

REPORT TO MINISTER FOR PLANNING AND ENVIRONMENT

By Graham Self MA MSc FRTPI

Appeal by Mr John Victor Le Vavasseur Dit Durell against an enforcement notice.

Reference Number: ENF/2020/00001.

Site at:

Field No. MY294 (UPRN 69213852) La Rue de la Hougue Mauger, St Mary (shaded in yellow on the attached plan),¹

Field No. MY295 (UPRN 69213853) La Rue de la Hougue Mauger, St Mary (shaded in blue on the attached plan),

Field No. MY296 (UPRN 69213854) La Rue de la Hougue Mauger, St Mary (shaded in green on the attached plan) and

Field No. MY249 (UPRN 69213816) La Rue des Touettes, St Mary (shaded in grey on the attached plan).

Site inspection carried out on 3 November 2021.

Introduction

1. This appeal is against an enforcement notice issued on 11 June 2021. Details of the enforcement notice are recorded below.
2. The matters which appeared to constitute the breach of development controls were set out in Part 3 of the notice as follows:
 - “3.1 At the northern boundary of Fields MY294 and MY295 a section of hedgerow and banque has been removed to create a new inter-field vehicular access path (*as indicated 3.1 on the attached Enforcement Notice Location Plan – ‘Removed Banques and Hedgerows’*). The removal of the hedgerow and banque was carried out without prior planning consent. The removal of this section of hedgerow and banque amounts to development, as defined in Article 5 of the Planning and Building (Jersey) Law 2002 and is not granted permission by way of the provisions of the Planning and Building (General Development) (Jersey) Order 2011.
 - 3.2 The hedgerow and banque boundary between Fields MY295 and MY296 measuring approximately 104m in length, has been removed to create a single field, measuring approximately 11500m² (*as indicated 3.2 on the attached Enforcement Notice Location Plan – ‘Removed Banques and Hedgerows’*). The removal of the hedgerow was carried out without prior planning consent. The removal of this section of hedgerow and banque amounts to development, as defined in Article 5 of the Planning and Building (Jersey) Law 2002 and is not granted permission by way of the provisions of the Planning and Building (General Development) (Jersey) Order 2011.”
 - 3.3 At the northern boundary of Fields MY296 and MY249 a section of hedgerow and banque has been removed to create a new inter-field vehicular access

¹ The references here to “the attached plan” refer to the plan attached to the enforcement notice, not to this report.

path (as indicated 3.3 on the attached Enforcement Notice Location Plan – 'Removed Banques and Hedgerows'). The removal of the hedgerow and banque was carried out without prior planning consent. The removal of this section of hedgerow and banque amounts to development, as defined in Article 5 of the Planning and Building (Jersey) Law 2002 and is not granted permission by way of the provisions of the Planning and Building (General Development) (Jersey) Order 2011."

3. The reasons for issuing the notice were stated to be:

"It appears the the Breaches of Development Controls have occurred within the last 8 years.

Fields MY294, MY295, MY296 and MY249 lie within the Green Zone as defined in the Jersey Island Plan 2011 (Revised 2014), wherein lies a general presumption against development that would cause serious harm to landscape character.

The unauthorised development is considered to cause serious harm to the landscape character and wildlife of this sensitive rural area and would fail to meet the requirements of Policies SP4, GD1, NE7, EIW5 and ERE1the Jersey Island Plan 2011 (Revised 2014)."

4. In Part 5 of the notice, the steps required to rectify the breach were specified as follows:

"Reinstate the hedgerow by;

- 5.1 The reinstatement of the previously removed banques as set out in 3.1, 3.2 and 3.3 above (and as indicated 3.1, 3.2 and 3.3 on the attached plan).

5.1(a) The dimensions of the reinstated banques to be between 2.50m and 3.00m wide at the base of the banque, between 1.25m and 1.75m high at the top of the banque and between 1.25 and 1.75m wide at the top of the banque.

5.1(b) The reinstated banques should be made up of topsoil mixed with any stones that were retained during the original removal of the banques.

