



Appeal Decision

Inquiry held on 16 and 17 July 2024

Site visit made on 17 July 2024

by J M Tweddle BSc(Hons) MSc(Dist) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11th December 2024

Appeal Ref: APP/A0665/C/23/3314256

Land at Kerry, 36 Hooton Road, Willaston, Neston, Cheshire CH64 1SJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
- The appeal is made by Mr Scott Penny against an enforcement notice issued by Cheshire West and Chester Council.
- The notice was issued on 7 December 2022.
- The breach of planning control as alleged in the notice is, without planning permission construction of earthmounds, the hardstanding (parking area) near to the dwelling along with the hardstanding track adjacent to the parking area (which runs North to South), the new track to the rear of 46-54 Hooton Road and the creation of a pond to the south of the property known as Kerry and of a larger pond for a wildlife area to the most southern field ["the Unauthorised Development"].
- The requirements of the notice are to:
 - (i) Fully remove the earthmounds, the hardstanding (parking area) near to the dwelling along with the hardstanding track adjacent to the parking area (which runs North to South), and remove the new track to the rear of 46-54 Hooton Road, remove all resulting materials away from the Land and restore the Land to its previous condition before the unauthorised development occurred.
 - (ii) Infill the pond to the south of the property known as Kerry and infill the larger pond for a wildlife area to the most southern field (with clean materials) and return to its previous condition before the unauthorised development occurred.
- The period for compliance with the requirements is three calendar months.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (d), (f), and (g) of the Town and Country Planning Act 1990 (as amended).

Formal Decision

1. It is directed that the enforcement notice is corrected by:
 - In Sections 3 and 5 of the notice, deletion of the word 'earthmounds' and replacing this with the words 'earth mound'.
2. Subject to this correction, the appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

3. At the inquiry, all evidence was given under oath or affirmation.
4. Despite various references throughout the appellant's submission as to the acceptability of the proposal or claimed benefits, an appeal on ground (a) has not been made. Therefore, planning merits are of no consequence to my determination of the appeal.

5. Similarly, the appellant has provided significant commentary in relation to whether it was expedient for the Local Planning Authority (LPA) to issue the enforcement notice in the first place. Nevertheless, it is well established by the courts¹ that any challenge as to whether it was expedient for a LPA to issue an enforcement notice must be pursued by way of judicial review. Therefore, I have no jurisdiction in this regard and this matter has no bearing on my decision.
6. The alleged 'earthmounds' are in fact a single continuous area of raised earth. Therefore, this is more accurately described as an 'earth mound', singular. At the inquiry, the parties agreed that the notice could be corrected to reflect this, without causing injustice to any party. I agree, and I shall therefore correct the notice accordingly by exercising the powers available to me under s176(1) of the Act.

The appeal on Ground (c)

7. The appeal on ground (c) is made on the basis that the matters stated in the notice, if they occurred, do not constitute a breach of planning control. In pursuing the ground (c) appeal, the appellant considers that the matters do not constitute development or alternatively that they are permitted development.
8. Therefore, to succeed on this ground the appeal would need to demonstrate that the alleged breach did not involve an act of development, or that planning permission was not required. This is one of the legal grounds of appeal, where the onus is on the appellant to make out their case and the relevant test of the evidence is made on the balance of probabilities.
9. The appeal site comprises a residential property known as 'Kerry', along with surrounding agricultural land. The property is a form of backland development, having been constructed to the rear of residential properties fronting Hooton Road. The land is generally flat with some occasional slight undulations. It is made up of several small fields that are bound by mature vegetation. The southernmost field is intersected by a public right of way which runs from west to east across the land.
10. Section 55(1) of the Town and Country Planning Act 1990 (the Act) sets out the meaning of 'development' for the purposes of the Act. This means the carrying out of building, engineering, mining or other operations in, on, over or under the land, or the making of any material change in the use of any buildings or other land.
11. Section 55(2)(d) of the Act states that the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such, shall not involve development of the land. However, this is of little assistance to the appellant's case because the alleged breach of planning control does not relate to the use of the land but is instead targeting alleged operational development, which the LPA considers to be engineering or other operations.
12. In *Fayrewood Fish Farms Ltd v Secretary of State for the Environment* [1984] JPL 267 it was held that the term 'engineering operations' should be given its ordinary meaning in the English language. It must mean operations of the kind usually undertaken by engineers, i.e., operations calling for the skills of an

¹ *Britannia Assets v SSCLG & Medway Council* [2011] EWHC 1908(Admin)

engineer. However, this does not mean that an engineer must actually be engaged on the project, simply that it is the kind of operation on which an engineer could be employed, or which would be within their purview.

