

**KIRKLEES METROPOLITAN COUNCIL  
INVESTMENT & REGENERATION SERVICE**

**DEVELOPMENT MANAGEMENT**

**Town and Country Planning Act 1990 (as amended) – SECTION 70**

**DELEGATED DECISION TO DETERMINE PLANNING APPLICATIONS**

Reference No:	<b>2023/62/93773/W</b>
Site Address:	Manashay House, 115, Upper Brow Road, Paddock, Huddersfield, HD1 4UP
Description:	Erection of gabion basket retaining wall
Recommending Officer:	Tom Hunt

**DECISION – Decline to Determine**

**I hereby authorise the decision to decline to determine this application for the reasons set out in the officer's report and recommendation annexed below in respect of the above matter.**

Teresa Harlow

***AUTHORISED OFFICER***

**Date: 25-Jan-2024**

## **OFFICER REPORT – 2023/93773– Erection of retaining wall**

### **1. Development**

- 1.1 This application proposes the erection of a retaining wall, retrospectively. This is a further application submitted retrospectively pursuant to an enforcement investigation and follows a previous retrospective planning application ref 2021/91604 refused on 08/06/2022; and a later application 2022/92927 seeking retrospective permission which was declined to be determined on 07/11/2022, with details being the same as the previously refused application 2021/91604. The development is subject to a pre-existing Enforcement Notice.
- 1.2 The application site relates to a large plot whereby a detached two storey dwellinghouse and a detached garage sits on elevated ground due to historic retaining walls to its west and southwest. It has a gated large driveway with access from Upper Brow Road. The retrospective application for development essentially is a new retaining wall built partially on top of an existing historic retaining wall and partially a new section of retaining wall both erected with stone gabions and backfill of land with fence to increase the extent of useable garden to the elevated ground.
- 1.3 To the north is a rail line bridge and a pedestrian bridge over, to the west and south is a large plot of undeveloped cleared land at a lower elevation which is partially wooded and outside of its boundary is a PROW footpath (HUD/318/10) which curves around to be approximately 4.2m at its closest to the plot boundary of the site and to its southeast is another residential detached building also served by a retaining wall. The plot is mostly surrounded otherwise by heavily vegetated banks, trees and greenery, some of which had be recently felled.
- 1.4 The railway line on a bridge is roughly level to the application site and there are significant ground level changes locally. The original retaining walls are constructed of drystone to the west closest to the rail line approx. 3.5m height. The adjoining middle section continues down to a buttress sloping section of retaining wall with coursed natural stone and then drystone retaining walls 3m in height. The southwest section are originally old gabion baskets approx. 3m height. The adjacent neighbouring detached property has an approximate 3m height gabion

basket retaining wall with sloping ground rising to the east to meet a timber fence.

- 1.5 The plot is within the Strategic Green Infrastructure Network as the River Colne Corridor in the Kirklees Local Plan.

## 2. Salient Planning History

**2021/91604** - Erection of retaining wall. Refused – 08/06/2022.

**Enforcement Notice – COMP/21/0030.** Served July 2022 and took effect on 02/09/2022, no appeal submitted. Period of compliance was 6<sup>th</sup> December 2022.

**2022/92927** – Erection of retaining wall. Decline to Determine – 07/11/2022.

**2021/91795** - Manashay Cottage, Upper Brow Road, Paddock, Huddersfield, HD1 4UP. Erection of 7 dwellings with formation of associated access and parking. Approved: 03/12/2021.

## 3. Decision to decline to determine the retrospective planning application

- 3.1 Part 3, Section 70C. - (1) of the Town and Country Planning Act 1990 states the following:

*‘A local planning authority in England may decline to determine an application for planning permission for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matter specified in the enforcement notice as constituting a breach of planning control*

*(2) For the purposes of the operation of this section in relation to any particular application for planning permission, a “pre-existing enforcement notice” is an enforcement notice issued before the application was received by the planning authority’*

## 4. Assessment

- 4.1 The submitted planning application for the Erection of retaining wall (**2021/91604**) relates to matters specified in the Enforcement Notice as constituting a breach of planning control and refused on 08<sup>th</sup> June 2022 for the following reasons:

