
Appeal Decisions

Site visit made on 12 April 2023

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 January 2024

Appeal A Ref: APP/Q9495/C/22/3296939

Land lying to the south-west of Birthwaite Road, Birthwaite Ground, Windermere, Cumbria

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Sam Westcott of Lakeland Gardens Ltd against an enforcement notice issued by Lake District National Park Authority.
 - The enforcement notice, numbered E/2021/0038, was issued on 11 March 2022.
 - The breach of planning control as alleged in the notice is, without planning permission,
 - a. The making of a material change of use of the Land from use as garden to use for storage as part of the adjacent landscape contractor's establishment (including vehicles, trailers, equipment, skip, deposit of green waste, and landscaping materials, and
 - b. Associated operational development, of engineering or other operations, consisting of the spreading of materials resulting in an increase in the level of the Land and creating a hardstanding to facilitate the use.
 - The requirements of the notice are:
 - (a) Discontinue the use of the land for storage as part of the adjacent landscape contractor's establishment, and
 - (b) Remove all stored items from the Land, including vehicles, trailers, equipment, skip, deposit of green waste, and landscaping materials and
 - (c) Remove all the materials comprised in the hardstanding and that used to raise the level of the Land down to a level that corresponds with immediately adjacent ground to levels north and south of the land and
 - (d) Spread a 250mm depth layer of topsoil over the Land, and
 - (e) Complete the woodland planting scheme specified in Appendix A of the notice.
 - The period for compliance with the requirements are:

The requirements at 5(a) and 5(b) shall be completed within one week after the notice takes effect.

The requirements at 5(c) shall be completed within two months after the notice takes effect.
 - The requirements at 5(d) and 5(e) shall be completed within twelve months after the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/Q9495/C/22/3299718

Land lying to the south-west of Birthwaite Road, Birthwaite Ground, Windermere, Cumbria

- 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 appeal is made by Mr Sam Westcott of Lakeland Gardens Ltd against an enforcement notice issued by Lake District National Park Authority.
- The enforcement notice, numbered E/2021/0038A, was issued on 14 April 2022.

- The breach of planning control as alleged in the notice is, without planning permission, operational development comprising engineering or other operations to alter the level of the Land, including the spreading of material resulting in an increase in the level of the Land, the installation of a culvert, the formation of a hard surface, the erection of a building and the siting of two tanks on the raised land.
 - The requirements of the notice are:
 - i. Dismantle the building that has been erected on the Land;
 - ii. Break up the floor slab and foundations of the building that has been erected on the Land
 - iii. Remove the two tanks and associated slab from the Land
 - iv. Remove the building materials and demolition spoil arising from steps i., ii. and iii. from the Land
 - v. Remove all material that has been spread and results in an increase in the level of the Land (and any hard surface thereupon) from the Land down to a level that corresponds with the levels shown on the topographic survey carried out by Spatial Data Limited: Site Survey: December 2010; and
 - vi. Remove the culvert pipework and headworks from the Land.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (f) of the Town and Country Planning Act 1990 as amended.
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Summary Decisions: Appeals A and B are both dismissed and the enforcement notices upheld

Procedural matters

1. The appeals relate to a site located on the west side of New Road in Windermere. Outline planning permission was granted in November 2019 for the use of part of a former garden centre site as a Landscape Contractors Establishment, subject to conditions (Authority Ref: 7/2019/5509). Reserved matters were approved the following year. The site to which those permissions relate includes the land now subject to Appeal B but not the land subject to Appeal A.
2. In relation to Appeal B, there is reference in the Statement of Case submitted by the Authority that the development was carried out otherwise than in accordance with Condition 3 imposed upon planning permission 7/2019/5509. Condition 3 required, amongst other things, the submission of full details of the surface water drainage system. I have therefore considered whether the Enforcement Notice numbered E/2021/0038A ought more properly to allege a breach of condition under paragraph (b) of section 171(a)(1) of the 1990 Act. However, on full consideration of the case advanced by the Authority, I am satisfied that it was entitled to allege new operational development under paragraph (a), as set out in the notice.
3. Also in relation to Appeal B, in his Full Statement of Case the appellant makes the point that the Authority did not enquire into or require submission of any topographical data in considering either the Outline or Reserved Matters Planning Applications. Although not expressly stated as such, the implication is that no further planning permission is required for the development alleged in the notice. The point is made in relation to the appellant's appeal on ground (a) but, on my reading, is more properly a point that falls to be considered under ground (c): namely that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control.