13. Furthermore, engineering operations involve works with some element of pre-planning, which would generally, but not always, be supervised by a person with engineering knowledge. Therefore, the appellant or person who carried out the works does not have to be an engineer or possess engineering knowledge for the works to be considered as an engineering operation.
14. In considering whether the matters alleged in this case would amount to an engineering or other operation, I shall also have regard to the well-established principle that operations to maintain, improve, extend and/or alter an existing structure may be so significant, as a matter of fact and degree, that the whole of what results is at risk of enforcement action.
15. In this case, the alleged development includes:
 - a pond located to the immediate south of the dwellinghouse known as Kerry (Pond 1);
 - a larger pond located in the southernmost field and extending along the eastern and southern boundary of the field (Pond 2);
 - an area of raised earth located in the southernmost field, extending along the southern and western boundary of the field, and to the rear of properties on Bennet Close (the earth mound);
 - an area of hardstanding to the immediate west of the dwellinghouse, adjacent to the access from Hooton Road, and extending in a westerly direction (the area of hardstanding);
 - a single width track leading from Hooton Road, along the side of No. 54 Hooton Road, into the field and to the rear of No.'s 54 to 46 Hooton Road (Track 1); and,
 - a single width track leading from the area of hardstanding adjacent to the dwellinghouse in a southerly direction across the field and terminating at the public right of way that crosses the land (Track 2).

Pond 1

16. The appellant claims this is a historic pond that has been in existence for in excess of 40 years, and which he recalls from visits to the property in the early 1980s. However, he told the inquiry that when he purchased the property in September 2021, pond 1 was dried up and overgrown with vegetation. Furthermore, aerial imagery from October 2010, June 2016, and June 2020² appears to show dry land with no pond at this location.
17. At the inquiry the appellant confirmed that shortly after he purchased the property, in September 2021, he carried out works to pond 1 by clearing it out and removing silt. He accepts that these works involved the excavation of land, resulting in an increase in the size of the pond, expanding it by about five times. This is apparent from the March 2022 aerial imagery, which shows a sizable pond at this location.

² CD2.7 & CD2.11

18. During cross examination, the appellant stated that the works to pond 1 were carried out using a JCB digger with bucket, a dumper, and vans. This involved a significant amount of excavation with the associated spoil later transported across the land to create part of the earth mound. In addition, land drains and soakaways were installed to direct water from the surrounding land into the pond. Two people were engaged in these works over a period of approximately five days.
19. This would have involved a degree of pre-planning. Whilst the works do not appear to have been supervised by a qualified engineer, the excavation of such a significant quantity of earth, and the laying and formation of land drains, are operations that would ordinarily be overseen by someone with engineering knowledge. Therefore, in my judgement, these works constitute an engineering operation and are therefore development for the purposes of the Act.

Pond 2

20. There is no dispute between the parties that, at the time the appellant purchased the property, a pond existed in the southeast corner of the southernmost field. The appellant accepts that this was a smaller pond which straddled the eastern and southern boundaries of the field, into land beyond the appellant's ownership and control.
21. In late summer 2022, around August time, the appellant started work to enlarge pond 2³. This involved clearing out the pond by removing soil and silt. The appellant told the inquiry how these works had increased the size of the pond by approximately five to six times its size. This had involved a digger, a dumper, vans, and a tractor and trailer to excavate the land and transport the spoil across the land to form part of the earth mound. Following these earthworks, water was artificially pumped into the pond to fill it up. In all, this took a team of four people over a period of 14 days to complete.
22. These works were similar to those undertaken in relation to pond 1, albeit on a larger scale and requiring greater resources and labour. Consequently, these works were sizable engineering operations that would have involved an element of pre-planning and oversight to co-ordinate the operations and the required machinery and personnel. Therefore, I find, as a matter of fact and degree that the works do constitute an engineering operation, and thereby an act of development as defined by the Act.

The earth mound

23. The earth mound is primarily created from the resultant spoil material from the excavation of pond 1 and pond 2. Tree roots/stumps and parts of hedgerows, that the appellant removed shortly after they purchased the property, are also buried within the earth mound.
24. During my visit I saw that the earth mound is of a substantial size and scale, extending along almost all of the southern and western boundaries of the field, and rising to a height of approximately 5 to 6 feet. The mound appears to have been carefully shaped along its front face and incorporates ramps at either end to enable access. Despite its significant scale, it has been landscaped with grass and domestic scale plants, shrubs, wildflowers and small trees, creating a residential garden-like appearance.

