



Appeal Decisions

Hearing Held on 26 April 2024

Site visits made on 5 February 2024 and 26 April 2024

by E Griffin LLB Hons

an Inspector appointed by the Secretary of State

Decision date: 6th June 2024

Appeal A Ref: APP/M0655/C/23/3320558

Appeal B Ref: APP/M0655/C/23/3320560

Alcrest, Mill Avenue, Great Sankey, Warrington WA5 3HL

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Brian Hale and Appeal B is made by Susan Hale against an enforcement notice issued by Warrington Council.
 - The enforcement notice was issued on 7 March 2023
 - The breach of planning control as alleged in the notice is without planning permission the insertion of windows into the roof space of the southern side elevation of the dwelling house and engineering operations to narrow the channel and alter the gradient and profile of Whittle Brook.
 - The requirements of the notice are
 - a) Fit the south facing roof space windows of the dwelling with obscure glazing to a minimum obscurity level 4. Retain obscure glazing to an obscurity level 4 at all times in these windows, unless use of alternative glazing is first approved in writing with the local planning authority.
 - b) Reinstate the channel width of Whittle Brook to its previous width prior to the commencement of the works that have resulted in its narrowing by removing all imported material (including retaining wall and flagstones) within the land edge blue on the plan attached at Appendix A to this notice
 - c) Reinstate the gradient of the embankment within the land edge blue on the plan attached at Appendix A to this notice, to a gradient contiguous with the gradient of the embankment immediately either side of the land edged blue, so as to ensure consistent gradient
 - The period for compliance with the requirements is 3 months.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 (the Act) as amended. Since an appeal has been made under Ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
 - Appeal B is proceeding on the grounds set out in section 174(2)(c), (f) and (g). Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decisions

1. It is directed that the enforcement notice is corrected by:
 - i) Deleting the words "the insertion of windows into the roof space of the southern side elevation of the dwelling house and" from the allegation
 - ii) Deleting requirements a) and c) from paragraph 5 of the notice.

- iii) Deleting "*3 months*" as the period for compliance in the enforcement notice and replacing it with "*5 months*."
2. Subject to these corrections and variations, Appeal A and Appeal B are 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

Preliminary Matters

3. Two site visits were carried out as the appeal was originally to be determined under Written Representation procedure but was subsequently changed to a hearing. A hearing was required to discuss the notice and clarify the grounds of appeal. A second site visit was conducted during the hearing.
4. Since the appeal was made, a revised National Planning Policy Framework (the Framework) has been published in December 2023. The document has not raised any new matters which are determinative to this appeal.
5. The Warrington Local Plan 2021/22-2038/39 (the Local Plan) was adopted on 4 December 2023 after the appeal was lodged. With regard to flood risk, Policy ENV2 of the Local Plan supersedes Policy QE4 of the Warrington Local Plan Core Strategy. The Council provided details of the policy in advance of the hearing and the appellants were given an opportunity to comment upon that policy.
6. The appellants, who are unrepresented, indicated on their appeal form that they were pursuing grounds (a) (c) (f) and (g). However, from the evidence submitted, the appellants are unclear about the difference between grounds (b) and (c) and I will therefore address grounds (b) and (c) together.

The Notice

7. The notice is split into two separate elements. The first part of the allegation relates to velux windows in the appeal property and the absence of obscure glazing. However, the appellants did fit obscure film to the windows after the service of the notice and the Council is satisfied that this step is sufficient to address actual or perceived loss of privacy. I share the Council's view that the deletion of these matters does not cause injustice to the appellant or the local authority and I will delete references to the windows from the allegation and the requirements.
8. Whilst the occupiers of No 32 and the Council refer to the dwelling itself being unauthorised, that is not part of the allegation in the notice. Whether or not enforcement action is to be taken in respect of the dwelling is a matter for the Council, subject to the appropriate time limits. The planning status of the dwelling itself is not altered by the deletions.

Grounds (b) and (c) - Appeals A and B

9. An appeal under ground (c) is that the matter alleged does not constitute a breach of planning control and an appeal under ground (b) is that the breach of planning control has not occurred as a matter of fact.
10. The remaining allegation relate to works carried out between the side of the brook and the appeal dwelling. These works comprised the importation of material to raise levels and create a terraced area between the garage and the

brook. This has narrowed the channel of the brook by altering the gradient of part of Whittle Brook which is within the appellant's riparian ownership.

