Planning Inspectorate

Appeal Decision

Site visit made on 25 November 2025

by Chris Preston BA(Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 April 2026

Appeal Ref: APP/J3015/C/24/3346391
7A Middleton Crescent, Beeston, Nottinghamshire, NG9 2TH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
- The appeal is made by Swallow Hill Homes against an enforcement notice issued by Broxtowe Borough Council.
- The notice was issued on 15 May 2024.
- The breach of planning control as alleged in the notice is Without planning permission, the construction of a gabion wall with the green bank above ("the Bank"), adjacent to the Tottle Brook, in the approximate position shown in blue on the attached plan.
- The requirements of the notice are to:
  - (i) Remove the entirety of the bank and reconstruct the bank in full accordance with the plans approved under planning application Ref: 21/00307/ROC. Specifically, in full accordance with plan references:
    - 17 Rev D, received by the Local Planning Authority on 9 March 2022
    - 16 Rev C, received by the Local Planning Authority on 25 October 2021
    - 13 Rev G, received by the Local Planning Authority on 29 September 2021 and
    - 9 Rev Q, received by the Local Planning Authority on 29 September 2021
  - (ii) Remove from the Land all building materials and rubble arising from compliance with the requirements of paragraph 5(i) above.
- The periods for compliance with the requirements are: For step (i) 12 weeks from the date the notice takes effect and for step (ii) 24 weeks from the date the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f), (g) of the Town and Country Planning Act 1990 (as amended). Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Decision

1. It is directed that the enforcement notice is varied by:

   The deletion of the words "12 weeks" in respect of the time period for compliance at step 5(i) and the words “24 weeks” in respect of the time period for compliance with step 5(ii) and their substitution with the words "12 months" in respect of step 5(i) and “15 months” in respect of step 5(ii).

2. Subject to those 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.

Preliminary Matters Relating to the Enforcement Notice

3. As set out above, the appeal relates to the construction of a “green bank”, adjacent to Tottle Brook, which was constructed as a retaining structure in association with a housing development within the substantial former garden of 7A Middleton Crescent. Application reference 18/00377/FUL (the 2020 permission) was approved by the Council on 17th December 2020, the description of development being; “Construct 14 houses, garages and associated access road following

demolition of dwelling". That permission was subsequently "varied" under s73 of the Town and Country Planning Act 1990 (as amended), under application reference 21/00307/ROC, which was approved in March 2022 (the 2022 permission).

4. The appellant claims that the 2022 permission was implemented. However, within its statement of case, the Council contends that the permission was incapable of implementation on account of discrepancies in the approved plans in relation to the construction of the retaining structure adjacent to Tottle Brook. In particular, the ground levels shown on the approved Landscape Plan (Drawing No. 17 D) do not tally with the cross sections shown on the Site Sections plan (Drawing No 09 Revision Q).

5. In effect, the sections show that the rear gardens of plots 1 to 5 would slope downwards from the rear of the dwellings to meet the top of the bank whereas the landscape plan shows that the gardens would be broadly level and only marginally lower in height than the finished floor level of the associated dwellings. Both cannot be correct. If the gardens were constructed as per the spot heights shown on the landscaping plan, the top of the bank would need to be significantly higher than is shown on the site section. It also follows that the angle of the bank would need to be steeper than shown on the section. Conversely, if the bank was constructed as per the site section, the gardens would not be at the level shown on the landscape plan, either in height or gradient.

6. Both parties agree that it is not possible to construct the development fully in accordance with both of the approved plans. I will address the implications of that more fully in respect of the appeal under Ground (c). However, given the Council's stated position that the approved planning permission is incapable of implementation, the requirements of the enforcement notice were puzzling. In particular, the requirement that the bank should be removed and reconstructed in accordance with details on various plan numbers. Amongst those plans are the conflicting landscape and site section plans referred to above. It seems odd that the Council would attempt to make the development comply with plans and a permission which, by its own admission, is not capable of implementation.