³ CD2.15, Paragraph 41.

25. The appellant confirmed that the earth mound took a team of five people approximately eight days, intermittently over a period of one year, to complete. This involved the use of a digger, a dumper, a tractor and trailer, and two vans. These were substantial earth works involving a variety of plant machinery and equipment. Accordingly, I find that this would have likely involved an element of pre-planning, and, while an engineer did not supervise the works, such operations would typically be overseen by someone with sufficient engineering knowledge.
26. For these reasons, I consider the works undertaken to create the earth mound to amount to an engineering operation that falls within the definition of development provided by the Act.

The area of hardstanding

27. The area of hardstanding was created to facilitate the turning and parking of vehicles, including trucks associated with the appellant's business activities. The hardstanding is located to the immediate west of the property and extends in a westerly direction. The appellant accepts that at least 50% of the area covered by the hardstanding extends over land that was an agricultural field at the time the works occurred, and which was separated from the dwellinghouse by a mature, treelined, hedgerow. This hedgerow followed the alignment of the western boundary of the main access to the property from Hooton Road and is clearly visible in the aerial imagery dated June 2016⁴ and June 2020⁵.
28. To create the area of hardstanding, in September 2021, the appellant removed the field boundary hedgerow and cut down 35 large conifer trees, digging out their stumps and piling them up in the corner of the southernmost field. A mix of crushed brick and road planings were then brought onto site using a truck. The area was then prepared by scraping back the turf and topsoil, and the ground subsequently levelled with a digger. The inquiry heard how the materials were then spread over the ground using a JCB digger to create the surface of the area of hardstanding. It took approximately four days to complete.
29. The area of hardstanding is particularly large and has involved considerable quantities of surface material having been brought onto the appeal site. Therefore, the works involved in constructing the area of hardstanding have been extensive. On this basis, I find that some pre-planning was probably required and undertaken before the works were carried out. There is no evidence to suggest that these works were supervised by anyone with engineering knowledge, but the laying of a hard surface to facilitate the turning and parking of vehicles would generally be so supervised.
30. Consequently, I find that these works constitute an engineering operation and are therefore a form of development as defined by the Act.

Track 1

31. Track 1 leads from a field access off Hooton Road, between No.'s 54 and 56 Hooton Road, and leads into the field and to the rear of No.'s 54 to 46 Hooton Road. The inquiry heard how there was a historic track at this location, but that by the 1990s it had fallen into disuse and was overgrown with grass. At the

⁴ CD2.11, Picture 2

⁵ CD2.7

time the appellant purchased the property it was not a surfaced track. This is evident from the various photographic evidence⁶ which shows that prior to September 2021, this 'track' had the appearance of a green field.

32. The appellant's own evidence to the inquiry confirms that, in the months following his purchase of the property, he scraped back the surface of the ground and infilled this with quantities of crushed brick that was then compacted to form a hard surfaced track. This was carried out with a digger over a period of approximately one week.
33. Photographic evidence⁷ documents the progress of these groundworks and shows the land being dug out, and a significant change in land levels, prior to the dumping of large quantities of aggregate. On this basis, the ground works were significant and resulted in the creation of a new hard surfaced track. The extent and nature of the works is such that there would have been some pre-planning to organise materials, machinery and labour, and to coordinate the subsequent groundworks. Furthermore, operations of this type and scale would usually be overseen by a person with engineering knowledge.
34. Accordingly, I find that the works carried out to create Track 1 were in fact engineering operations and therefore operational development as defined by the Act.

Track 2

35. The appellant claims that track 2 was a pre-existing track leading in a southerly direction over the back field and providing a vehicular route to the southernmost field. In this regard I am directed to photographic evidence and an aerial image⁸ that the appellant claims to show the extent of the track prior to the works being undertaken. Therefore, it is argued that the works to track 2 were simply maintenance of a pre-existing track.
36. However, under cross-examination the appellant was unable to point out the track in the photograph or aerial image. Furthermore, the appellant's own witness, Mr Sewell, told the inquiry that this historic loose-brick track had fallen into disuse and became overgrown with grass in the 2010s. In this regard, the evidence does not support the appellant's assertions.
37. The appellant described how, over a period of approximately three days, he imported a quantity of road planings onto the site with a tractor and trailer. He told the inquiry how the works were undertaken in a similar way to those carried out to develop track 1, scraping back the topsoil and then dumping and spreading the material to form a finished hard surface. Pre-existing hardcore was found under the grass during these groundworks and was subsequently excavated and replaced with the road planings.
38. In my judgement, these works far exceed the maintenance of a historic track, and instead amount to the wholesale development of a new hard surface track. For similar reasons to my conclusion in relation to track 1, I find that the extent and nature of the works have been extensive, and therefore would have likely required some pre-planning. Furthermore, operations to provide a surface to

⁶ CD2.7 & Appendix 2 of the Knights Statement on behalf of Local Residents

⁷ Appendix 2 of the Knights Statement on behalf of Local Residents

⁸ CD2.15, Exhibit SP5

facilitate the movement of vehicles over land, are typical of the kind that would ordinarily be overseen by a qualified engineer.