- 5.2 The reinstated banques to be planted under the supervision of a qualified horticulturalist with the following mixture of locally sourced hedgerow plants grouped together once every 6m to 8m along its respective lengths;

5.2(a) 50% Hawthorn (*Cretageous Monogyna*) and the remaining 50% to be made up of a mixture of Elder (*Sambucus Nigra*) and Blackthorn (*Prunus Spinosa*).

5.2(b) Plants must be spaced a minimum of 60cm apart in groups of not less than 6 plants comprising of a combination of each of the species mention in 5.2(a) above.

5.2(c) All plants must be planted with a spiral guard shelter and stake with either a mulch mat or wood chip for protection.

5.2(d) Any of the newly planted plants that fail within the first 12 months after compliance with this order must be replaced with a similar plant in accordance with 5.2(a), 5.2(b) and 5.2(c) above."

5. The period for compliance with the enforcement notice (referred to in the notice as "Time Frame" for compliance) was specified as:

"You are required to commence these remediation works no earlier than the 15th of November 2021 and have concluded and complied with this order in full by no later than the 31st of March 2022."

6. The rest of this report includes a note on some procedural matters, a description of the appeal site and surroundings, summaries of the cases for the appeal parties, my assessment, conclusions and recommendations. The appeal statements, plans and other relevant documents are in the case file for you to examine if necessary.

Procedural Matters

7. I had originally intended to hold a hearing into this appeal. However, after I had received and read the appeal documents and was about to make arrangements for a hearing, Mr Durell informed the Judicial Greffe that he would be away from Jersey and not available for about two months, although his daughter could be available to act on his behalf. In the circumstances I considered that the appeal could be suitably assessed by the written representations procedure combined with a site inspection, and that questions which I had intended to ask at a hearing could be put in writing. At the site inspection Mr Durell was represented by his daughter, Ms G Durell.
8. I invited written comments from your department and from the appellant on two matters. The first concerned the fact that the compliance period was defined in the enforcement notice with start and end dates, instead of by specifying a period of time. An appeal has the effect of suspending the requirements of an enforcement notice; and bearing in mind the time elapsed because of the appeal, and the time which might elapse between submission of my report and your decision², the dates specified might not be sensible or reasonable. Since it appeared that neither side had considered this matter I judged it appropriate in the interests of fairness to invite comments, and arranged for an email to be sent to your Department and to Miss Durell through the Judicial Greffe for this purpose.
9. The second matter on which I invited comments concerned paragraph 5.2(d) of the enforcement notice as issued, which purported to specify a requirement to be carried out after the end of the compliance period. That is not a valid combination of timing and requirement.
10. I have taken account of the comments submitted in response, which are mentioned in the case summaries below.

Site and Surroundings

11. The appeal site is located in a rural area south of La Rue de la Hougue Mauger, near La Mare wine estate. The land slopes gently down from north to south.
12. At the time of my inspection the fields within the site were in arable cultivation. The site comprised three fields. With reference to the location map attached to the enforcement notice, these are: Field MY294 to the east, MY249 to the west, and a combination of Fields MY295 and 296 in roughly the centre of the site. As indicated by the red line on the plan labelled "Removed Banques and Hedgerows", there was no bank or other physical subdivision between Fields

² The timing of your decision is of course outside my control, and I am aware that recent decisions on planning appeals have taken up to around 3 months from the submission of an inspector's report and recommendation.

MY295 and MY296. As also indicated on that plan, there were gaps in the bank in the north-west corner of Field MY294 and in the north-east corner of Field MY249.

13. The bank between Field MY249 and the central field (MY295/296) was well vegetated with trees and shrubs. The bank between Field MY294 and the central field was also vegetated, though much less thickly, with grass and five or six shrubs or small trees.
14. The southern boundary of the central field has a "kinked" shape, where the eastern part projects southwards a little beyond the adjacent field. Field MY249 in the west projects southwards well beyond the other parts of the appeal site.
15. Along the northern boundary of the site there is a roadside bank with field entrances. The bank is grassed with intermittent trees, and in places what appear to be some recently planted shrubs (without collar-type guards). When I saw them it was difficult to tell whether these shrubs were alive but they did not appear to be thriving. The land beyond the site to the north is open countryside near the coast and the northern part of the site is fairly exposed to northerly winds.