7. It is simply not possible to construct the bank in full accordance with both plans given the conflict between them. That undoubtedly brought a lack of clarity to the requirements. Accordingly, I wrote to the parties to seek views on whether the ambiguity in the requirements was such that the notice should be considered a nullity, with reference to established caselaw[1].

8. In line with relevant principles laid down in *Oates*[2] it is not sufficient for a notice to simply contain a section which purports to set out the breach or remedial steps, the relevant part must inform the recipient with reasonable certainty what the breach of planning control is and what must be done to remedy it. The fact that there may be some degree of uncertainty does not necessarily dictate that there will be a failure to comply with statutory requirements and whether a defect renders the notice, as a whole, a nullity will be dependent upon context. I am mindful that the Courts have guarded against applying an overly restrictive and technical approach to the question of whether a notice is a nullity.

[1] *Miller-Mead v MHLG [1963] 1 A11 ER 459 & Oates v SSCLG & Canterbury CC [2017] EWHC 2716 (Admin)*
[2] *Oates v SSCLG & Canterbury CC [2017] EWHC 2716 (Admin) – para. 63*

9. In response to my letter the Council stated that any concerns with the notice could be remedied by relaxing the requirements such that the requirement to reconstruct the bank in accordance with the four specified plans was removed. The only remaining requirements would be to remove the bank in its entirety and remove materials and rubble arising from that requirement from the land.

10. Without any forewarning, the Council then decided to relax or waive the requirement to reconstruct the bank in accordance with the specified plans, under powers set out in s173A(b) of the Town and Country Planning Act 1990 (the Act), notifying recipients of the notice, as required by s173A(3). Those provisions do not prevent a Council waiving or relaxing the requirements of a notice after an appeal has been made. However, if the original notice was a nullity, then it would have had no legal basis or standing and I am not satisfied that it would have been possible for the Council to utilise s173A to try and make valid something which had no effect in the first place.

11. However, on reflection I am satisfied that the requirement to remove the bank is severable from the requirement to reconstruct it in accordance with the conflicting plans. Without the requirement to reconstruct in accordance with the plans, the notice effectively alleges that a gabion wall and green bank has been constructed and requires its complete removal. That would appear to be clear enough on its face.

12. The fact that the remaining requirements are capable of standing alone, in the absence of the requirement to reconstruct in accordance with the specified plans, leads me to conclude that the original notice was not a nullity, having regard to relevant caselaw. Both main parties are in agreement that the notice should not be considered a nullity. Accordingly, the Council was within its rights to waive/ relax the requirements under s173A.

13. The Council has suggested that I could also choose to vary the terms of the notice as a “belt and braces” exercise. However, to do so is unnecessary given that the Council has already waived/ relaxed the requirements. That amended notice is what is in force and I shall consider the appeal on the basis of those amended requirements. The appellants have had the opportunity to comment upon it such that no injustice will arise.

14. However, the fact that the notice may not be so deficient as to amount to a nullity does not mean that it is without issue. It is clear is that the extent of the structure is far greater than is shown in blue on the plan attached to the enforcement notice. The blue lines appear to broadly correspond to the top of the bank. The appellant contends that the blue lines, if scaled from the plan, cover a depth of about 80cm. However, the bottom “toe” is significantly closer to the brook than depicted and the backfilled material extends much further into the site, towards the dwellings at Plots 1 to 6.

15. Notwithstanding the above, the blue lines on the enforcement plan are intended to identify the broad location of the breach, as opposed to being a precise scaled drawing. They are also cognisant of what would be required to remove the bank in its entirety, having regard to comments made following the Council’s decision to relax the requirements. Thus, the description of the breach and requirements are clear enough on its face.

16. In the absence of any alternative retaining measures, the appellants contend that would result in a 5m sheer earth face, directly to the rear of the dwellings at Plots 1 to 6. I have no reason to doubt the accuracy of that statement, having noted the scale of the bank. A letter from a Civil Engineer on behalf of the appellant suggests that removing the bank would put the gardens and homes at risk of slope failure and result in a likelihood of unsecured material falling into the brook.