*“1. The retaining wall by reason of its overall scale and design would form a prominent feature that would be out of keeping with the character and appearance of the local area and would be visually oppressive to residents within the development approved by application no. 2021/91795. The proposal would therefore be detrimental to visual*

*amenity and to approve such an application would be contrary to Policy LP24 (a) and (b) of the Kirklees Local Plan and conflict with paragraph 130 of the National Planning Policy Framework.*

*2. The retaining wall and its ground works would form a closely overbearing structure that would unacceptably impact on the residential amenity of the future adjacent development in application 2021/91795 contrary to Policy LP24 (b) of Kirklees Local Plan and paragraph 130 of the National Planning Policy Framework.*

*3. The structural integrity of the retaining wall is undetermined and is a material planning consideration in relation to land stability, as such, the development hereby submitted would not accord with the requirements to ensure the public safety interest concerning the land stability of the approved residential development in 2021/91795, the Public Right of Way and the railway line contrary to the requirements of Policy LP53 of the Kirklees Local Plan and paragraph 183(a) and (c) of the National Planning Policy Framework.”*

4.2 The enforcement notice required that the applicant should permanently reduce the height of the gabion basket retaining wall to a height not exceeding 3 metres measured from natural ground level; to return the land to its previous condition with a ‘battered’ sloping embankment; and to remove all dismantled resulting material from the site.

4.3 Upon submission of the present application **2023/93773**, the Planning Officer received a Location Plan, Existing and Proposed Site Plans, Existing and Proposed Site Section Plans, a Design and Access Statement by STIQ Consulting (Ref: ST23.233.) and a Conditions & Dilapidations Report by Batty France Ltd (dated 22/11/2022, Ref: 20750).

4.4 Comparing the original application for the Erection of a Retaining Wall - **2021/91604** – this submission still proposes to retain the gabion walling at over 3m in height, limited sectional information has been provided, and does not propose to batter back the land as required in the enforcement notice. Some additional ‘justification’ has been provided in support of the revised proposal (particularly in section 2 of the design and access statement). It is noted that the Enforcement Notice stated that the applicants are directed to permanently reduce the height of the gabion basket retaining wall to a height not exceeding 3 metres measured from natural ground level. This would include all sections of the retaining wall, such as the new ~2.0m to ~2.8m metres height section of the retaining wall above the existing historic retaining wall. The application submission is silent on this.

4.5 The submitted photographs within the Design and Access Statement by STIQ Consulting and the conclusion of this document is acknowledged but does not materially impact on the Decision issued.

- 4.6 The Design and Access Statement by STIQ Consulting comments that the removal of mature trees and greenery had the likely effect of destabilising the existing retaining wall. It refers to a superseded set of plans within application 2021/91604 with a proposed gabion design that was more substantial. It states that a gabion retaining wall, which is of the same design as 2021/91604 but which – for one section referred to would be at a height of 3.75m, is the only practical and feasible option to replace the effect of mature trees and greenery’s soil stabilisation. It proposes to visually screen the height of the land banking and sections of the retaining wall with landscaping including fast growing coniferous plants and climber plants, with this also obscuring the impact of the regraded land to the rear of the dwelling. It does not comment on or supply other sections of the retaining wall, only limited sections along one part of the site.
- 4.7 Within the Statement, it provides an Existing Site Section with Proposed Adjacent Dwelling as Approved in 2021/91795, which is not to scale but is annotated with heights and widths in millimetres. This includes one of the proposed houses affected within application 2021/91795 and comments that it would increase the separation distance of the previously existing retaining wall (3m height from ground) with the proposed being 0.5m further but with an increased height of 3.75m from ground and omits to reference the overall increase in regraded land behind the retaining wall. Officers note that this pertains to one very limited section and does not provide specific details which would alter the overall proposal as assessed in application 2021/91604.
- 4.8 The Statement erroneously states that the ‘proposed’ height is 4m lower than the ‘existing’ however Officers had assessed the same proposal in 2021/91604 and there had been no alteration in assessed height in the current proposal 2023/93773. The ‘existing’ height is the original height of the original retaining wall.
- 4.9 A Conditions & Dilapidations Report by Batty France Ltd (dated 22/11/2022, ref: 20750) was submitted in support of the scheme to address Reason 3 for Refusal. This was drafted by Ashley France of Batty France Ltd, with presented credentials which is likely to qualify him as a ‘competent person’ under paragraph 189c) of the NPPF. The report contains a repetition of the same information and calculations as submitted previously within application 2021/91604 and additional photographic recordings. It includes within its appendix, previously submitted plans including a Proposed Rear Elevation (drawing no. 100)03) which is at odds with the submitted plans and information within the design and access statement. It does not confirm that the proposed retaining wall is structurally stable as a competent person.
- 4.10 No significant amendments are proposed to conclude that the harm under Reasons one and two of the 2021/91604 decision would be overcome. There is limited sectional information and no clear demonstration how an effective landscape proposal would be undertaken in a narrow strip of land. In respect of Reason 3, Officers do not have

