

Appeal Decisions

Site visit made on 10 December 2024

by D Hartley BA (Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 DECEMBER 2024

Appeal A Ref: APP/B3030/C/24/3340763

Appeal B Ref: APP/B3030/C/24/3340764

**Land known as The Nook, Marsh Lane, North Muskham, Newark,
NG23 6HG**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended). Appeal A is made by Mr Duncan Lancaster and Appeal B is made by Mrs Sarah Lancaster against an enforcement notice issued by Newark & Sherwood District Council.
 - The notice was issued on 16 February 2024.
 - The breach of planning control as alleged in the notice is without planning permission, operational development consisting of the altering of land levels and the construction of associated works including a gabion wall, brick walls and wooden sleeper wall, as shown on images 1, 2 and 3.
 - The requirements of the notice are to A) remove in full all gabion baskets and any associated materials, shown on images 1, 2 and 3, from the land; B) remove in full the brick walls and any associated materials erected abutting, but excluding, the steps, shown on image 3; C) remove the wooden sleepers shown on image 3, and D) regrade the land on which the above elements are in place to its former gradient before the development took place. Thereafter restore the land to its condition before the development took place as a grassed bank, as indicated on images 4, 5, and 6.
 - The periods for compliance with the respective requirement are A) 5 months; B) 5 months; C) 5 months, and D) 6 months.
 - Appeal A is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended). Appeal B is proceeding on the grounds set out in section 174(2) (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended). Since an appeal has been brought on ground (a) for Appeal A, an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decisions

Appeal A Ref: APP/B3030/C/24/3340763

1. It is directed that the enforcement notice is corrected and varied by (i) the deletion of the words *"land known as The Nook, Marsh Lane, North Muskham, NG23 6HG, as edged in red shown on the attached Local Plan"* and their substitution with the words *"land known as The Nook, Marsh Lane, North Muskham, NG23 6HG, as edged in red shown on the attached location plan"*,

and (ii) the deletion of all words in section 6 and their replacement with "A. 6 months after this notice takes effect, B. 6 months after this notice takes effect, C. 6 months after this notice takes effect and D. 7 months after this notice takes effect". Subject to the correction and variations, 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/B3030/C/24/3340764

2. It is directed that the enforcement notice is corrected and varied by (i) the deletion of the words "*land known as The Nook, Marsh Lane, North Muskham, NG23 6HG, as edged in red shown on the attached Local Plan*" and their substitution with the words "*land known as The Nook, Marsh Lane, North Muskham, NG23 6HG, as edged in red shown on the attached location plan*", and (ii) the deletion of all words in section 6 and their replacement with "A. 6 months after this notice takes effect, B. 6 months after this notice takes effect, C. 6 months after this notice takes effect and D. 7 months after this notice takes effect". Subject to the correction and variations, the appeal is dismissed, the enforcement notice is upheld.

Preliminary Matters

3. The Government consulted on reforms to the National Planning Policy Framework 2023 (the Framework) on 30 July 2024 (Consultation Draft Framework). The consultation closed on 24 September 2024. I afford the Consultation Draft Framework limited weight in decision making terms as a material planning consideration. Considering the deemed planning application main issues below, there are no proposed reforms in the Consultation Draft Framework which have a material bearing on how this appeal should be considered. In this regard, it has not been necessary for me to seek comments from the main parties in respect of the Consultation Draft Framework.
4. The appellant has raised concern about the rationale behind the Council's decision that it was expedient to take enforcement action. Expediency is not a matter for my consideration. I am only required to consider matters that relate to the specified grounds of appeal and expediency is not a relevant consideration in this regard. The Courts have held that expediency matters can only be addressed by means of judicial review. Inspectors have no jurisdiction to determine whether a local planning authority has complied with section 172 of the Act.
5. The appellant questions whether Mr Richard Marshall had delegated authority, in accordance with the Council's constitution, to issue the notice. The Council's evidence submitted as part of this appeal demonstrates to me that Mr Richard Marshall did have delegated authority to issue the notice. In any event, the Courts have held that whether a local planning authority has the required delegations in place when the notice was issued does not fall within the scope of what can amount to a nullity argument.

The Notice

6. Section 2 of the notice which concerns the land to which the notice relates reads as '*land known as The Nook, Marsh Lane, North Muskham, NG23 6HG, as edged in red shown on the attached Local Plan*'. A Local Plan is not attached to the notice but instead a location plan is attached with the land edged in red. The reference to a '*Local Plan*' is clearly a typographical error. I shall correct section 2 of the notice, without injustice being caused to the main parties, so that it reads '*land known as The Nook, Marsh Lane, North Muskham, NG23 6HG, as edged in red shown on the attached location plan*'.