11. The appellants provided responses to a Planning Contravention Notice (PCN) prior to the service of the notice. They then provided an update to the same PCN, rather than a statement as part of the appeal. In those responses, the appellants set out that they carried out works on their property as they were concerned about erosion next to Whittle Brook. However, in providing an explanation, the appellants accept that work including the importation of topsoil and flag walling was carried out. They state that the work was not authorised and that they did not obtain planning permission for any of those works. The works included building up the sloping edge to the brook and creating a raised terraced area with a supporting wall.
12. However, the appellants dispute that they have narrowed the channel width. During discussions at the second site visit as part of the hearing, it became apparent that the narrowing element relates to a spatial element of the development rather than that the base of the channel has been narrowed as a result of works. The Environment Agency attended the site visit and confirmed that the works reduced the channel capacity within the brook i.e. the channel was narrowed. The Council supports the Environment Agency's view that the bulk and form of the works carried out reduce the area into which water would flow thereby increasing the risk of flooding.
13. Section 57 of the Act states that planning permission is required for the carrying out of any development of land. Section 55 of the Act includes in the definition of the word 'development' the carrying out of 'building, engineering, mining or other operations in, on, over or under land.'
14. The nature and extent of the works which includes the building up of the bank and importing materials to create a hard surfaced terrace with a flank wall is, in my view, an engineering operation which constitutes development. That development has taken place and the appellants do not dispute carrying out works which do not have planning permission. The appeals under grounds (b) and (c) therefore fail.

An appeal under ground (a) and the Deemed Planning Application (the DPA)- Appeal A

15. The terms of the DPA directly derive from the allegation. Planning permission is therefore sought for the engineering operations at the appeal site.

Main Issue

16. The main issue is the effect of the development on flood risk.

Reasons

17. Whittle Brook runs along the side and rear of the appeal site. The appellants constructed a garage which is close to the boundary with the brook in 2014 and constructed the appeal dwelling at a later date. The development is located between the side garage and the brook. The Council is concerned about flood risk due to the proximity of the appeal site to the brook. Whilst the Council had alleged that the appeal site was in Flood Zone 3. It was agreed during discussions at the hearing that part of the appeal site fell within Flood Zone 2 and part fell within Flood Zone 3. Whilst the appellant believes that the

development may not be within those higher category flood zones in the future, I have to assess the development based upon the existing designation.

18. Policy ENV2 of the Local Plan states that a site specific Flood Risk Assessment (FRA) is required for all proposals for new development including minor development in Flood Zones 2 and 3. It also states that "No development will take place within 8m of the top of the bank of a watercourse either culverted or open, unless such approach is supported by the Environment Agency and Warrington Borough Council". The need for a site specific flood risk assessment for all development in Flood Zones 2 and 3 is also set out in the National Planning Policy Framework (the Framework).¹ In the absence of a FRA, there is no evidence to show how the development's location and design addresses the risk of flooding. The development is located next to a watercourse.
19. Whilst the appellant states that his property has not flooded since his occupation, flood risk policies are in place to ensure that development within sites which are in higher risk categories are protected. The addition of a physical structure with infilling of the slope to create a level surface has reduced the area into which water can flow thereby increasing flood risk both to the appeal site and to the wider area.
20. I do therefore find that the development is in conflict with Policy ENV2 of the Local Plan and Paragraph 173 of the Framework which both require development in Flood Zones 2 and 3 to be supported by an FRA. In the absence of an FRA, it has not been demonstrated that the development is located and designed to ensure that flood risk is acceptable in planning terms.
21. The appellant indicated in his PCN responses that he carried out the work as he wished to prevent further erosion, silting and flooding. No other alternative options were considered by the appellant and it is not clear why a flat terrace arrangement with a wall was required to address the appellant's concerns. The appellant refers to being advised by the Environment Agency years ago to use natural materials for any work and whilst that is not documented, it is not what has occurred. None of the work was authorised by either the Council or the Environment Agency.
22. The appellant wishes to retain the area so that there is parking for up to 4 cars at the appeal site. He considers that the loss of the area for parking will increase parking issues on the road. Mrs Hale also has mobility issues. However, I noted that there is an existing garage and a generous drive with space for parking as well as off-site parking on Mill Avenue itself. Whilst there would be less parking space at the appeal site, there would still be onsite parking for Mrs Hale. The parking matters and personal circumstances raised by the appellant do not outweigh my findings with regard to flood risk in the absence of an FRA.
23. The development is contrary to the development plan taken as a whole. There are no other material considerations that would indicate that the development should be determined other than in accordance with the development plan. The appeal under ground (a) fails.

