Horsham District Council

DELEGATED APPLICATIONS - ASSESSMENT SHEET

APPLICATION NO./ADDRESS:

DC/25/0008
Bentons Place, Hooklands Lane, Shipley, West Sussex, RH13 8PY

DESCRIPTION:

Application to confirm that on the balance of probabilities the bund was 87% substantially complete by September 2019 (Lawful Development Certificate - Existing)

RELEVANT PLANNING HISTORY:

DC/21/0901	Prior notification for the existing track and gateways to be resurfaced.	Prior Approval Not Required on 01.07.2021

RELEVANT ENFORCEMENT HISTORY

Enforcement Notice reference EN/22/0032 dated 18.10.2023

Without planning permission, the deposit of material including hardcore and rubble to form a bund in the approximate position shown hatched brown on the attached plan.

Reasons for Issuing the Notice:

(1) It appears to the Council that the above breach of planning control has occurred within the last four years. The site lies within the floodplain of Lancing Brook in an area identified as land at risk of flooding by the Environment Agency failing within Flood Zones 2 and 3.

(2) The unauthorised development comprises the deposit of inert material to form a bund along the eastern perimeter of the field adjacent to Lancing Brook. The unauthorised development results in an increased risk of flooding elsewhere because the floodplain capacity has been reduced through the construction of the bund. All development that proposes works within Flood Zone 3 requires a Flood Risk Assessment (FRA). However, no such FRA has been submitted and insufficient information has been provided to demonstrate that the development would not have a detrimental impact on the flood flow pathway along the Lancing Brook valley, increasing the risk of flooding elsewhere. Therefore, it is considered the unauthorised development is contrary to the advice contained in paragraphs 167 and 168 of the National Planning Policy Framework and Policies 35 and 38 of the Horsham District Planning Framework 2015 concerning Climate Change and reducing the risk to flooding.

(3) In addition, the unauthorised development results in an unnatural features in the landscape which neither protects, conserves or enhances the landform of the area. It is therefore considered to have a detrimental impact on the character and appearance of the surrounding area contrary to policies 25, 26 and 33 of the Horsham District Planning Framework 2015. The Council does not consider that planning permission should be granted, because planning conditions could not overcome these objections to the unauthorised development.

Requirements of the Notice:

(i) Remove the bund shown hatched brown on the attached plan from the Land;

(ii) Following (i) above, restore the Land to its original condition before the unauthorised development took place by levelling the ground to match the level of the Land either side of the unauthorised development and sow it with grass seed; and

(iii) Remove the resulting debris from the Land.

Time for Compliance

Within six (6) calendar months from the effective date of the Notice.

Subsequent to the serving of the Notice, the compliance period was extended to 18.01.2025.

PLANNING ASSESSMENT

The application seeks a Certificate of Lawful Development Existing to confirm that the bund was '87% substantially complete' by September 2019 (a period in excess of 4 years from the date of the application).

Article (2) of Section 191 of the Town and Country Planning Act 1990 states:

"For the purposes of this Act uses and operations are lawful at any time if –

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force."

Applicant's Evidence

- *Location Plan*
- *Measured Survey (TOPO) reference EX10*
- *Planning/Lawful Development Statement*

The evidence available through aerial photo analysis confirms that on the balance of probabilities, the bund was 87% substantially completed by September 2019. The height of the 87% length of bund has remained the same, where this equates to a distance of 126m out of a total length of 145m.

The last available aerial photo before September 2019 is the September 2018 aerial photo. This photo shows the bund serving its purpose to retain the water.

The 2009 aerial photo prior to any earthworks clearly shows an area of wetland distinct from the fields around. That area of wetland relates clearly to the extent of lake that is evident in the latest 2022 aerial photo. The September 2012 shows the commencement of works. The subsequent aerial photos shows that it was clearly the intent of the occupier of the land to create a lake with an earth bund running from the north continuing south to form the eastern bank of the lake.

Council's Evidence

- *EN/17/0480 – Importation of Soil*

The importation of soil to reinstate the historic lake requires planning permission as the bunding created by the imported material is considered to be an engineering operation.

Photographs dated 21.09.2017 show an area of imported soil adjacent to a pool of water, with a pile of soil and digger in situ.

- *EN/22/0032 – Without planning permission, the deposit of material including hardcore and rubble to form a bund in the approximate position shown hatched brown on the attached plan*

Council informed in January 2022 that tipping on the floodplain had restarted. Further allegation of tipping received in May 2022. Site visit undertaken on 29.06.2022 confirmed that material had been tipped on the east side of the pool of water.

The site visit photos dated 29.06.2022 show a bund to a greater length than that evident from the 2017 site photos.

The site visit photos dated 06.03.2023 show a bund along the length of the body of water, with a digger in situ along the ridge of the bund. The southern extent of the bund comprises soil, with the northern extend grassed over.

- *Google Earth aerial photos dated 09.2015, 08.2018, 04.2020, 02.2021, 03.2022*

  09.2015 image shows the area of land laid to grass.

  08.2015 image shows a pool of water with a track present to the east of this. A digger is present to the southern extent of this track, and it is unclear from the aerial photo whether the ground is elevated.