Case for Appellant

16. The basis of the appellant's case is set out in the appeal form and in letters addressed to the Judicial Greffe dated 6 July and 1 and 27 August 2021. The summary grounds of appeal in the appeal form refer to paragraph 3.2 of the enforcement notice and contend: "Not to replace the banque mound of earth with no trees or bushes on it; instead: on the south boundary producing a larger area of plants and hedges to produce a copse in the dog-leg which should grow and use for animals".
17. Various other points are made in the letters. Mr Durell makes clear that he had no knowledge of the need for planning permission for the removal of the field banques, as this did not arise during his farming career. He states that he will replace the inter-field access path as proposed (3.1 and 3.3).³
18. In 2020 Albert Bartlett did not want field MY295, so it grew weeds⁴. In 2020 Mr Durell bought field MY296 and levelled the bank which had three gorse bushes on it; the bottom half was level with the field. When he farmed he would place the tractor wheel on the bank to plough the last furrow. Bartletts wanted the field of good size and with easy access. Putting the bank back would create two small fields of no use to agriculture. Re-wilding is important, but this could be achieved by straightening the southern boundary so as to create an estimated area of 9 perch to grow bushes and trees as shown in the plan in the letter of 1 August.
19. In the later letter, Mr Durell maintains that creating a re-wilding area at the south end of field MY295 would produce a larger and more protected area of land than

³ Here I have recorded a part of Mr Durell's letter dated 6 July 2021. I think this means that Mr Durell agrees to replace the short lengths of banque which were removed to create accesses between two of the fields (labelled 3.1 and 3.3 on the Enforcement Notice Location Map) – ie he agrees to replace these parts of *the banque*, not to replace *the access path*.

⁴ A supporting letter was submitted with the appellant's letter of 1 August. The letter is from a Mr Adrian Baudains, Farm Director Albert Bartlett, but has no sender's or recipient's address (it is addressed "Dear Sir/Madam"). Although it is not clear from the letterhead or the letter, I assume it was sent on behalf of the well-known company which I believe is named Albert Bartlett & Sons. In summary, the letter confirms that the company was unable to gain access to field MY295 in previous years due to very tight access and the field being too small; having field MY295 under control enabled safe and proper access for Bartlett's machinery.

could be planted with significant hedging for nature. A planning officer (Mr Clarke) had advised Mr Durell over the phone not to apply for retrospective planning permission as it would be refused; if IHE agreed that a retrospective application could be submitted the process could be started immediately. The required reinstatement of the removed hedgerow would require 78 hedging plants and goes beyond what was originally in position which was 6 large gorse bushes as shown by aerial photographs. Based on past experience of planting hawthorns near the north coast only a small proportion of hawthorns would survive.

20. Mr Durell recognised the importance of maintaining Jersey's character but it was necessary to secure fields for the farming industry. In the past he had removed banques with no problems and had seen other banques being removed recently in St Mary so was unaware this was subject to the law.
21. A message from Ms Durell on her father's behalf (in response to my message mentioned in paragraph 8 above) stated that the inspector's comments were understood and asked whether it would be possible to include in the cause of action a note regarding weather/ground conditions allowing machinery and movement of ground to be carried out.

Case for Planning Authority

22. From the comments made by the appellant, the Department understood that he intended to comply with requirements 3.1 and 3.3 in the enforcement notice to reinstate the sections of banque and hedging which had been removed to create accesses between fields. This is welcomed and the Department understood that these parts of the notice were not being contested.
23. As is set out in the reasons for issuing the notice, the banks and hedgerows would have provided significant habitat for a range of wildlife species, and the works undertaken had caused serious harm to landscape character. The development was contrary to several policies of the Island Plan, including Policy SP4 on protecting the natural and historic environment, reinforced by the general considerations covered by Policy GD1. The site is in the Green Zone where Policy NE7 provides a presumption against development subject to possible exceptions; the removal of banques and hedgerows is not such an exception.
24. Policies SP4 and NE7 are partly based on a Countryside Character Appraisal which notes that a patchwork of small fields is characteristic of this area. In this Appraisal the restoration and management of field boundaries is highlighted as a priority. Island Plan policies NE1, NE2 and NE3 also set out objectives to promote biological diversity and wildlife corridors. Policy NE4 provides that boundary features which are of landscape or biodiversity value (including banques and hedgerows) will be protected by refusing development proposals which would result in their loss or damage.
25. An aerial photograph taken in summer 2018 prior to the unauthorised works being undertaken shows a clear shadow line illustrating the existence of the banque and planting. The density of the planting varies and appears to have been shorter towards the south but there is no evidence that the "bottom half was level with the field" as stated by the appellant. Some of the vegetation may have been lost by lack of management and by tractors being reversed onto the base of the banques.