Ground (b) appeals

7. An appeal made on ground (b) of section 174(2) of the Act is that the matters alleged in the notice have not occurred. The onus is on the appellant to make their case on any legal grounds of appeal.
8. The appellant does not actually make a claim that the development has not occurred. The appellant's claim is that the development has not occurred within adopted highway land (as claimed by the Council) and that it is permitted development pursuant to Class A, Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). This is not a matter to be considered as part of a ground (b) appeal. It is a matter that I consider below as part of the ground (c) appeals.
9. As a matter of fact, the matters alleged in the notice have occurred. Therefore, I conclude that the ground (b) appeals fail.

Ground (c) appeals

10. The appeals made on ground (c) of section 174(2) of the Act is that that those matters (if they occurred) do not constitute a breach of planning control.
11. The appellant claims that the gabion wall, brick walls and wooden sleeper wall are permitted development pursuant to Class A, Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO).
12. As a matter of fact and degree, I find that the breach of planning control comprises a single and cohesive act of development. The evidence is that at least part of the single act of development, comprising the stone gabion wall, was erected on the land owing to the concern of the appellants that the grass bank along Marsh Lane was eroding and retreating, and hence that the footings/foundations of the dwellinghouse were being undermined.
13. The evidence is that the appeal land falls within flood zone 2 and is at risk of flooding. I have been provided with photographs which show flooding events in the vicinity of the appeal site. The evidence is that the single act of development was primarily carried out as a dwellinghouse foundation/footings protection measure.
14. The Council claims that the gabion wall element of the breach of planning control comprises an engineering operation and that it is not a means of enclosure. Therefore, the Council states that Class A of Part 2 of Schedule 2

GPDO permitted development rights are not applicable. While the development may appear to be a means of enclosure in visual terms, I nonetheless consider, as a matter of fact and degree, that the works involve considerable engineering operations which go well beyond what might be considered as a 'minor operation' under Class A of Part 2 of Schedule 2 of the GPDO.

15. Moreover, the evidence is that the substantive element of the breach of planning control (i.e., the gabion wall) was not undertaken for the purpose of being primarily for a means of enclosure. The evidence is that it was primarily constructed as a means of mitigating the impact of flooding events on the footings/foundations of the house.
16. Indeed, the flood risk assessment that accompanied the planning application¹ for the gabion wall states '*the earth bank that fronts the Nook has been eroding in recent years and there is a concern that the retreating bank could get close to the property and undermine the footings of the house*' and '*the use of stone gabions was considered that it offers support to the back whilst allowing flood water to flow through should the flood waters rise to this extent*'. I find that when the development is considered as a whole, it constitutes an engineering operation and not a means of enclosure. The evidence is that the development involved an element of engineering pre-planning. It does not matter that the works were allegedly carried out by 'builders' as distinct from 'engineers'.
17. For the above reasons, I do not therefore find that the breach of planning control, when considered as whole, falls to be considered against Class A of Part 2 of Schedule 2 of the GPDO. In this regard, it cannot therefore benefit from the permitted development rights that exist within this class of development. Even if one were to disagree with my conclusion on this issue, it is noteworthy, in any event, that parts of the gabion wall is more than 1 metre in height above ground level when measured against the level of the surface of the ground on Marsh Lane that is immediately adjacent to it. This height was agreed between the main parties on my site visit. Therefore, the breach of planning control, which comprises a single act of development, requires planning permission even if Class A of Part 2 of Schedule 2 of the GPDO had been a relevant consideration.
18. There is dispute between the main parties in terms of whether the breach of planning control has been constructed on part of the adopted highway. Given my reasoning above, it has not been necessary for me to reach a definitive view about this matter for the ground (c) appeals. I do, however, return to this matter as part of the consideration of the ground (a) appeal.
19. For the reasons outlined above, I conclude that the breach of planning control constitutes a single act of development and is not permitted development pursuant to Class A of Part 2 of Schedule 2 of the GPDO. The breach of planning control constitutes an act of development for which planning permission is required. Therefore, the ground (c) appeals fail.

¹ Planning application ref. 23/01698/FUL

Ground (d) appeals

20. The appeal made on ground (d) of section 174(2) of the Act is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. In an appeal against an enforcement notice on ground (d), the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is on the balance of probability.
21. The claim made by the appellants under ground (d) are the same as those raised for the ground (c) appeals. Such a claim is not relevant to the consideration of a ground (d) appeal. A relevant ground (d) appeal claim is that the alleged breach of planning control is immune from enforcement action, having subsisted for the four-year time limit period as laid down by section 171B of the Act.
22. The appellants do not provide any evidence to substantiate a possible claim that the breach of planning control has subsisted for at least four years. Therefore, I find that when the notice was issued it was not too late to take enforcement action. The breach of planning control is not immune from enforcement action and I therefore conclude that the ground (d) appeals fail.