39. For all these reasons, I find that the works were an engineering operation, and thereby a type of operational development as defined by the Act.

Permitted development

40. In the event that I consider the works amount to an act of development, the appellant suggests that these operations would be 'permitted development' pursuant to the provisions of Schedule 2, Part 1, Class E and F, or Schedule 2, Part 6, Class A or B of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO).
41. Schedule 2, Part 1 of the GPDO allows for certain types of development within the curtilage of a dwellinghouse. Whether something falls within the curtilage is a question of fact and degree and is primarily a matter for the decision-maker⁹ through the application of their planning judgement.
42. The courts have determined that for land to be said to fall within the curtilage of a building, it must be intimately associated with the building to support the conclusion that it forms part and parcel of the building¹⁰. Other considerations include the physical layout of the land in relation to the building, their ownership (past and present), and their use or function (past and present).
43. The dwellinghouse and the surrounding land are all in the same ownership and this appears to have been the case for some time as part of a small holding with the dwellinghouse at its centre.
44. In relation to physical layout, the two ponds are located some distance from the dwellinghouse and prior to the operations carried out by the appellant they were separated from the dwellinghouse by a mature hedgerow and trees. These physical enclosures were described by the appellant as the 'boundary line' and were removed shortly after he purchased the property to facilitate the engineering operations that have occurred.
45. The use and function of the site prior to the appellant taking ownership and removing the boundary features appears to be that of a small, enclosed garden area, with the surrounding fields forming separate land with no evidence of any functional relationship with the dwellinghouse. Indeed, the site's planning history supports this view, including an application made by the appellant in 2021 which sought permission to include the adjacent paddock land within the garden area and to install a tennis court. Plans and drawings accompanying this, and other historic planning applications, show a small area of enclosed land surrounding the dwellinghouse. This is labelled as 'existing garden' and excludes the surrounding fields that, prior to the development occurring, were separated by strong boundary features. Both of the ponds, tracks and the majority of the area of hardstanding is located in these surrounding fields, beyond the formerly enclosed garden area.
46. For these reasons, I am not persuaded that the land on which the operational development has occurred is intimately associated with the dwellinghouse. I acknowledge that part of the area of hardstanding may fall within the curtilage

⁹ Burford v SSCLG & Test Valley BC [2017] EWHC 537 Admin

¹⁰ Methuen-Campbell v Walters [1979] 1 QB 525

of the dwellinghouse. However, this is part of a larger operation that was carried out as a single act of development, and which clearly extends into land beyond the curtilage of the dwellinghouse. Therefore, as a matter of fact and degree, the operational development has not exclusively occurred within the curtilage of a dwellinghouse.

47. As a consequence, the appellant cannot rely on the permitted development rights set out in Schedule 2, Part 1 of the GPDO.
48. Schedule 2, Part 6, Classes A and B of the GPDO permit certain types of agricultural development which are reasonably necessary for the purposes of agriculture. This can include engineering operations and the provision of hard standing. In some cases, development is only permitted by pursuing an application for prior approval.
49. Nevertheless, the appellant has provided no evidence to demonstrate that the operations are in fact 'reasonably necessary for the purposes of agriculture' or that the development would satisfy the relevant conditions and limitations as set out in the GPDO. Furthermore, the appellant confirmed that an application for prior approval had not been made in relation to the operations. Accordingly, it has not been demonstrated that the development would qualify as permitted development.

Conclusion on ground (c)

50. Bringing all these points together, I conclude, on the balance of probabilities, that the matters alleged do in fact amount to development which requires but does not have planning permission. Furthermore, it has not been demonstrated, on the balance of probability, that the development is permitted development.
51. Therefore, a breach of planning control has occurred and so the ground (c) appeal must fail.