26. The majority of fields used for agriculture in Jersey are between 3 and 4 vergées. Fields MY 294 and MY295 are about 3.4 and 3.2 vergées respectively. Both have a long history of agricultural use and were farmed separately until 2020.
27. As regards the breach described in paragraph 3.2 of the notice, the appellant has suggested alternative planting; but this is not an application for planning permission and the enforcement notice can only require that the breach be remedied, not that works be undertaken as an alternative or in mitigation. The suggested alternative planting cannot be considered as part of the appeal as the suggestion has not been made under ground (h), so there is no application for planning permission to be granted. In any case planting the area suggested by the appellant would not replace the banque and hedging which previously existed and would not provide shelter and wildlife foraging corridors between fields.
28. The letter submitted on behalf of Albert Bartlett about difficulties using the fields is noted, but the Department consider that these fields in their previous size are capable of being used for agriculture, and that enabling financial efficiency for a particular grower does not justify the detrimental impact which has been caused to the Jersey countryside.
29. In response to the inspector's questions (as mentioned in paragraphs 8-9 above) the Department suggested that if the appeal were dismissed, the start date for the commencement of the works specified in the notice should be removed, since a decision would not be reached by 15 November 2021. However, the decision might be reached well before the completion date of 31 March 2022 giving time for the remediation works to be undertaken. As regards paragraph 5.2(d) of the notice, it would be reasonable to suggest two possible amendments to the time frame for compliance, depending on the date of the Minister's decision, as follows:
- (1) If the appeal is dismissed and the date of decision allows time for the remediation works to be completed by 31 March 2022:
- "You are required to complete the remediation works set out in paragraphs 5.1(a) and (b), and 5.2 (a),(b) and (c), by no later than the 31st of March 2022, and should any of the newly planted plants fail within the first 12 months after planting, these must be replaced with a similar plant in accordance with paragraphs 5.2 (a), (b) and (c)".
- (2) If the appeal is dismissed but the date of decision does not allow time for the remediation works to be completed by 31 March 2022:
- "You are required to commence these remediation works no earlier than the 15th of November 2022, and to complete the remediation works set out in paragraphs 5.1 (a) and (b), and 5.2(a), (b) and (c), by no later than the 31st of March 2023, and should any of the newly planted plants fail within the first 12 months after planting that [*sic*] these must be replaced with a similar plant in accordance with paragraphs 5.2(a), (b) and (c)."

Assessment and Conclusions

The Enforcement Notice

30. The enforcement notice is flawed in various ways. I refer to seven of them below.
31. First, Sections 2 and 3 of the notice specify the land affected by reference to various shades of colour (yellow, blue, green and grey) on "the attached plan". But there are two attached plans, plus what is labelled as "Enforcement Notice

Location Map – Aerial View” (although it is not a map - it is actually a reproduction of an aerial photograph).