4. The appellant has not made an appeal on ground (c) on the Appeal Form. Nonetheless, I will treat the point as if made under ground (c). The Authority responds to the point in its rebuttal of the appeal made on ground (a), and I will take those comments into account. I am therefore satisfied that no injustice would be caused.
5. The appellant also makes reference to the findings of the Ombudsman in respect of a complaint against the Authority concerning its handling of the outline planning application referred to above (Authority Ref: 7/2019/550). The Ombudsman concluded that there was maladministration by the Authority causing injustice. The appellant insinuates that, by the issuing of (in his view) an unsubstantiated Enforcement Notice, the "injustice" has been deliberately transferred by the Authority to him for ulterior purposes. That insinuation is wholly irrelevant to my consideration of Appeal B and I make no comment in relation to it.

Appeal B: The appeal on ground (c)

6. An appeal on this ground is one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.
7. The response of the Authority to the point made by the appellant is that the planning permissions granted do not permit any material change in land levels. The Authority explains that no such operational development was proposed or consented as part of those permissions. The Authority goes on to explain that the facts of the extent of the departures from the approved permission were revealed as part of the Authority's compliance investigation. This found that, as a matter of fact, land raising of up to 1.5m had taken place at the site, which was not detailed on the approved plans. The investigation also found that the building at the site, while matching in terms of position and dimensions that shown in the application, was erected on land that had been raised up, and over the line of the stream crossing the site. The investigation further found that as a matter of fact a concrete hard standing and two large black tanks had also been installed on the land.
8. The meaning of development for the purposes of the 1990 Act is defined at Section 55(1) of that Act as meaning:
...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 any building or other land.
9. The raising of ground levels constitutes an engineering operation on land. It then becomes a question of fact and degree. I can accept that a minor raising of ground levels could potentially be regarded as being *de minimis*. However, in this case the land has been raised up by some 1.5m overall. The topographical survey submitted by the appellant (Drawing No. HT1349.3.103 REV A) shows that in some places the ground has been raised by less than 1.5m. In other places, the drawing shows that ground levels have been raised considerably in excess of 1.5m: at one point, Drawing No. HT1349.3.103 REV A shows that the ground level has been raised by 1.93m. This degree of the raising of ground levels across the site cannot reasonably be considered as *de minimis*. As such, it constitutes development for the purposes of section 55(1) of the 1990 Act.

10. Section 57 of the 1990 Act states that development requires planning permission. As a matter of fact and degree, I consider that the extent to which ground levels have been raised on the site are beyond the scope of the outline and reserved matters permissions that have been granted. The raising of the ground levels is not granted by either of those permissions. The raising of the ground levels therefore requires planning permission in its own right, which has not been forthcoming.
11. The appellant does not contend that the other matters stated in the notice, including the installation of a culvert, the formation of a hard surface, the erection of a building and the siting of two tanks on the raised land, do not require planning permission.
12. I conclude, on the balance of probability, that the matters stated in the notice do constitute a breach of planning control. Accordingly, the appeal on ground (c) fails.

Appeal A: the appeal on ground (a)

13. The ground of appeal 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. The Authority has stated one substantive reason for issuing the enforcement notice, from which the main issues raised are:
 - The effect of the breach of planning control on the character and appearance of the area, and
 - The effect of the breach of planning control on the living conditions of the residents of surrounding residential properties, specifically in relation to visual intrusion, noise disturbance and privacy.

Character and appearance

14. The appeal site is located within a residential area. The character of the area is derived to a large extent from the dwellings on either side of New Road. These dwellings take a variety of form and scale, and are typically set within generous plots containing a variety of trees and shrubs. The area therefore has a residential character but one which is both spacious and verdant.
15. The wider appeal site is surrounded by residential development, within which it is an anomaly in terms of its character and which stems from the historic use of the site. Photographic evidence shows that the area into which the use as a Landscape Contractors Establishment has been extended was an area of woodland that was entirely consistent with the character and appearance of the area, and which would have positively contributed to that character.
16. The extension of the Landscape Contractors Establishment into this area has had a significant impact. The woodland and low-level vegetation has been replaced with a hard surface that is out of keeping with the character of the surrounding residential properties. The area was comparatively empty at the time of my site visit but the photographic evidence provided by local residents shows that this is not always the case. Those photographs show numerous bags full of materials stored on the land, together with a variety of vehicles parked there. The movement and activity associated with the use of this area is entirely out of keeping with the tranquil character of the woodland before the use commenced.