sufficient information to consider otherwise and so there is no justification to change the Local Planning Authority's previous Refusal.

- 4.11 The submitted received information, including the drawings ST23.233.P-1001, 1002 and 1101 by STIQ Consulting, and the design and access statement seek to provide additional information in support of revisions to the unauthorised structure. The information submitted has been assessed, this is limited in terms of detail and does not overcome the previous reasons for refusing planning permission or for the steps required to remedy the breach of planning control set out in the enforcement notice. Consequently, part of an enforcement matter is involved in this application.
- 4.12 Following *Chesteron v Wokingham BC* [2018] EWHC 1795 (Admin), it is clarified that S70C is not concerned with the existence of differences between two developments, but with the existence of similarities. Thus, the discretion to decline to determine application is available to the Local Planning Authority where any part of an enforcement matter is involved in the application regardless of whether the application would involve consideration of different planning merits.
- 4.13 It is clear *Chesteron* is relevant in this instance as the application is seeking permission for a part of the development enforced against in light of the planning submission and plan attached to the enforcement notice. There is no doubt that the development to erect a retaining wall is the same unauthorised development than that sought under the current application. Consequently, there can be no argument that the permission sought for the retaining wall does not form the **retaining wall** enforced against. Section 70C is therefore engaged if it is considered the applicant is seeking permission for a development already considered and enforced against by the Local Planning Authority.
- 4.14 Although some amendments to the unauthorised structure are suggested with some mitigating measures proposed by the applicant or the agent; these do not overcome Reasons 1 and 2.
- 4.15 No appeal was submitted against application **2021/91604**, submitted in April 2021 and not determined until June 2022 or the pursuant Enforcement Notice – **COMP/21/0030**. The current submission appears to seek a further decision for the local planning authority on the erection of a gabion retaining wall.
- 4.16 Consequently, it is appropriate for the LPA to lawfully decline to determine this application in light of the planning history and its decision.
- 4.17 The basis for not determining, as set out above, is under section 70C is by reason the applicant is seeking permission for development which forms part of development specified in a pre-existing enforcement notice the Local Planning Authority is using its discretion to do so on the same development.

## 5. Recommendation – Decline to Determine

5.1 In accordance with Part 3, Section 70C (1) of the Town and Country Planning Act 1990, the Local Planning Authority exercise its discretion to decline to determine application no. **2023/93773**.

### Decision Notice Text

The Local Planning Authority exercises its discretion under section 70C of the Town and Country Planning Act 1990 to decline to determine the application no. **2023/93773** by reason that the granting of permission would form part of a development specified in a pre-existing enforcement notice.

This decision is based on the following plans/documents:-

<b>Plan Type</b>	<b>Reference</b>	<b>Version</b>	<b>Date Received</b>
Location Plan.	Drawing no. ST23.233.P-1001.	Unamended.	21/12/2023
Pre 2020 and As Built Site Plans.	Drawing no. 1002.	Unamended	21/12/2023
Existing and Proposed Section Plans.	Drawing no. 1101.	Unamended	21/12/023
Design and Access Statement	Design and Access Statement by STIQ Consulting. Ref: ST23.233.	Unamended.	21/12/2023
Conditions & Dilapidations Report	Conditions & Dilapidations Report by Batty France Ltd. Dated 22/11/2022. Ref: 20750.	Unamended.	15/01/2024

Dated: 24/01/2024