32. Second, paragraph 3.1 of the notice refers to the removal of a section of hedgerow and banque “at the northern boundary of Fields MY294 and MY295”. This is incorrect. What has been removed is a section of banque and hedgerow *at the northern end of the boundary between Fields MY294 and MY295*, not the northern boundary of these fields.
33. Third, in paragraph 3.3 of the notice the incorrect description just described is also used. What is described as “the northern boundary of Fields MY296 and MY249” should have been described as *the northern end of the boundary between Fields MY296 and MY249*.
34. It is not always necessary to correct the allegation part of enforcement notices where it is clear that they have been understood by an appellant, since what is normally more important (because failure to comply can lead to prosecution) are the requirements of a notice. In this case, however, the requirements of the notice are framed so as to incorporate paragraphs 3.1-3.3 of the allegation, so these references to locations need to be accurate.
35. Fourth, paragraph 5.2 of the notice sets out a requirement for the reinstated banques to be planted under the supervision of a qualified horticulturalist, with a mixture of locally sourced hedgerow plants. The terms “qualified horticulturalist” and “locally sourced” are imprecise, and could mean different things to different people. For example, in his letter dated 6 July 2021 Mr Durell states “I am a qualified horticulturalist I farmed here for 20 years”. Mr Durell obviously has long experience, but experience and qualifications are not necessarily the same thing. If an enforcement notice needs to specify input from any type of “qualified” person, that term must be clearly defined; otherwise it is unenforceable. The term “locally sourced” creates questions such as: does this mean sourced within St Mary? Or within Jersey? Or within the Channel Islands? Again, this term is too imprecise, bearing in mind that failure to carry out the requirements of an enforcement notice could result in prosecution for a criminal offence.
36. Fifth, the way the planting requirements are specified is open to different interpretations. I refer here in particular to the requirement for the reinstated banques to be planted with plants grouped together once every 6 metres to 8 metres along “its respective lengths” (which I take to mean “along *their* respective lengths”, being a reference to the plural banques) and that plants must be spaced a minimum of 60 centimetres apart in groups of not less than 6 plants. This could be interpreted to mean, for example, that there could be groups of 6 plants with, say 5 metres between each plant (ie “a minimum of 60 centimetres apart”) and 8 metres *between each group* (ie a gap of 8 metres between the end plant of each group). On that basis, I calculate that about 18-20 plants would be required for the approximately 100 metre length of the boundary between fields MY295 and MY296, whereas if the 8 metre figure were taken to apply to the distance between the *centre of each group*, more than 70 plants would be required.
37. If plants were spaced, say, 15 metres apart (still meeting the “minimum of 60 centimetres apart” criterion, in what could be termed a “group” of seven plants (“not less than 6 plants”), the whole length of the reinstated banque between Fields MY295 and 296 would be planted with the seven plants.
38. By making some assumptions and guesses, the foregoing aspects of the requirements can reasonably be interpreted in the way which I think the planning

authority intended (probably the "grouped together once every 6 metres to 8 metres" was intended to mean that the 6 to 8 metre dimension should be *between the centre of each group*). Mr Durell appears to have interpreted the notice in that way, hence his reference to 78 plants. Nevertheless there is scope for doubt and dispute. Moreover there are further potential problems, in that the requirement for planting the reinstated banques applies not only to the length between Fields MY295 and MY296 labelled 3.2 on one of the plans attached to the enforcement notice) but also to the other two short gaps in the banques to the east and west, each around 8-10 metres wide (as marked with red lines and labelled 3.1 and 3.3 on the plan just referred to). The requirement to plant "groups of plants" not less than 60 centimetres apart in each of these gaps is impossible to carry out. Two plants with 60 centimetres or more between them would meet one part of the enforcement notice's requirements but would not form even a single group, let alone plural groups.