17. I conclude that the breach of planning control unacceptably harms the character and appearance of the area. I therefore conclude that the development is contrary to Policy 02 of the Lake District National Park Local Plan (Local Plan) which, amongst other things, requires that development is of a scale and nature appropriate to the character and function of the location in which it is proposed.

Living conditions

18. The appeal site is surrounded by residential properties. The Authority has not commissioned a noise survey of its own to support the allegation that the use of the land as a Landscape Contractors Establishment detracts from the living conditions enjoyed by the occupiers of surrounding residential properties. The appellant has submitted what appear to be comments on a noise report submitted in support of a previous planning application, but these comments do not specifically address the use of the land subject to the enforcement notice. Consequently, those comments do not greatly assist me.
19. Nevertheless, it is clear from the representations made by local residents that they clearly perceive that the use of the land as a Landscape Contractors Establishment does detract from the living conditions they previously enjoyed before the breach of planning control occurred. There is reference in those representations, including from the occupiers of the retirement home that adjoins the land, to being unable to use their gardens because of the noise from the appeal site. Another resident explains that they have been distressed and have suffered high levels of anxiety when out in the garden because of the noise. Reference is also made to the source of the noise generated by the use of the land as a Landscape Contractors Establishment, including noisy forklift trucks, loud reversing alarms and the loading/unloading of vans, as well as being disturbed at unsocial hours by the arrival of vehicles onto the land.
20. It is apparent that the use of the land as a Landscape Contractors Establishment has dramatically changed the outlook from the residential properties that adjoin it. That outlook is no longer onto tranquil woodland or residential gardens: it is onto a busy contractor's yard, within which the contents and activities are alien to a residential environment. I note the proximity of those properties to the appeal site. In my opinion, the use of the land as a Landscape Contractors Establishment is visually intrusive when viewed from those properties.
21. The proximity of those properties to the appeal site, particularly those on the southern boundary, is also a factor in relation to privacy. There is some screening on the boundary: at the time of my site visit, this was principally in the form of planter boxes plus some trees. But in other places there is only a plastic mesh fence. This affords direct views into the rear elevations and gardens of those properties. The resultant loss of privacy to those properties is unacceptable, both in actual and perceived terms.
22. I conclude that the breach of planning control unacceptably harms the living conditions of the residents of surrounding residential properties, specifically in relation to visual intrusion, noise disturbance and privacy. I therefore conclude that the development is contrary to Policy 06 of the Local Plan which, amongst other things, requires that development does not have an unacceptable impact on the amenity of adjoining residents, due to visual intrusion, overlooking and noise.

Other considerations

23. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that the use of the land as a Landscape Contractors Establishment fails to accord with the development plan. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.
24. The appellant argues that the scale & nature of the use is insignificant when compared to the usage of the authorised adjacent land where the majority of the occupant's activities take place and which was deemed acceptable by the Authority. The appellant estimates that the increase in the area compared with the approved site is 12.1%. But that misses the point. The use as a Landscape Contractors Establishment has been extended into a previously tranquil area of woodland. The harm to both the character/appearance of the area and the living conditions of the occupiers of the adjoining residential properties is unacceptable for that very reason.
25. For the same reason, the decision of the Authority to issue the enforcement notice is not, as the appellant contends, diametrically conflicted with the Outline & Reserved Matters assessments and determinations: the latter were made against a very different set of circumstances with the site at that time being used for the storage/sale of cars.
26. I am mindful that two letters have been received in support of development that has taken place. One of those letters is from the occupier of a property in Rayrigg Gardens, to the north of site, and therefore not directly affected by the extension of the Landscape Contractors Establishment at the western end of the site. The other is from the occupier of a property in Gatesbield, whose property is towards the eastern end of the site and also some distance from the extension of the Landscape Contractors Establishment at the western end of the site. Consequently, whilst these representations do weigh in favour of granting planning permission for the development, I afford them only limited weight. Furthermore, the support they provide is significantly outweighed by the representations objecting to the development from those living closer to, and therefore more directly affected by, the breach of planning control that has occurred.
27. The appellant explains that the area the area over which the appellant has agreed a lease with the landowner differs from that shown on the application site plans accompanying applications 7/2019/5509 and 7/2020/5480. This plan attached to the lease was 20 metres deeper/longer than the location plan that accompanied the planning applications. That is not a planning matter and can have no bearing on my consideration of this appeal.
28. I have considered whether the imposition of suitably worded conditions could overcome the harms that I have identified above and make the development acceptable in planning terms. However, in my view the harms identified are intrinsic to breach of planning control that has occurred and could not be overcome by the imposition of conditions.