17. Given that the dwellings and gardens sit above made ground to the rear of the retaining structure I do not doubt the likelihood of that scenario. It appears that those dwellings have not yet been sold or occupied but the potential safety implications go without saying. Whether the Council has considered that matter is not clear from the information presented.

18. In enforcement cases, the requirement to remove the offending part of the development is often accompanied by a requirement to restore the land to its condition before the breach took place, particularly when a Council is seeking to remedy the breach in full. In this case, the Council's stated aims are not to remedy the breach in full but to remedy the injury to amenity. In any case, a requirement to restore the land to its condition before the breach took place would need the slope to be reconstructed to the levels prior to the development taking place. It is not clear how that could be achieved without impacting on the dwellings that have been constructed on the top of the bank. Those dwellings do not form part of the allegation and to widen the scope of the requirements could clearly cause injustice to the appellant. Consequently, that is not an option that is open to me in the present appeal.

19. Nonetheless, the potential implications of the relaxed requirements does not mean that the notice is invalid in my view. The requirements are clear, even though the implications may be severe and have other consequences.

20. Therefore, after giving the matter considerable thought, I am satisfied that the notice is neither null or invalid and is sufficiently clear to enable those involved to understand the nature of the breach and what needs to be done to rectify it.

21. Consequently, I shall consider the appeal on the basis of the notice, as waived/ relaxed by the Council.

The Appeal on Ground (c)

22. An appeal on Ground (c) is made on the basis that the matters alleged do not constitute a breach of planning control. As with all legal grounds of appeal, the onus, on the balance of probability rests with the appellants to demonstrate their case.

23. I have touched on the inconsistency between the approved plans in relation to the 2022 permission above. Landscape Plan (Drawing No. 17 D, Unredacted), depicts the bottom of the retaining bank being set 3m from the boundary of the site and is annotated; "Start of retaining bank 3m from boundary to allow wildlife more shallow gradient to access the brook".

24. The boundary of the site is shown in red, beyond which is the brook with the neighbouring gardens of Nos 41-61 Wollaton Vale beyond that. The plan depicts trees being planted within that shallow 3m zone. The approved Site Sections plan (Drawing No 09 Revision Q) depicts the proposed bank at Section A-A. That plan

shows the shallow section towards the bottom of the bank being 2.135m from the edge of the brook. Unlike the Landscape Plan, which appears to show the brook beyond the site boundary, the site boundary is shown to be in the middle of the brook on the sectional drawing. It is quite difficult to pair the two drawings as a result.

25. That is not the only inconsistency. As noted above, the site section shows that the rear gardens of the new dwellings would slope downwards to meet the top of the bank. In contrast, the spot heights on the approved landscape plan show that the gardens would be broadly level with the ground floor of the dwellings. The spot height at the bottom of the gardens/ top of the proposed retaining structure within plots 1 to 5 is shown to be 39.70m. The ground floor level of the respective dwellings range between 39.70m at plot 1 and 40.375m at plots 4 and 5. Thus, the height at the bottom of the gardens of 39.70 was equal to or marginally less than the height of the ground floor.

26. Section A-A on the approved site sections plan is drawn on a line running through No.59 Wollaton Vale and plot 2 of the proposed scheme. The plan is drawn to scale and depicts the position of the proposed bank, its profile and scale in relation to both properties. Residents living in properties at Wollaton Vale would have had a reasonable expectation when viewing that plan at the application stage that it was an accurate portrayal.

27. However, the section depicts that the proposed garden would slope downwards to a much greater extent than depicted in the spot height on the approved landscape plan. Both plans cannot be correct. If the gardens are constructed in line with the sectional drawing the bank would have the profile shown. If the retaining bank needed to reach the 39.70m level shown on the landscape plans it would need to be steeper and higher than shown on the sectional drawing.

28. The inconsistencies are not minor. The retaining bank is a substantial structure and key part of the approved development, situated directly next to the residential properties at Wollaton Vale. Condition 1 of the 2022 permission required that the development be carried out in accordance with a list of approved drawings. Amongst those were the landscape and site section plans referred to above.