39. Sixth, there are problems with the way the compliance period (or "time frame" as worded in the notice) is specified by stating start and finish dates instead of a period of time. This may have been done with the aim of setting a time of year suitable for planting, but the notice has been suspended as a result of the appeal, and as mentioned in paragraph 8 I do not know how long will be taken to decide the appeal. Another problem with the compliance period is that paragraph 5.2(d) of the notice purports to require the replacement of any plants which fail "within the first 12 months after compliance with this order". That is not a valid requirement in the notice as issued because an enforcement notice cannot impose steps to be carried out after the end of the specified compliance period.
40. I suspect that the requirements about planting and timing have been based on advice from the government's Land Resource Management team, without sufficient consideration of the enforcement context. I return to these points in my conclusions and recommendations below.
41. The seventh fault in the enforcement notice is on the last page under the heading "Enclosures". Item Number 4 here is stated to be "Images from Field". I could not find any such item in the government's register of enforcement notices published online. By arrangement agreed with the representatives of both sides at the site inspection, the Department later sent copies of the photographs mentioned above. However, I have not received any written confirmation that these photographs were one of the "enclosures" attached to the enforcement notice.
42. On the information available to me, I consider that the photographs can reasonably form part of the available evidence; but if they were not attached to the enforcement notice they should not be listed as such in the notice. If I am wrong, the arrangements for registering enforcement notices and their integral attachments on the government online register for access by the public (and appeal inspectors!) must be faulty, in that not all the documents attached to the notice were placed on the register (and at the time of writing this report, have still not been placed on the register).
43. In addition to the faults mentioned above, there are several errors of wording which I think can remain uncorrected on the basis that they are not so significant as to affect the meaning or legal validity of the notice. Three examples are:
 - The word "of" is missing in the phrase "PoliciesERE1 the Jersey Island Plan" at line 6 of page 3 of the notice.
 - "Mention" on the last line of that page should read "mentioned".

- In the list of "Enclosures", the references to plans do not correspond with the actual titles of the plans. Although the differences are fairly minor (for example using the word "Plan" instead of the word "Map" which appears in the titles), these references should correspond accurately to avoid any possible confusion or room for dispute.

Ground (f) – Scope of Appeal

44. Mr Durell has not understood the limited scope of an appeal made solely on ground (f) of Article 109(2). This is apparent from the summary grounds of appeal in the appeal form and from his letter dated 6 July 2021, where he states: "I would like to propose as I have now joined the two fields together that they remain so".
45. The situation in this case is that development has been carried out without planning permission, so is unauthorised for the purposes of planning law. The scope of ground (f) is restricted to considering whether the requirements of the enforcement notice exceed what is reasonably necessary to remedy the breach of planning control – in other words, whether there are lesser steps which would provide a satisfactory remedy, but without granting planning permission for the unauthorised development to be retained. In this context "lesser steps" does not mean alternative steps which would leave the unauthorised development to remain unaltered. The planning authority has drawn attention to this matter in both its first and second response statements, pointing out in paragraph 9 of the first statement that: "this is not an application for planning permission where alternatives could be considered", and making a similar statement in paragraph 9 of the second statement.
46. If Mr Durell wanted to pursue the possibility of retaining the development subject to this enforcement notice, (or at least most of it, by keeping what was formerly fields MY295 and 296 as one field with no subdividing boundary), he should have pleaded ground (h) of Article 109(2) linked with an application for planning permission, which would have required payment of an application fee. There is no ground (h) in this case, and it is not possible to permit the development retrospectively through an appeal on ground (f) – to do so would in effect result in development being permitted without any application or fee payment.
47. It may help to explain this point by analogy. If a house were to be built without planning permission and an enforcement notice were to require the house to be demolished, an appeal against the notice on ground (f) could not validly argue that the house should be allowed to remain provided it was screened by tree-planting. If such an argument were to succeed the outcome would be equivalent to planning permission for the house, without any application process (including neighbour notification etc) or application fee.
48. In these circumstances I must refrain from making any comment on the planning merits or demerits of the development and whether planning permission should or should not be granted. Mr Durell's suggestion about planting trees or other vegetation in the area at the south end of Field MY295 could have some biodiversity benefits but misses the point of ground (f). Similarly, I have noted the letter from a director of the Albert Bartlett company in support of Mr Durell's appeal. The company evidently wanted the central field to have "good size and easy access". The agricultural efficiency of larger fields might be a consideration where the possible grant of planning permission is an issue but that is not so here. For the same reason I also make no comment on the Department's arguments which might have applied to a planning application, including the policy aspects mentioned in the Department's statement.