  04.2020 image shows the track to be further extended to the south. It is unclear from the aerial photo whether the ground is elevated.

  02.2021 image shows the track to be further extended to the south. It is unclear from the aerial photo whether the ground is elevated.

  03.2022 image shows the track to a similar extent as the previous image. It is unclear from the aerial photo whether the ground is elevated.

Discussion

Section 191(4) of the Town and Country Planning Act 1990 states that:

"*If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application…they shall issue a certificate to that effect; and in any other case they shall refuse the application*."

F W Gabbitas v SSE and Newham LBC [1985] JPL 630 held that the applicant's own evidence does not need to be corroborated by "independent" evidence in order to be accepted. If the Local Planning Authority has no evidence of its own, or from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application; provided the Applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the "balance of probability".

The application seeks a Certificate of Lawful Development Existing to confirm that the bund as shown on the submitted plan was 87% substantially complete in September 2018.

The Planning/Lawful Development Statement states that the aerial photographs available from Google Earth shows on the balance of probability that the bund was 87% substantially completed on September 2018. It is outlined that the intent of the occupier was to create a lake with an earth bund running from the north and continuing south to form the eastern bank of the site.

In Sage v SSETR & Maidstone BC [2003] UKHL 22254 concluded that regard should be had to the *totality* of the operations which the person originally contemplated and intended to carry out. If the developer has stopped short of what was contemplated and intended, the building can properly treated as an incomplete building against which the four year period has not yet begun to run. Assessing whether the developer intends is an objective exercise based on evidence from various sources, having regard especially to the building's physical features and its design. The character and purpose of a structure falls to be assessed by examining its physical and design features.

The Google Earth image dated 09.2015 shows no evidence of a soil having been deposited, with the relevant area of land comprising grass. There appears to be some piles of unidentifiable deposit adjacent to the lane, but it is unclear from the image what this may be. The next available image is dated 08.2018 where this shows a track extended to the south of the existing lane, with a length of soil deposited and a digger present at the southern tip. It is noted that water has begun to pool along the northern extent of the track/deposit. These images indicate that engineering operations begun sometime between 09.2015 and 08.2015. A compliance investigation dated from September 2017 alleged the importation of soil, with the site visit photographs dated 21.09.2017 showing a deposit of soil adjacent to a pool of water. Based upon this evidence, it is likely that the engineering operation began sometime between 08.2015 and 09.2017, albeit that the Council have no evidence to confirm the exact date the operation began.

The application submission seeks to demonstrate that the bund was substantially completed by September 2019. However, having reviewed the Google Earth imagery, it is evident that engineering operations to extend the track continued from the point a breach was identified through 2018, 2020, 2021, and 2022. The aerial photographs show the track to have been extended further to the south in the photos dated 08.2018, 04.2020, and 02.2021, with the track remaining the same length on the 2022 image. This evidence shows that the Applicant continued to carry on the operational development, with a clear intention to extend the bund to the south. On this basis, it is considered that the evidence shows on the balance of probability that the engineering operations to the bund continued over an extended period of time, with the evidence showing that the bund was progressively extended to the south between 08.2018 and 02.2021.

While the characteristics of the development, which comprises the importation and deposit of soil to create the bund, make it difficult to confirm a definitive end to the development, the Google Earth imagery shows the continued addition to the deposit, with the difference in length of the bund between 08.2015 and 04.2020 considered substantial. In addition, a noticeable increased in length of the bund occurred between 04.2020 and 02.2021. For these reasons, it is not considered that it has been shown on the balance of probability that the bund was substantially complete by September 2018.

Furthermore, the evidence presented to the Council does not specify the height of the bund at any given point within the applicant's timeline. It is possible that material continued to be deposited on the bund after September 2018, potentially altering the site further. This contributes to the existing uncertainty and ambiguity surrounding the evidence provided.

Notwithstanding the above, it is noted that an Enforcement Notice has been served, relating to the deposit of material including hardcore and rubble to form a bund. The Notice was served on 18.10.2023, with the relevant plan indicating that the Notice relates to the entire length of the bund. The Notice outlines that the development had occurred within 4 years of the date of the Notice. As discussed above, the engineering operations to deposit the soil and create the bund occurred over a period up until 2021. The evidence illustrates a continued intent to extend the bund to it's current length, where it is considered that the bund was not substantially completed until such time as the last deposit. The Enforcement Notice is therefore considered relevant, where the development is not considered to be lawful by virtue of time.

For these reasons, it has not been demonstrated on the balance of probability that the development, namely the bund, was substantially complete by September 2018. The Certificate of Lawful Development Existing is therefore recommended for refusal.

Recommendation:

1 It has not been demonstrated on the balance of probability that the bund shown outlined in red on the attached plan was substantially complete and immune from enforcement action on September 2018.

Plans list for: DC/25/0008
Schedule of plans/documents **not approved**:

Plan Type	Description	Drawing Number	Received Date
Location plan		NONE	06.01.2025
Plans		EX10	06.01.2025

DELEGATED

Case Officer sign/initial Tamara Dale Date: 27.02.2025

Authorising Officer sign/initial RHERMITAGE Date: 08.04.2025

PLAN

