude that, as a matter of fact and degree, the development has a harmful effect on the land stability of the site. In terms of the policies cited within the notice, none directly relate to the issue of land stability. I have therefore considered it against the relevant provisions in the National Planning Policy Framework and find that it would conflict with Paragraph 184, which sets out that where a site is affected by contamination or land stability issues, responsibility for securing a safe development rests with the developer and/or landowner.

Other Matters

25. In their reasons for issuing the notice the Council also cite matters of character and appearance of the area; living conditions of neighbours, with regard to noise, disturbance and dust nuisance; and highway safety.
26. In terms of the character and appearance of the area, I noted on my site visit that the surrounding land incorporates residential and commercial properties, the majority of which possess well-maintained gardens and curtilages. The excavation of the land within the site has left an exposed wall of rock with some soil above, which is partly visible from School Lane and Front Street. This has a rudimentary appearance which is out of keeping with the positive characteristics and appearance of the locale, to the area's detriment.
27. Whilst the appellant contends that clearing the land has improved the environmental quality of the site, no substantive evidence has been provided to demonstrate this.
28. On this basis, the development conflicts with Policy CS10 of the Wakefield Local Development Framework Core Strategy, 2009 (the WCS) and Policy D9 of the Wakefield Local Development Framework Development Policies Document, 2009 (the WDPD). Together, these policies require new development to incorporate sustainable buildings, spaces and landscaping of high-quality design; and to make a positive contribution to the environment and the amenity of its locality.
29. In relation to the living conditions of neighbours, with regard to noise, disturbance and dust nuisance, and highway safety, the Council's concerns mainly stem from the potential effects of the removal of any additional material from the site as part of the proposal.

⁷ Section 7 Conclusions p 11.

30. I have had regard to the site's context, in terms of its proximity to occupiers of adjacent properties, as well as its access arrangements onto the adjacent highway. Nevertheless, there is no evidence before me which alludes to the proposed removal of any additional material from the site. I am satisfied that any effects arising from these matters are historic and given the issue of a stop notice by the Council, are unlikely to resume. On this basis, the development does not conflict with Policy CS10 of the WCS and Policies D9 and D20 of the WDPD in so far as they relate to environmental quality and the amenity of neighbouring users or residents. Additionally, it does not conflict with Policy D14 of the WDPD, regarding safe and convenient access to development.
31. In relation to the matters above, the Council also cite Policy CS4 of the WCS and Policy D8 of the WDPD. However, given the context of the site and detail of the development, these policies are not relevant.
32. I acknowledge that, in upholding the notice and its requirements, there may be some potential effects in relation to the living conditions of neighbours and highway safety. However, these will be temporary in nature and necessary to achieve the purposes of the notice.
33. I have had regard to the appellant's comments that a further benefit of the proposal is that the development may allow the land, which is declared to be in a highly sustainable location, to be utilised beneficially. However, no details of any proposed or potential uses have been advanced in this regard. As such, I attach little weight to this matter.
34. The Council and an interested party highlight that neighbouring properties possess private access rights on Title Deeds which allow pedestrian access and access by barrow through the land, which has been lost due to the excavation and would be obstructed if the appeal were allowed. No evidence has been provided on this matter. Nonetheless, it is a civil matter between the appellant and the neighbour, and not one for my consideration as part of this appeal.
35. I note the appellant's comments regarding the Council's approach and conduct prior to and after issuing the notice and the associated stop notice. However, these matters are not within the remit of my considerations as part of this appeal.

Conclusion on the appeal on ground (a)

36. Accordingly, I conclude that planning permission ought not to be granted for the matters stated in the notice. Therefore, the appeal on ground (a) fails.

The appeal on ground (f)

37. The appeal on ground (f) is that the steps required by the notice to be taken, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters.
38. The starting point for this ground of appeal is to identify the purposes of the notice. Section 173(4) of the 1990 Act as amended sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place, or (b) remedying any injury to amenity which has been caused by the breach.

39. In this case the requirements of the notice are to: a) Back fill the excavated area of Land with appropriate soil material, such that the previous ground levels are reinstated as near as is practicable to the same levels before the breach took place, and b) evenly grade out the surface of the land to form a stable slope. The purpose of the notice must therefore be to remedy the breach of planning control that has occurred by restoring the land to its condition before the breach took place.
40. The appellant advances that Paragraph 5 of the notice should be varied to omit the requirement to back fill the excavated area and instead require the installation of retaining walls as proposed in the submitted scheme. However, having regard to the alleged breach of planning control and the purpose of the notice, the alternative step of installing retaining walls would not remedy the breach and restore the land to its condition before the breach took place. Furthermore, as set out above, I cannot grant planning permission for the installation of retaining walls within the site.
41. Additionally, whilst I note the Council's comments on this matter in their appeal statement, having regard to section 176(1)(b) of the 1990 Act as amended, any variation in this regard would potentially cause injustice to the Council by not allowing them to fully assess and control the detail of the proposed scheme if it was implemented as submitted, including matters of the appearance of the retaining walls and drainage.
42. Therefore, I conclude that the steps required by the notice to be taken do not exceed what is necessary to remedy the breach of planning control but are proportionate given the purpose of the notice. Accordingly, the appeal on ground (f) fails, and I have not varied the notice as suggested.

Conclusion

43. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decision

44. It is directed that the enforcement notice is corrected by:
- in Paragraph 3 of the notice, delete the word 'unauthorised'.
45. Subject to the correction, 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.

F Cullen

INSPECTOR