¹ Footnote paragraph 59 to Paragraph 173 of the Framework

An appeal under ground (f) - Appeal A and B

24. Section 174(2)(f) of the Act states that an appeal may be made on the ground 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 or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
25. The scope of the requirements is limited by Section 173(4)(a) and (b) of the Act. Those purposes are—
- (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, 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.
26. There are two requirements which relate to the development. The first requirement states *"Reinstate the channel width of Whittle Brook to its previous width prior to the commencement of the works that have resulted in its narrowing by removing all imported material including retaining wall and flagstones within the land edge blue on the plan attached at Appendix A to this notice."*
27. The notice states that the purpose of the notice is to remedy the breach in seeking the removal of the development. However, at the second site visit, the Council indicated that based upon a scaling of the land edged blue on the enforcement plan, a modest area of the terrace would remain to the side of the garage together with the supporting material below that area that existed before the breach took place. The removal of the rest of the imported materials is covered by the first requirement.
28. The appellants have not indicated in their evidence why that requirement is excessive or suggested an alternative. At the hearing, the appellants did suggest the use of pumps to assist with water flow as an alternative to removal. However, the appellants have not provided any information as to how this would be achieved or established what consents would be required in order to install pumps. I therefore do not consider that the first requirement is excessive.
29. The second requirement is to *"reinstate the gradient of the embankment within the land edge blue on the plan attached at Appendix A to this notice to a gradient contiguous with the gradient of the embankment immediately either side of the land edge blue so as to ensure consistent gradient."*
30. The wording of this requirement lacks clarity and the appellants have interpreted this wording as requiring them to reinstate the bank to the other side of the brook which is not within their riparian ownership. The Council explained that the wording is intended to ensure that the embankment within the appeal site is restored to the same gradient as the bank on the opposite side of the brook. However, there is limited evidence that the gradients were the same before the breach took place. Whilst the line of the brook is clearly shown on a photograph taken prior to any development including the appeal property taking place at the appeal site, there is no evidence to show that

reflects the appearance of the brook prior to the development taking place. The requirements cannot seek improvements.

31. There was discussion between the parties about whether reliance upon photographs would assist in formulating any alternatively worded requirement. However, there was no agreement between the parties in terms of the gradient that needed to be achieved. The first requirement will ensure that the physical works that have been carried out which included the importation of materials will be removed within the identified area. The strip of terrace adjacent to the garage is not within the identified area.
32. Having a second requirement is confusing when the first requirement will remove almost all of the development apart from a modest terraced area to the side of the garage. The Council wishes the two banks to mirror each other but in the absence of evidence or agreement to indicate that is what existed before the breach took place, such a requirement is excessive irrespective of the purpose of the breach. The wording of the requirement also lacks clarity. A requirement to carry out further remedial works is outside of the scope of the notice having regard to Section 174 of the Act and the purposes of the notice. The appeal under ground (f) succeeds to the extent that requirement (c) will be deleted.

An appeal under ground (g) – Appeals A and B

33. An appeal under ground (g) is that the period for compliance with the notice is too short. The current period for compliance is 3 months. The Environment Agency has stated that a Flood Risk Activity Permit (the Permit) would be required for works to be undertaken within Whittle Brook. The Council accepted that the compliance period of 3 months allowed only for the works themselves and did not include any time to enable the Permit to be obtained from the Environment Agency. I will therefore vary the period of compliance to 5 months which I consider would allow adequate time for a Permit to be applied for and the works to be carried out. The appeal (g) succeeds to that extent.

Conclusions

Appeal A

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

Appeal B

35. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and variations.

E Griffin

INSPECTOR

APPEARANCES

APPELLANTS:

Brian Hale

Susan Hale

FOR THE LOCAL PLANNING AUTHORITY:

Sandra Beckett

Senior Planning Enforcement Officer

Jason Lewis

Principal Planning Enforcement Officer

INTERESTED PARTIES:

Graham Todd

Environment Agency

Stephen Wielebski

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Margaret Meli

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Frank Meli

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DOCUMENT SUBMITTED AT THE HEARING

Flood Map for Planning dated the 22 April 2024