



Appeal Decision

Site visit made on 30 July 2025

by **D Hartley BA (Hons) MTP MBA MRTPI**

an Inspector appointed by the Secretary of State

Decision date **31 July 2025**

Appeal Ref: APP/F0935/C/25/3363167

Land at Mirebank Wood and adjacent to 10 Elm Garth, Wetheral, CA4 8LB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended) (the Act).
 - The appeal is made by Mr Martin Ian Bragg against an enforcement notice issued by Cumberland Council.
 - The notice was issued on 26 February 2025.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the Land from woodland (class sui generis) to use as a domestic garden use associated with a dwellinghouse (class C3) and associated operational development consisting of engineering operations by depositing surplus soil and materials on the Land from building work at 10 Elm Garth, Wetheral, CA4 8LB, causing a change in the land levels (of up to 1000mm) within the Root Protection Areas of protected trees (TPO266 Appendix 2).
 - The requirements of the notice are to a) cease to use the woodland as domestic garden, and b) restore the Land to its condition before the breach took place (appendix 3), and as such you should; i) remove all structures, fence posts and laurel hedging plants from the woodland, ii) restore the land by reprofiling the ground level prior to the materials being deposited, ensuring this process does not disturb RPAs of affected trees T2, T3, T10 and T12 (appendix 4 Tree Survey Plan and Tree Condition Schedule), iii) provide top-soil cultivation (BS3882:2015 standard), depths laid to minimum of 20cm, iv) supply and plant two replacement trees to compensate the loss of 1 No. mature Beech and 1 No. mature oak, protected by TPO266 (tree species, maturity and position to be agreed with the LPA). If any replacement tree dies, becomes diseased or is damaged within 5 years of the date of planting, it shall be replaced in the next available planting season by others of a similar size and species, v) reseed the re-levelled woodland areas with a mix of native wildflower species to replace the loss of the ground layer, which included snow drops and bluebells. Re-plant any holly that remains within the woodland, and vi) re-establish the correct boundary between points A and B as shown on the attached approved plan PL003C (appendix 5).
 - The period for compliance with requirements a) and b) i), ii) and iii) is four months and the period for compliance for b) iv), v) and vi) is at the start of the planting and sowing season following all other work in a) and b) i), ii) and iii) comprising September 2025.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (d) and (f) of the Town and Country Planning Act 1990 (as amended).
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Decision

1. It is directed that the enforcement notice is varied by (1) the deletion of all the words in section 5b)iv) and the substitution of the words "*Supply and plant a replacement tree to compensate the loss of 1 No. mature Beech and supply and plant a replacement tree to compensation the loss of 1 No. mature oak, protected by TPO266 (tree species, maturity and position to be agreed with the LPA)*", and (2) the deletion of all the words in section 6.2 and the substitution of the words "*The period for compliance with steps set out in paragraph 5b) iv) v) vi) is at the start of the first available planting season following all other work in 6.1 above (for the avoidance of doubt the planting season is September to October in any given year)*". Subject to the variations, the appeal is dismissed, and the enforcement notice is upheld.

Preliminary Matter

2. I observed on my site visit that the children's playhouse referred to in the main parties' evidence (i.e., a structure) had been moved from its position when the notice was issued. It was now closer to the position of tree T8. Based on the Council's measuring out on the site (not disputed by appellant on the site visit) relative to the appellant's land ownership boundaries, it appeared to still be positioned within part of the woodland known as Mirebank Wood.

The Notice

3. The appellant has commented that he does not know what part of the land the breach of planning control relates to. I am satisfied that when the notice is considered as a whole, it does clearly and precisely tell the recipient what they have done wrong within the red edge on the plan attached to the notice and what they must do to remedy the breach of planning control.
4. The 'Land' as falling within the red line on the plan attached to the notice is to be read alongside appendix 4 of the notice, which indicates the area of the alleged unauthorised development and the planning breaches that have occurred beyond the appellant's lawful garden boundary. The notice also seeks to define what is the lawful garden boundary for No. 10 Elm Garth at appendix 5. Consequently, the recipient of the notice can be clear that it is the land within Mirebank Wood where an alleged material change of use of the land has occurred to a domestic garden use as well as where the associated operational development has taken place. I find that the notice therefore satisfies the requirements of section 173(3) of the Act.

Ground (b) appeal

5. The appeal made on ground (b) is that the matters comprising the alleged breach of planning control have not occurred. The onus is on the appellant to make his case on any of the legal grounds of appeal.
6. The claim made by the appellant is that part of the land falling within the red edge on the plan attached to the notice (i.e., that beyond the boundary shown associated with No. 10 Elm Garth in appendix 5) has been used as a garden for some fifty years. However, this is not a ground (b) matter but is instead a ground (d) appeal matter which I consider below.
7. Given the ground (d) appeal case made by the appellant below (i.e., there is no claim made that the alleged domestic garden use ceased), it cannot reasonably be said that when the notice was issued the defined land (i.e., Mirebank Wood) was not being used as a domestic garden in association with No. 10 Elm Garth. Furthermore, the Council's photograph dated 3 July 2024 shows a children's playhouse positioned on stilts within Mirebank Wood, raised land levels consistent with the height of the garden associated with No. 10 Elm Garth, and the planting of new laurel hedging.
8. The appellant also claims that the engineering operations undertaken by depositing surplus soil and materials on the land from building work carried out at 10 Elm Garth, and causing a change in the land levels (of up to 1000mm) within the root protection areas of protected trees (TPO266), was undertaken by a previous landowner and rectified following the prosecution of that former landowner.