29. In the *Choiceplace Properties* judgement referred to by the Council[3] it was held that a permission for residential development could not lawfully be implemented on account of an inaccuracy/ inconsistency between approved plans. In that case a scaled street scene section depicting the relationship with neighbouring dwellings was inaccurately drawn, depicting that the proposed dwelling would step down in height between the two neighbouring properties. However, when plans showing the existing and proposed spot heights for ground levels were compared to the scaled elevational drawings, the proposed building height was actually taller than both neighbouring properties.

30. In dismissing an appeal against the Council’s refusal to grant a certificate of lawfulness, the Inspector determined that the permission could not lawfully be implemented because it was not possible to comply with all of the approved plans, as required by condition. In other words, if the scheme was built in accordance with the spot heights and approved elevations, it would not conform to the approved street scene drawing. That decision was upheld.

[3] Choiceplace Properties Ltd v SSHCLG [2021] EWHC 1070 (Admin)

31. There are clear parallels with the current appeal. The approved site section was drawn to scale and represented a scaled drawing of the profile and height of the retaining bank in relation to the neighbouring residential property. That plan is incompatible with the approved landscape plan which shows the level of the proposed gardens and top of the retaining bank. It is impossible to construct the development in accordance with both plans. As such, the development could not comply with condition 1 of the 2022 permission which required compliance with all of the specified plans.

32. That raises significant doubt as to whether the permission could be lawfully implemented. If it couldn't, which seems likely, having regard to the relevant caselaw, then it follows that the bank does not benefit from planning permission and amounts to a breach of control.

33. However, even if I am wrong in my interpretation of the relevant caselaw, the bank, as constructed, does not comply with the approved plans in any event. It is significantly closer to the brook along its entirety than shown on either the approved landscape plan or the site section. That is plain to see upon visiting the site.

34. In reality there is almost no shallow zone between the edge of the brook and the bank. Residents have measured the distances from the bottom of visible bank to the edge of the brook and plotted them on a plan of the site. The gap is 1.08m at the closest point which appeared to be accurate as evidenced on my site visit. The gap varies along the length but at no point is it anywhere near the 3m shown on the Landscape Plan. In the location of section A-A the gap is well under the 2.135m shown on the approved section.

35. Those measurements are taken from the visible bottom of the bank. It should be noted that the actual toe of the bank is likely to be closer still on account of the way the Terramesh system tapers. The differences are not marginal but significant, especially given the limited distance to neighbouring properties, the stated aim of allowing wildlife to access the brook and the fact that the bank has been constructed in a flood zone.

36. Even on the supposedly, "As-Built" plans provided by the appellant the position of the bank in relation to the brook does not appear to be accurately drawn. For example, the "Bank Site Boundary" plan (Project No.3390, Drawing No. SK25, dated 10/6/24) shows a much wider gap between the bottom of the bank and the brook than actually is evident on site along much of its length. That is with the exception of the part directly opposite No.43 Wollaton Vale where the drawing shows the toe of the bank being constructed beyond the red line boundary of the site plan. Consequently, I have significant reservations as to the accuracy of that drawing.

37. The angle of the bank is also significantly steeper than shown on the approved sectional drawing. Had the shallower bank depicted been constructed it would not have been possible to create the level gardens shown on the landscape plan. Therein lies the inconsistency in the approved drawings. I appreciate that the technical details discharged by the Council in relation to condition 4 of the 2022 permission appear to show a steeper bank than approved in the sectional drawing. It would appear that the inconsistency in the planning permission had not been picked up at that point in time.

38. Nonetheless, the position of the bank as constructed is closer to the brook than shown in any of the approved drawings. Thus, even if the permission could have been implemented, which is doubtful, the bank, as constructed, is not what was approved. In either scenario, it does not benefit from planning permission and represents a clear breach of planning control. Accordingly, the appeal on Ground (c) must fail.