Appeal B: the appeal on ground (a)

29. The Authority has stated one substantive reason for issuing the enforcement notice, from which the main issues raised us the effect of the breach of planning control on the living conditions of the residents of surrounding residential properties, specifically in relation to visual intrusion, noise disturbance and privacy.
30. The same issues arise in relation to this appeal as with the Appeal A, in this case primarily in relation to the residential property known as Brackenthwaite. The representation from the occupiers of that property sets out the impacts on their property in considerable detail, supported by photographic evidence. It is not necessary to rehearse all the points made in that representation: it is sufficient to record here that the breach of planning control that has occurred unacceptably harms the enjoyment of their property for essentially the same reasons that I record in relation to Appeal A.
31. The difference in relation to this appeal is that this part of the site has the benefit of planning permission for use of the land as a Landscape Contractors Establishment. The activities that give rise to those unacceptable impacts could therefore lawfully take place had the planning permissions been implemented in accordance with the terms of those permissions, including compliance with any conditions imposed on those permissions.
32. There is, however, no doubt in my mind that the raising of the ground levels has had a significant, and indeed fundamental, effect on way in which those activities are experienced by the occupiers of Brackenthwaite. The occupiers of that property have described how the raising of the ground levels has increased the visual intrusion from the building and has obliged them to screen two of the windows at the back of their house to provide them with more privacy. The raising of the ground levels has also increased their exposure to noise disturbance. Indeed, on my reading of their representation, the raising of the ground levels has resulted in the activity on the site generally dominating the rear of their property, to the extent that they are no longer able to enjoy the amenity resource provided by that space.
33. I conclude that the breach of planning control unacceptably harms the living conditions of the residents of surrounding residential properties, specifically in relation to visual intrusion, noise disturbance and privacy. I therefore conclude that the development is contrary to Policy 06 of the Local Plan.

Other considerations

34. The appellant explains that the watercourse had been previously culverted, albeit the Authority disputes the extent to which it was culverted. The appellant also contends that there is a minimal risk of increased levels of flood risk upstream. That may well be the case but the reason for issuing the enforcement notice refers to a lack evidence to show that the culverting of the watercourse and the associated development will not have an adverse effect on surface water drainage. The very limited evidence provided by the appellant does not discharge that requirement. Furthermore, there is evidence in some of the representations from local residents to suggest that the raising of the ground levels and/or the culverting of the watercourse has resulted in localised flooding whereas this did not occur previously.

35. The appellant considers that the loss of the building, and the scarce financial resources used to construct it, will have a severe impact on the financial viability of Lakeland Gardens Ltd and could potentially endanger its future sustainability. However, the appellant has not provided any evidence to support that contention or what the implications of that might be for the local economy. I am therefore unable to factor that into the overall planning balance.
36. The harms that I have identified are again intrinsic to breach of planning control that has occurred and could not be overcome by the imposition of conditions.

Appeal A and Appeal B: conclusion on the appeals on ground (a)

37. For the reasons set out above, the breaches of planning control alleged in the notices are contrary to the development plan. Having weighed the factors in support of the development, I am not persuaded that there are any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan. Accordingly, I conclude that planning permission ought not to be granted for the matters stated in the notices.

Appeal B: the appeal on ground (f)

38. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the Town and Country Planning Act 1990 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 notice include dismantling the building that has been erected on the Land, removing all material that has been spread and results in an increase in the level of the Land (and any hard surface thereupon) and removing the culvert pipework and headworks from the Land. The purpose of the notice must therefore be to remedy the breach of planning control that has occurred.
40. The appellant explains that when Lakeland Gardens Ltd entered into a lease with the Landlord in October 2020 it is entirely plausible that the landform had been altered in the previous decade. However, there is no evidence before me to demonstrate that. Indeed, the Authority consider this unlikely, stating that prior to the commencement of the development the land at the rear of the site was overgrown and that there was no evidence of access by vehicles between 2010 and 2020, not least of sufficient size and numbers to import material in such quantities to affect the level of the land. The view of the Authority in that respect is reinforced by the photographic evidence that is before me.
41. It follows that the 2010 topographical survey is the most reliable baseline information that is available in relation to ground levels prior to the breach of planning control taking place. The requirement of the notice to return the land to the ground levels shown in that topographical survey is not excessive. Accordingly, the appeal on ground (f) fails.

Conclusion

42. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notices and refuse to grant planning permission on the applications deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decisions

Appeal A Ref: APP/Q9495/C/22/3296939

43. 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.

Appeal B Ref: APP/Q9495/C/22/3299718

44. 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.

Paul Freer
INSPECTOR