9. I have considered the evidence before me including photographs in the Westwood Landscape Limited Tree Report prepared on behalf of the Council dated 12 July 2024 (2024 Survey). When compared to the photos taken by Westwood Landscape Limited in 2019, who completed reprofiling works to reinstate land levels following unauthorised engineering works undertaken by the previous owner of the land, the evidence demonstrates, as a matter of fact and degree, that when the notice was issued land levels had been materially changed in some areas as described in the notice, and falling within the root protection areas of identified protected trees.
10. In reaching the above conclusion, it is also noteworthy that the appellant has commented *“for the southeast section of the boundary, our client has admitted that the level of the garden here has been changed by the spoil from the works being piled on the existing lawn”*. While the appellant does not accept that the land levels have changed to the extent claimed by the Council, he does nonetheless comment that *“the area where the breach has occurred is around T8, where his contractors put the spoil from the house extension works. He admitted the breach in the interview under caution and will rectify as soon as he hears from the Council officer”*.
11. Moreover, on the site visit the appellant commented that while he did not accept that significant land level changes had taken place within the vicinity of the planted laurel hedging (i.e., that which is closest to where the playhouse was positioned when the notice was issued), which was agreed to be outside of the land in his ownership, he did nonetheless state that *“if there had been land level changes it was likely to be only a matter of inches”*. This comment at the very least casts some doubt about the appellant’s assertion that land level changes had not occurred within this part of the woodland, as well as that which he agreed had taken place within the vicinity of tree T8.
12. The Council’s evidence casts sufficient doubt about the appellant’s assertion that the previous owner of the land carried out the engineering operations referred to in the notice. In fact, the Council’s evidence is that land levels were reinstated in 2019. The appellant seeks to cast doubt about the evidence provided by Westwood Landscape Limited in so far that a ‘fire pit’ was included in the 2024 Survey when in fact it was not in place at that time. This is a matter that was specifically addressed in paragraph 2.1 of the 2024 Survey which says, *“infilling of a fire pit close to trees T5-T8 which is no longer evident on the ground”*. Therefore, I afford significant weight to the evidence submitted by the Council and, in particular, the 2024 Survey.
13. The appellant’s evidence is not sufficiently precise or unambiguous to counter the Council’s evidence which supports the comment made by Westwood Landscape Limited in the 2024 Survey (appended to the notice) that the unauthorised development includes the *“regrading of the area with subsoil and topsoil to extend the flat platform of the garden and to achieve an even grade for a new garden hedge of Prunus laurocerasus (Laurel). This has raised the ground level in some areas within the tree RPAs by approximately 90-100 cm. This work was carried out in 2021 for the main area and the easternmost area in 2022 where the Laurel hedge is younger”*. Moreover, there is no compelling evidence before me to demonstrate that the deposited earth does not fall within the identified root protection areas of the identified protected trees.
14. The appellant makes the claim that the identified protected trees were already dead prior to them being blown over in a storm(s) in November 2021. There is no

compelling objective evidence before me to support the claim that the trees were already dead, or that they were blown over in a storm. The sales particulars for No. 10 Elm Garth in July 2020 cast doubt about the claim that the identified protected trees were already dead prior to the breach of planning control occurring. The trees shown are in leaf. Moreover, I afford weight to the Council's technical evidence from Westwood Landscapes Limited in the 2024 Survey which identifies ground level changes and evidence of stress to identified protected trees. In addition, and, in the absence of any compelling/objective technical evidence from the appellant, I have no reason to disagree with the comment made that *'the playhouse on stilts is likely to have caused harm to the roots'* and *'90 percent of all roots grow near the soil surface...Soil disturbance within the root protection area should be avoided as this can significantly affect the tree's stability and moisture uptake'*.

15. The onus is on the appellant to make his case on ground (b). As a matter of fact and degree, and, for the reasons outlined above, I conclude that the evidence demonstrates that when the notice was issued the matters alleged in the notice had occurred. Therefore, I conclude that the ground (b) appeal fails.