Ground (a) appeal and the deemed planning application

Main Issues

23. An appeal is made under ground (a) which is that planning permission ought to be granted in respect of the breach of planning control alleged in the notice. I have considered the reasons for issuing the notice and the main issues are the effect of the breach of planning control on (i) the character and appearance of the area, (ii) the setting of St Wilfred's Church which is Grade I listed, and (iii) highway safety.

Character and appearance

24. The site falls within the Trent Washlands Landscape Character Area and Cromwell, North and South Muskham policy zone (Ref. TW PZ 11) identified within the Newark and Sherwood Landscape Character Assessment Supplementary Planning Document 2013 (SPD). The landscape condition of this area and its sensitivity to change are both defined as 'moderate'. Landscape action includes requiring development to conserve the historic landscape features and boundaries.
25. North Muskham is positioned between the 'A1' highway and the River Trent. The area surrounding the settlement comprises mainly undeveloped agricultural fields. The appeal site is off a lane which spurs off Main Street. This part of the settlement has a distinctive rural character. While some of the properties have brick or stone boundary walls, these are generally set back from grass verges/banks that appear to form part and parcel of the highways. Some of the properties in the area have only hedges/trees adjacent to the grass verges and banks, as distinct from walls.
26. Overall, there is a pleasing consistency to the way that the area is experienced by passers-by. There is a consistency in terms of the character and appearance of the boundary treatment where it exists. Above all, the area

is appreciated as having a semi-rural character owing to the presence of undeveloped grass verges/banks adjacent to roads and dwellinghouses.

27. The breach of planning control is positioned at the end of Marsh Lane where it meets open and undeveloped agricultural fields. As part of my site visit, I experienced that this part of Marsh Lane, with its relatively narrow highway and close relationship with open and undeveloped fields, had a very distinctive rural character.
28. When the breach of planning control is considered as a whole, I find that it fails to assimilate well into its landscape context. The gabion basket wall is significant in length and bulk and has an unacceptably jarring and dominant impact when seen from Marsh Lane. This harm is compounded owing to its stepping up appearance. I consider that the use of gabion baskets has a very engineered appearance in this locality. It is not reflective of the use of traditional stone or brick boundary walls that exist in the locality. This is also the case in terms of the use of sleepers which have been formed around a vehicular passing place. Such sleepers look very suburban in appearance and this kind of material is not prevalent in the immediate locality.
29. Overall, I find that the unauthorised development appears as an incongruous and harmful addition within Marsh Lane. Most of it is tight up against the resultant hard surfaced element of Marsh Lane and departs unacceptably from the former grass banking which offered a distinctive soft edge to The Nook. Indeed, I have been able to view this land in the submitted historic photographs. It added positively and distinctively to the landscape character of the area.
30. I acknowledge that the appellant has planted a Yew Tree hedge behind the walls/sleepers. However, this has essentially had the effect of screening part of the dwellinghouse, rather than breach of planning control itself. The Yew Tree hedge does not sufficiently soften the breach of planning control and its existence does not outweigh the above identified harm.
31. For the above reasons, I conclude that significant harm has been caused to the character and appearance of the area, including to landscape character. Therefore, the development does not accord with the landscape, character, appearance and design requirements of Core Policies 9 and 13 of the Council's Amended Core Strategy DPD 2019 (CS), Policy DM5 of the Council's Allocations and Development Management DPD 2013 (DM DPD), the SPD, and chapter 12 of the Framework.

Listed building setting

32. The Church of St. Wilfrid, which is a grade I listed building, is positioned to the northeast of the appeal site. It dates from the 12th century and is constructed from coursed rubble and large dressed stone with ashlar dressings. It includes an imposing and characterful tower which can be seen from several public vantage points in the settlement.
33. The listed building derives its significance from its age, use of traditional materials and architectural details, its internal fixtures and fittings, and its association with Thomas Barton. The listed church is set within a graveyard

and is set back from Main Street. Moreover, the land to the east comprises open and undeveloped fields.