The Appeal on Ground (a)

39. The main issues in respect of the appeal on Ground (a) are:

    i) The effect on the character and appearance of the area;

    ii) The effect on living conditions of neighbouring occupiers;

    iii) The effect on flood risk;

    iv) The effect on wildlife along the corridor of Tottle Brook; and

    v) The weight that should be applied to any fall-back position.

Character and Appearance of the Area

40. The retaining bank is situated at the boundary of a recently constructed housing development within the grounds of No 7a Middleton Road. Tottle Brook runs immediately adjacent to the bank, with gardens associated with the dwellings at Wollaton Vale beyond. The bank is not prominent from wider public vantage points but is extremely prominent from various private vantage points, particularly the rear of Nos 41 to 63 Wollaton Vale. Residential properties at 163 & 165 Appledore Avenue are directly to the west.

41. Photographs of the appeal site prior to the housing development being constructed show a substantial garden, with a gradual incline running away from the brook. The prevailing character at that point in time was therefore of low-density housing with a relatively open aspect alongside the brook as it meanders to the rear of Wollaton Vale.

42. Inevitably the new housing development has altered that context which is less open as a result. However, the bank, as constructed, represents a substantial and unsympathetic engineered edge to that new development. Its height is imposing and the extremely steep angle of its face contrasts awkwardly with the previously natural appearance of the bank adjacent to the stream.

43. Although the Terramesh system is designed to allow vegetation to grow, thereby giving a green exterior, the height, length and steepness of the bank are such that it appears completely unnatural in design. It is the kind of feature one might associate with a highway embankment on a major road scheme, stuck in the middle of a suburban residential environment. Given the steepness of the bank and the lack of any notable shallow area next to the brook, I very much doubt that any significant trees or landscaping would establish over time, notwithstanding that a few small saplings have taken root. Certainly not to an extent that would mask the scale and harsh nature of the feature. Thus, the visual impact could not be mitigated by a condition requiring a landscaping scheme.

44. I recognise that the Council approved a retaining structure in association with the development and that some impact would inevitably result. However, the plans

depicted a bank that was further from the brook and the section showed a much shallower angle and more natural profile. Consequently, notwithstanding the inconsistencies with the plans approved, the envisaged result was not comparable to the impact of the development, as built.

45. Overall, the banking is an unsympathetic engineered solution that fails to have regard to its context, causing harm to the character and appearance of the area. For those reasons it is contrary to the aims of Policy 17 of the Broxtowe Part 2 Local Plan (2019) (the LP Pt 2), particularly subsections 1(a), which requires development to integrate into its surroundings and 1(e), which aims for development to reflect local topography and landscape features. It would also fail to comply with the design related aims of Policy 10 of the Council's Aligned Core Strategies Part 1 Local Plan (2014) (the ACS). Whilst not visible from the public realm it is visible from a considerable number of properties and design related policies apply to all development, not only those visible from public vantage points.

Impact Upon Neighbouring Living Conditions

46. As noted above, the bank is an imposing structure on account of its height, length and the severe angle of its face. It is particularly prominent when viewed from the rear gardens of the opposing dwellings at Wollaton Vale. Given the proximity with which it has been constructed to the brook it is the equivalent of having a highly engineered wall a number of metres high directly at the bottom of the respective gardens. The effect on outlook from the rear gardens of the opposing dwellings is harmful and significant.

47. The bank is directly to the south of Wollaton Vale and does appear to result in some overshadowing on account of its height and proximity. Photographs provided within the garden of No.43 Wollaton Vale depict overshadowing, albeit that they were taken in January when the sun will be low in the sky. In addition, the newly constructed dwellings sit above the retaining structure. Whilst the Council contends that the planning permission was unimplementable, it has not sought to take action against the dwellings themselves and they would appear to be no higher than shown on the approved drawings.

48. Thus, a degree of overshadowing would be likely in any event. It is also the bottom section of the neighbouring gardens that is primarily affected. The gardens are substantial such that the impact from overshadowing and any loss of light on living conditions at the properties as a whole is not overly significant.