Ground (d) appeal

16. The appeal made on ground (d) 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.
17. The appellant claims that the land (i.e., Mirebank Wood) has effectively been used as an extended garden in association with the use of No. 10 Elm Garth as a use class C3 dwellinghouse for some fifty years. He claims that it is therefore immune from enforcement action given the passage of time and considering section 171B of the Act. The evidence which is relied upon to support this claim includes 'statements of truth' prepared by the occupier of 4 Elm Garth, the former occupier of 12 Elm Garth, the previous owner of 10 Elm Garth between October 2018 and December 2020, and the appellant. These are not sworn statements or statutory declarations and so in relative terms I cannot afford the statements of truth the same weight from an evidential point of view.
18. The four individuals refer to the existence of a bench or seat within Mirebank Wood (this is marked with an 'X' on the plan attached to Mr Clark's statement of truth) and claim that the land hatched in red on the plans attached to the statements of truth has been used as a garden, including the siting of the said seat/bench, for a number of decades and well in excess of ten years.
19. While I have no reason to doubt that a bench/seat was positioned in part of Mirebank Wood for several years (I noticed on my site visit that a new bench had been positioned on the land and including a small patio area), that does not in itself automatically mean that a material change of use of the land had occurred from that of a woodland to a domestic garden. Mirebank Wood is extensive, and I find that the positioning of a bench/seat within it would not in itself constitute a material change to the character of activities associated with the primary use of the land as a woodland. In reaching this conclusion, I observed on my site visit that the woodland can be accessed from a separate pathway between No. 10 Elm Garth and its neighbouring dwellinghouse. Therefore, it cannot be said that the woodland

is or has been only accessible from No. 10 Elm Garth. The evidence is that the woodland is and has been accessible to members of the public from another area.

20. The evidence before me does not precisely and unambiguously demonstrate that the said bench/seat was continuously used in association with a garden use, or that it could reasonably be said that its use would, in any event, amount to a material change of use of the land from a woodland use to a domestic garden use. The evidence from interested parties is not supported with any objective, compelling or precise evidence in this regard. In my judgement, even if the said bench/seat had been used in association with No. 10 Elm Garth, or by other neighbouring residents, it would not have amounted to a significant difference in the character of the activities associated with the primary use of Mirebank Wood as a woodland as a matter of fact and degree.
21. In respect of the engineering operations associated with the breach of planning control, the evidence is that when the notice was issued, such works had not been substantially completed for the period specified in section 171B of the Act. In any event, and, in respect of the ground (d) appeal, the appellant's evidence is focussed on the material change of use allegation, and not on the unauthorised engineering operations.
22. For the reasons outlined above, and, on the balance of probability, I conclude that when the notice was issued it was not too late to take enforcement action. Therefore, I conclude that the ground (d) appeal fails.

Ground (f) appeal

23. The appeal on ground (f) is made on the basis 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 or to remedy any injury to amenity which has been caused by any such a breach.
24. The purpose of the notice is to remedy the breach of planning control by firstly ceasing to use the woodland as domestic garden, and, secondly by restoring the land to its condition before the breach took place. The latter is included in appendix 3 of the notice in respect of level details following land reprofiling work following unauthorised work undertaken by the previous owner of No. 10 Elm Garth. In respect of ceasing to use the woodland as a domestic garden, this is not an excessive requirement. It remedies this part of the breach of planning control.
25. However, in respect of restoring the land to its condition before the breach took place, it is noteworthy that requirement 5b)iv) states "*Supply and plant two replacement trees to compensate the loss of 1 No. mature Beech and 1 No. mature oak, protected by TPO266 (tree species, maturity and position to be agreed with the LPA). If any replacement tree dies, becomes diseased or is damaged within 5 years of the date of planting, it shall be replaced in the next available planting season by others of a similar size and species*".
26. The replacement of former protected trees on a 2:1 basis is an excessive requirement. This is because it seeks to put in place more trees than existed prior to the unauthorised development occurring. Moreover, replacing trees that die, become diseased or are damaged within five years of planting goes beyond restoring the land to its condition before the breach took place. This requirement is

equivalent to imposing a planning condition, rather than remedying the breach of planning control.

27. I shall therefore vary requirement 5b)iv) of the notice by deleting all the words and replacing them with *“Supply and plant a replacement tree to compensate the loss of 1 No. mature Beech and supply and plant a replacement tree to compensation the loss of 1 No. mature oak, protected by TPO266 (tree species, maturity and position to be agreed with the LPA)”*.
28. The notice requires the land to be restored to its condition before the breach of planning control took place. It was clear on the site visit that both the Council and the appellant have photographs which provide details of what the site was like prior to the breach of planning control took place. I am satisfied that the parties would be able to reach agreement in terms of this matter based on a detailed consideration of the photographs. In this regard, it is not necessary for me to add any more precision in terms of requirement 5(b) of the notice. It is also noteworthy that section 173(4) of the Act states that an enforcement notice should specify the steps that are required to be taken or the activities which the authority require to cease, in order to achieve *“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”*. The notice correctly and precisely does the latter.
29. The period for compliance with specified requirements includes a period of both four months and then *“the start of the planting and sowing season following all other work in 6.1 (above) comprising September, October 2025”*. Given the date of this appeal decision, and a period of four months to carry out other identified requirements, it is necessary, in the interests of precision, that all the words in requirement 6.2 of the notice are deleted and replaced with *“The period for compliance with steps set out in paragraph 5b)iv) v) vi) is at the start of the first available planting season following all other work in 6.1 above (for the avoidance of doubt the planting season is September to October in any given year)”*.
30. Given the above variations, I conclude that the ground (f) appeal succeeds. The variations would not lead to any injustice being caused to the main parties.

Conclusion

31. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall vary the enforcement notice prior to upholding it. The appeal on ground (f) succeeds to that extent.

D Hartley

INSPECTOR