34. There is an open setting around the church allowing views of it from surrounding land such as Main Street, parts of Marsh Lane and from the public footpath alongside the River Trent. When experienced from Marsh Lane, I find that the breach of planning control has a jarring impact in the street-scene for the reasons outlined above. However, for the most part there is mature and evergreen vegetation alongside Marsh Lane and so this means that from this public area, the listed church and the unauthorised development are not seen together. However, the church and the wall are very much seen in the same visual context for those travelling along the public footpath alongside the River Trent.
35. I find that prior to the unauthorised development occurring, those travelling along the above public footpath were able to appreciate the significance of the listed church within its spacious and verdant setting and including its splendid tower and without the harmful and distracting impact associated with the discordant wall. In this regard, I find that the heritage significance and setting of the listed church has been harmed because of the breach of planning control. Any passer-by is now visually distracted by the breach of planning control and hence no longer appreciates the architectural splendour of the listed building, including its tower, in the same positive way.
36. In the context of paragraph 208 of the Framework, I find that less than substantial harm has been caused to the significance of the Church of St. Wilfrid. I deal with other considerations/public benefits below. For the reasons outlined, I do not find that there are any public benefits that outweigh the less than substantial harm caused to the listed building.
37. The unauthorised development does not preserve the setting of the Church of St. Wilfrid. I therefore conclude that the breach of planning control does not accord with the conservation requirements of Core Policy 14 of the CS, Policy DM9 of the DM DPD, and chapter 16 of the Framework.

Highway safety

38. There is a dispute between the main parties in terms of whether the breach of planning control has been built, at least in part, within the adopted highway. Both the local planning authority and the Highway Authority are of the view that that part of the unauthorised development has been constructed on adopted highway, albeit that there is no dispute that such land is in private ownership.
39. The Highway Authority allege that the width of the adopted highway has been narrowed because of the position of part of the unauthorised development. The Highway Authority reach this view based on their own investigations, including a survey.
40. The Highway Authority comment that forward visibility around the north-eastern corner of Marsh Lane has been compromised. Moreover, it states that the provision of the Yew Tree hedge further obstructs visibility, and this would get worse as it matures.

41. As part of my site visit, the main parties agreed that there was only one residential property located beyond the wall. This is known as 'Lindon'. While my site visit was only a snapshot in time, I did not notice any vehicles passing along Marsh Lane. It is reasonable that I conclude that Marsh Lane, which is a cul-de-sac, is lightly trafficked and, furthermore, that traffic speeds are likely to be very low. I acknowledge that agricultural vehicles/machinery pass along Marsh Lane and into the nearby field. However, the field is directly at the end of Marsh Lane and so the visibility of drivers is not impacted by the unauthorised wall. Moreover, and despite comments made by the parties about the resultant width of Marsh Lane, I do not find that the evidence demonstrates that the unauthorised development would hinder the convenient movement of larger farm vehicles along Marsh Lane and into the nearby field.
42. While the height and position of the wall, coupled with the planting of the Yew Trees, has resulted in some technical harm to the forward visibility of drivers manoeuvring towards and from 'Lindon', owing to the likely low speed of vehicles in this lane, coupled with the low number of vehicular movements associated with one residential property, I do not find that the development has an unacceptable impact on highway safety.
43. In this case, it has not been necessary for me to reach a conclusion on whether adopted highway land has been built on. Even if the wall had been built on adopted highway, that would not in itself mean that the development was unacceptable in planning terms. It is open to the Highway Authority to investigate land ownership and adopted lane issues separately from this appeal and, if necessary, to take separate action should that be justified.
44. For the above reason, I find that the development has not had an unacceptable impact on highway safety. I therefore conclude that the development accords with the highway safety requirements of Spatial Policy 7 of the CS, Policy DM5 of the DM DPD, and paragraph 115 of the Framework.

Other considerations

45. I acknowledge the appellant's desire to ensure that the footings/foundations of the dwellinghouse are not undermined because of the grass verge being eroded because of flooding events. I have not been provided with any technical evidence to support a claim that the footings/foundations of the dwellinghouse are at risk or have been negatively impacted, or, importantly, that the gabion wall would in itself have the effect of safeguarding the footings/foundations of the dwellinghouse should it be necessary to do so.
46. Moreover, I do not know if it would be possible, in any event, to opt for other engineering solutions which might offer additional structural stability to the dwellinghouse footings/foundations and without having to opt for the breach of planning control which I have found causes significant harm to the character and appearance of the area and to the setting of a listed church. In this case, I do not find that the reasons why the appellant has carried out the unauthorised development outweighs the collective harm that I have identified in respect of my conclusions on the main issues.