49. The terraced area of the gardens at the top of the bank looks down into neighbouring gardens of Wollaton Vale from a considerable height and at close proximity. Without mitigation that creates a feeling of being overlooked and would result in a significant loss of privacy once the dwellings were occupied. It is the intention of the appellant to plant screening along the top of the bank/ bottom of the gardens and that would help to minimise overlooking from those using the gardens to an extent.

50. However, the way in which the bank has been constructed, directly adjacent to the brook, with such a severe outer face, is such that there is very limited opportunity for intervening planting, as was initially proposed when the planning application was considered. The approved landscape plan depicted a line of trees running along the then proposed shallow section of the bank. Not only would such landscaping have helped to soften the visual impact of the engineering works once

established, it would have helped to prevent overlooking and the sense of being overlooked. I have significant reservations that a similar landscaping scheme could be achieved in the available space and having regard to the steepness of the bank, as constructed.

51. Overall, the design of the bank appears deliberately conceived to provide the maximum amount of level garden space for the newly constructed dwellings at the expense of all else. No thought appears to have been given to the impact on neighbouring properties. It is an unneighbourly form of development in that respect and one that has caused harm to the living conditions of the residents in the opposing dwellings, particularly Nos 43 to 61 Wollaton Vale who live opposite.

52. For those reasons, the development is contrary to the aims of policy 10(2)(f) of the ACS and Policy 17(1)(l) of the LP Pt2.

Flood Risk

53. Matters of flood risk do not appear in the stated reasons for issuing the enforcement notice. It is not clear why given the clear objection to the development from the Environment Agency (EA) which formed one of the reasons for refusal on application 23/00074/VOC. Nonetheless, the Council and other parties have raised the issue, the appellant has had the opportunity to respond and it is clearly an important matter in the determination of the appeal.

54. As set out in the EA's written statement to the appeal, the organisation was consulted on the original application to develop the site in 2018 and was eventually satisfied that the development was acceptable, subject to the findings of the Flood Risk Assessment and associated conditions attached to the permission.

55. However, as noted above, the bank has been constructed significantly closer to the brook than shown on plans submitted with the approved permission. The EA has confirmed that its hydraulic modelling clearly shows that the bank has been constructed within the functional flood plain (Flood Zone 3b) and the construction has inevitably led to a reduction in flood storage capacity which could have adverse effects on the likelihood of flooding on third party land.

56. The appellants contend that the properties to the north of Tottle Brook are in Flood Zones 2 and 3, such that they would be at risk of flooding in any event and that the construction of the bank will not result in any significant change to that situation. However, in the absence of a Flood Risk Assessment I am not satisfied that assertion is soundly based. Given the proximity of the bank to the brook – significantly closer than previously approved – it has inevitably reduced the ability of flood water to flow along the southern side of the watercourse. It seems inevitable that will displace water in a flood event to the lower ground to the north. There is nowhere else for that water to go.

57. Moreover, the bank is a substantial structure with a significant volume and there is no evidence to support the assertion that the impact will be insignificant. Even if it was, there is a cumulative impact to flood risk. A series of small impacts could clearly add up to have a larger impact downstream. There is nothing within the National Planning Policy Framework (the Framework) or associated Planning Practice Guidance (PPG) to suggest that vulnerable development should be permitted in a functional flood plain simply because it is small in scale.

58. As noted in the EA's written statement, the development type is classed as "More Vulnerable" having regard to Annex 3 of the Framework. Table 2 of the PPG makes it clear that 'more vulnerable' development is not compatible within Flood Zone 3b and therefore should not be permitted.

59. I also note that the approved scheme provided a shallow area at the foot of the bank in order to provide access for maintenance, at the request of the EA. Given that the area at the foot of the bank is only wide enough to walk in single file such access has clearly been impeded.

60. For those reasons, the construction of the bank within the functional flood plain has reduced flood storage capacity, thereby increasing the risk of flooding for properties to the north and/or downstream of the site, whilst also hampering future flood maintenance measures along the brook. The increased risk of flooding is clearly contrary to the aims of Chapter 14 of the Framework and associated flood risk guidance in the PPG.