The appeal on ground (d)

52. The appeal on ground (d) is that, at the date that the notice was issued, no enforcement action could be taken in respect of any breach of planning control constituted by the matters.
53. Section 171B(1) of the Act states that no enforcement action may be taken in respect of engineering or other operations in, on, over or under land after the end of the period of four years beginning with the date on which the operations were substantially completed. In this case, for any of the operations to be 'immune' from enforcement action, they would need to have been substantially completed by 7 December 2018, four years before the enforcement notice was issued.
54. At the inquiry the parties were in agreement that the 4 year period applies in this case.
55. The appellant's case for the ground (d) appeal essentially rehearses the arguments put forward for the ground (c) appeal, in that they consider no breach of planning control has occurred. Nevertheless, in light of my conclusion on the ground (c) appeal, I have found that the appellant's actions in this case

do amount to a breach of planning control, comprising six distinct forms of operational development.

56. The appellant has confirmed that the development commenced no earlier than September 2021, around the time he was purchasing the property, or shortly after this time. All of the evidence supports this and, therefore, the development is not immune from enforcement action.

57. Consequently, the appeal under ground (d) cannot succeed.

The appeal on ground (f)

58. This ground of appeal is that the requirements of the notice exceed what is necessary to remedy any breach of planning control.

59. 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 (the 1990 Act) 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 making the development comply with the terms of any planning permission, 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.

60. In this case, the objective of the notice is to remove the operational development and to restore the land to its previous condition before the breach of planning control took place. It follows that the purpose of the notice is to remedy the breach of planning control that has occurred.

61. The appellant is of the view that the requirements of the notice are excessive and disproportionate. They suggest that the removal of the ponds would be unworkable and would inappropriately harm wildlife and protected species. However, there is no substantive evidence before me to confirm the presence of any protected species or that the ponds provide a habitat that would be protected by legislation. Moreover, these concerns go to the planning merits of the case. As set out above, in the absence of an appeal on ground (a), the planning merits of the case are not before me for consideration.

62. As alternative lesser steps, the appellant suggests that the earth mound could be lowered by 2 feet in height, the tracks merely scraped back to remove the hardcore, and the area of hard standing also scraped back.

63. However, if I were to accept the appellant's suggested solution this would result in the retention of part of the development, tantamount to granting planning permission, and it would not remedy the breach of planning control or restore the land to its previous condition. Consequently, these suggested lesser steps would not achieve the purpose of the notice.

64. I have given consideration as to whether there are any other suitable alternatives to the requirements stated in the notice which would achieve the purpose of the notice with less cost or disruption to the appellant, but none are obvious to me.

65. For these reasons, I conclude that the requirements of the notice are not excessive, and so the appeal on ground (f) must fail.

The appeal on ground (g)

66. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is three calendar months.
67. My task in relation to this ground of appeal is to balance the public interest in securing expeditious compliance with the requirements of the enforcement notice against the private interests bound up in the unauthorised development. In doing so, I acknowledge that the development is located within the green belt and is harmful to the openness of this area. In this regard, the Council cites conflict with a number of development plan policies in relation to the protection of the green belt, countryside, and landscape character. There is also significant objection from local residents. It is, therefore, in the public interest to remedy the breach of planning control as soon as reasonably possible and without delay.
68. The appellant initially sought a compliance period of 18 months. At the inquiry he suggested that this could be reduced to a 12 month period. An extended compliance period is sought on the basis that the required remedial works are extensive and will be difficult to complete at this time of year when heading into the winter months with periods of inclement weather. This could hamper the appellant's ability to complete the required steps.
69. However, I note that the development was initially carried out by the appellant primarily over the autumn and winter months, from September 2021 and into the early months of 2022, with some further works taking place later that year. This did not appear to cause any issues for the appellant, and he carried out and coordinated much of this work himself. Furthermore, no single operation took more than two weeks to complete and so I see no impediment to completing the remedial works within a 3 month period.
70. Consequently, extending the compliance period to 12 months, as suggested, would unduly perpetuate the breach of planning control and the associated harm, without sufficient justification. Therefore, in weighing the balance between public and private interests, I consider that the public interest of expeditious compliance with the requirements of the enforcement notice outweighs the private interest in extending the period for compliance.
71. I am, therefore, not persuaded that there is a need to extend the period for compliance with the requirements of the notice. The period of compliance stated in the notice is a proportionate response to the breach of planning control that has occurred.
72. Accordingly, the appeal on ground (g) fails.

Conclusion

73. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections, as set out in my formal decision.

J M Tweddle

INSPECTOR

APPEARANCES

For the Appellant:

Andrew Foden, Counsel

Instructed by Mr Scott Penny

He called:

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Barry Sewell

The Appellant
Local Resident

For the Local Planning Authority:

Piers Riley-Smith, Counsel

Instructed by Victoria Roberts, Cheshire West
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He called:

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