47. It is a moot point in terms of whether the reason for constructing the breach of planning control constitutes a public rather than a private benefit. Even if I were to conclude that it was a public benefit, it would not outweigh the less than substantial harm that I have found has been caused to the designated heritage asset.
48. The appellant considers that if the notice is upheld, it would put the footings/foundations of the dwellinghouse at risk from the effects of floodwater eroding the returned grass bank. Again, I have no technical evidence to support this claim and, moreover, have not been provided with any objective evidence, in any event, to demonstrate that the erection of an out of keeping gabion wall is the only technical solution available to the appellant to address the perceived harm that has been or might be caused to the footings/foundations of the dwellinghouse.
49. If it is proven that the gabion wall is needed to stop or slow down the effect of flood water on the footings/foundations of the dwellinghouse, I acknowledge that in upholding the notice it could have the effect of meaning that the occupiers of the property had to eventually move out of the dwellinghouse, at least on a temporary basis, while remedial work took place. In this regard, it remains possible that the occupants of The Nook could be made homeless.
50. In the above context, I have considered the rights of the occupiers of the dwellinghouse under Article 8 of the European Convention on Human Rights as incorporated into the Human Rights Act 1998 which states that everyone has a right to respect for private and family life, their home and correspondence. This is a qualified right whereby interference may be justified in the public interest, but the concept of proportionality is crucial. In this case, and, given my conclusions on the main issues, I find that any interference with the Article 8 rights of the occupiers of the dwellinghouse is proportionate and necessary in the public interest.

Ground (a) appeal - planning balance and conclusion

51. I have concluded that in this case there is justification for retaining the unauthorised development despite its impact on forward visibility on Marsh Lane for those travelling to or from 'Lindon'. This is a matter of neutral consequence in the planning balance.
52. I have found that harm has been caused to the character and appearance of the area, including to landscaping character. In addition, less than substantial harm has been caused to the significance of St. Wilfrid Church as a Grade I listed building as a result of harm caused to its setting. Collectively, these are matters to which I afford substantial adverse weight in the planning balance.
53. In this case, I do not find that the above collective harm is outweighed by the identified other considerations. I therefore conclude that the development does not accord with the development plan for the area taken as a whole and there are no material considerations, including the supportive comment from an interested party, that indicate the decision should be made other than in accordance with the development plan. Therefore, the ground (a) appeal fails.

Ground (f) appeals

54. An appeal on ground (f) of section 174(2) of the Act is that the steps required by the notice to be taken, or the activities required by the notice to cease, 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.
55. The claim made by the appellants is that the requirements of the notice are excessive as the breach of planning control does not cause harm and accords with planning policy. I have considered the breach of planning control against relevant local and national planning policies as part of the consideration of the ground (a) appeal and the deemed planning application. I have concluded that the breach of planning control does not accord with the development plan when considered as a whole and that there are no material considerations that outweigh this harm.
56. The appellant claims that the Council could have '*suggested amendments*'. There is no alternative scheme before me, and I have therefore been unable to consider such a matter as part of the ground (a) appeal.
57. Other than the erected steps which the notice permits be retained (i.e., underenforcement), the purpose of the notice is to remedy the breach of planning control. In this regard, the requirements of the notice are not excessive as they remedy the breach of planning control. I therefore conclude that the ground (f) appeals fail.

Ground (g) appeals

58. The appeal made on ground (g) is that the period specified in the notice in accordance with section 173(9) of the 1990 Act (as amended) falls short of what should reasonably be allowed.
59. The claim made by the appellants is that a compliance period of twenty-four months should be allowed rather than the five- and six-month compliance periods. The appellants state that twenty-four months is needed to '*book a construction team*'. However, the appellants do not provide any detailed evidence to substantiate why twenty-four months is needed for this process, and to comply with the various requirements in the notice, as distinct from the compliance periods contained within the issued notice.
60. On the evidence that is before me, I do not find that the compliance periods are excessive. Notwithstanding this conclusion, it is noteworthy that in its statement of case the Council comment that they would be content for the notice to be varied so that the compliance period is six months for steps A, B and C and seven months for step D. I am mindful that Section 173A (1) (b) of the Act allows the local planning authority to '*waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9)*'.
61. It is reasonable that I interpret the Council's above comment that it would seek to subsequently relax the timescales for compliance with the requirements of the notice (if needed), even if I were to uphold the notice without any variations in this regard. Therefore, I shall vary the compliance periods in the notice from five months to six months for steps A to C, and

from six months to seven months for step D. In this case, I therefore find that such variations are reasonable and proportionate. To this extent, I conclude that the ground (f) appeals succeed.

Conclusions

Appeal A Ref: APP/B3030/C/24/3340763

62. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction 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 Ref: APP/B3030/C/24/3340764

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

D Hartley

INSPECTOR