Effect on Wildlife

61. Conditions 7 and 10 of the 2020 permission required appropriate landscaping and the submission of and implementation of ecological enhancements with the aim of maintaining Tottle Brook as a wildlife corridor and enhancing biodiversity. Those conditions were replicated in the 2022 permission. The approved plans depicted a much more substantial gap between the edge of the bank and the brook, within which tree planting would take place.

62. The development as constructed appears as an entirely unnatural feature running almost up to the edge of the brook with very limited space to accommodate planting or to allow for the movement of wildlife along the corridor. No surveys or assessments have been presented but it seems highly likely that the increased proximity to the brook and narrowing of the corridor will have had a negative impact upon the ability of wildlife and vegetation/ habitat to flourish.

63. Certainly, the appellants have failed to demonstrate how the unauthorised development has maintained the wildlife corridor or had a positive impact upon biodiversity. In those respects, the development is contrary to the aims of Policy 17 of the ACS and Policy 17 of the LP Pt 2.

Potential Fall-Back Position

64. The appellants have noted that the consequence of the Council's decision to waive/ relax the requirements of the EN are that there is no requirement to rebuild any retaining structure after the bank is demolished. If nothing was rebuilt that would leave a sheer face of earth at a height of about 5m according to the appellants. It would be unstable and would lead to potential collapse into the brook. Neither would it present an attractive outlook for adjacent residents.

65. However, whilst that scenario is undoubtedly a potential fall-back, the likelihood of it occurring appears limited in my view. If permission was refused and the notice upheld, there would be an onus on both parties to work together to find an alternative solution; something that does not appear to have occurred, in earnest, to date. It seems highly unlikely that the appellants would leave the new dwellings at risk of collapse given the expense involved in constructing them and the fact

that it would be irresponsible to do so. Likewise, it would be incumbent on the Council to work towards an appropriate solution.

66. Thus, the fact that no obvious alternative scheme has been presented to date does not dictate that a solution is unlikely to be found. The appellants had every right to seek permission for the current structure in response to the enforcement notice but if the appeal is unsuccessful the reasons for that could be addressed in an alternative design, seeking planning permission as necessary.

67. It is not for me to determine such a scheme and consultation with neighbours and relevant bodies would be necessary. Nonetheless, given that planning permission has been granted previously, albeit with conflicting plans, there would appear to be no obvious reason why a suitable scheme could not be designed.

68. Clearly, any alternative would still have some impact. Nonetheless, a less severe bank, set further away from the brook would provide a softer edge in terms of outlook, would allow more space for landscaping and wildlife and alleviate issues in terms of flood risk.

69. Accordingly, whilst I am mindful of the fall-back scenario, the weight I attach to it is limited.

Conclusion on Ground (a)

70. The bank appears to have been constructed with the sole aim of providing as much level garden space for the newly constructed dwellings at the expense of almost anything else. It is an inward looking solution that had no regard for the character of the area, neighbouring amenity, flood risk, or biodiversity. It has caused harm in all of those respects and is contrary to the relevant policies of the development plan, as set out above. That harm could not be mitigated through the use of planning conditions.

71. The development is contrary to the policies of the development plan as a whole and no material considerations have been put forward that would outweigh that harm. I am mindful of the requirements of the enforcement notice and its potential implications. However, faced with that scenario I find it likely that the parties would work together towards an alternative solution and it is not a matter that outweighs the harm arising from the bank, as constructed.

72. For those reasons, the appeal on Ground (a) fails and I shall refuse to grant planning permission in respect of the deemed application.

The Appeal on Ground (f)

73. An appeal on this ground is made on the basis 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. The Council have stated that the aims of the enforcement notice are to remedy the injury to amenity.

74. The appellant has suggested that the terms of the notice could be varied to require reconstruction of the bank in “full” accordance with Landscape Plan (Drawing No. 17 D, Unredacted) and “broad” accordance with Site Sections plan (Drawing No 09 Revision Q). In my view, such a requirement would be hopelessly vague and it is

not clear how it could be achieved. A key problem with the plans is that it is not possible to achieve both. If the garden levels are constructed in full accordance with the landscape plan it is not possible to construct the retaining bank in broad accordance with the site section. What would be required would be a bank which is significantly different in height and gradient.

75. Therefore, the suggestion is unworkable in my view and would lack precision or clarity in terms of what needed to be done to comply.

76. It has also been suggested that the notice could require the gradient of the bank to be altered, with reference to section 173(5)(d) of the Act. However, it is not simply the gradient of the bank which causes the injury to amenity but its position which is too close to the brook. That injury is not simply as a result of overshadowing but due to the effect on outlook, the inability to plant any landscaping as envisaged, the effect on wildlife and potential increased flooding of neighbouring gardens. As such, a requirement to lessen the gradient would not be a lesser step that could achieve the same aims.

77. Finally, the appellant has requested that the red line plan attached to the enforcement notice should be reduced in scale should I be minded to uphold the notice. It is said that would allow the requirement to remove resultant rubble and building waste from “the site” to be complied with more easily by enabling it to be utilised in other parts of the development. In other words, if the red line was smaller the material could be taken off-site but used in land immediately adjacent, without needing additional trips on the road network.

78. From what I could see at the time of my visit the remainder of the development seemed largely complete with a number of homes occupied. Consequently, it seems unlikely to be needed for such a purpose and the requirement goes no further than is necessary to remedy the injury to amenity, it being common to require unauthorised material to be removed from site.

79. Whilst the appellant may have preferred the red line area to be smaller to assist in selling houses within the development, there is nothing inherently wrong in the Council’s decision to identify the wider site as a whole given that the retaining bank formed part of the development for which permission was granted on the whole site. The address on the enforcement notice is referred to as land associated with 7a Middleton Crescent and the red line is the land historically associated with that property. Accordingly, I see no obvious reason to amend the plan and it is not a lesser step that would remedy the injury to amenity under Ground (f).

80. No other obvious alternatives are before me and it follows that the appeal on Ground (f) must fail.

The Appeal on Ground (g)

81. The enforcement notice provides for a period of 12 weeks to remove the bank and 24 weeks to remove resultant rubble and material. The appellant considers that to be unreasonably short and requests that the time period be extended to 9 months to allow for the removal and a further 6 months for the removal of resultant material.

82. As with all cases on Ground (g) the aim is to strike a proportionate balance between the need to ensure compliance; to remedy the harm in the public interest;

to maintain confidence in the effective enforcement of the planning system and taking account of practical timescales and the private interests of those concerned.

83. Given the scale of the bank and the likely work involved to remove it, the period of 12 weeks seems unduly short, purely in practical terms, let alone anything else. Both parties have confirmed that a permit to carry out works would be required from the EA and that could take 3 months to process. The appellant has requested another 6 months beyond that.

84. I am also very mindful of the potential consequences of the enforcement notice and the fact that it is in nobody's interest to leave the bank unsecured. Whilst the parties have referred to discussions, there is nothing to indicate that any alternative proposal has been submitted to date.

85. In the present appeal the appellant has largely sought to retain the bank in its present position, with suggestions under Ground (f) of altering the angle of the face. In order to overcome the issues identified in respect of the Ground (a) appeal an alternative design would clearly be needed. It is not for me to suggest what that could entail but in the circumstances of the case I do think it prudent and reasonable to allow a period of time under Ground (g) for an alternative to be considered and subsequently implemented, should the necessary permission be granted.

86. Given the complexities of the case and the need to consult other parties, I am of the view that extending the period for compliance with section 5(i) of the Notice to 12 months would be reasonable; roughly 6 months to secure permission and 6 to complete the work. That would also allow time for any permit to be sought. A further 3 months beyond that to remove any resulting rubble and material would be sufficient.

87. Accordingly, I conclude that the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on Ground (g) succeeds to that extent.

Chris Preston

INSPECTOR