49. The letter from the Bartlett company director mentions the benefits of wind protection ("...a lot of trees and hedging are now established helping us considerably with crop protection..."), which could be seen as conflicting with the company's apparent desire for larger fields. Be that as it may, it seems that the company may have encouraged Mr Durell to remove the disputed banques without considering whether planning permission was required. If so, that is a matter the company may wish to review.
50. I do not know what was said during the telephone conversation Mr Durell refers to, between him and a planning officer, Mr Clarke. Mr Durell appears to have believed that your Department has to agree to a retrospective application being made⁵. If he did and still does so believe, he has either been misled or has misunderstood something he was told, since no permission is required to *apply for planning permission*, whether retrospective or prospective. Indeed, the opportunity to apply retrospectively for planning permission when appealing against an enforcement notice is what ground (h) of Article 109(2) provides, and it is up to an appellant to decide which grounds of appeal to plead. It seems that Mr Durell may have muddled planning *application* with planning *permission*.

Ground (f) - Other Considerations

51. Despite the limitations of this ground of appeal as explained above, some of Mr Durell's arguments have force. I consider below two main aspects – first, the physical size and shape of the bank; second, the planting.
52. As far as I can tell from the aerial photographs and other information available, the bank which formerly separated Fields MY295 and 296 probably had a shape and size roughly similar to the bank on the east side of Field MY295. During my inspection I invited those present to agree on approximate dimensions for this bank, which at its base was between around 3-3.5 metres wide and mostly varied in height between less than a metre to about 1.3 metres, though a little higher towards the north. The dimensions in paragraph 5.1(a) of the enforcement notice specified as part of the requirements (between 2.5 and 3 metres wide at the base of the bank and between 1.25 and 1.75 metres high) have a fairly similar range, although the upper height figure is greater.
53. As regards the planting, the available evidence indicates a considerable difference between what recently existed and what is required by the enforcement notice, although some of the appellant's evidence on this point is unconvincing. In his letter dated 1 August 2021 Mr Durell claimed that the bank had three gorse bushes on it, located "half way up". But this was almost certainly an understatement, as he himself has apparently accepted, since in a later letter (27 August) he referred to "6 larger gorse bushes similar to the banque between Fields MY 294 and MY295". Mr Durell's use of the word "larger" suggests that there were other "smaller" shrubs.
54. Aerial photographs suggest that the bank now removed from the centre of the site had an amount of coverage by shrubs or other wooded vegetation greater than the field boundary to the east (between Fields MY294 and 295) but less than the field boundary to the west (between Fields MY296 and 249). The shadows in the 2018 aerial photograph attached to the Department's second response statement indicate the past existence here of around 10-15 established shrubs, plus some smaller shrub growth and/or tussocky grass. There also appear to have been gaps between the shrubs of up to around 10 metres, particularly towards the southern end.

⁵ I refer here to the comment in his letter of 27 August 2021: "If IHE agree that a retrospective application can be submitted..." etc.

55. Taking all those points into account, I judge that Mr Durell has a reasonable case with regard to the planting requirements of the enforcement notice. The planning authority's aim to replace what has been removed with fairly dense planting is understandable; but it goes beyond what is necessary to remedy the breach of planning control.
56. Putting together all the issues discussed above, including the flaws in the notice as issued as well as the points arising from the ground (f) appeal, I can see two options. One would be to allow the appeal on ground (f) and quash the enforcement notice. The other option would be to amend the notice, using the powers available to you under Article 116(2)(d) of the 2002 Law. On balance, I consider that the latter option would be preferable, as quashing the notice on ground (f) would be quite likely to result in the service of another notice with corrections and revised requirements, prolonging the process for all those involved.
57. The amendments I am recommending relate mainly to Part 5 of the enforcement notice setting out its requirements. The variations I consider to be necessary here are so extensive that it is simpler to delete the original requirements completely and substitute revised requirements. Other amendments arise from my comments earlier in this report about the incorrect references to locations in "the northern boundary", and the unsatisfactory wording of the requirements referring imprecisely to plans and to a qualified horticulturalist. On this latter point, my recommended wording omits any such reference because of the difficulty of defining the term "qualified", but it should be in the appellant's own interests to ensure that the requirements of the notice are carried out with suitable horticultural skill (together with the use of items such as spiral guards), so as to avoid the prospect of further proceedings.
58. I am recommending amendments to the compliance period to take account of the difficulties discussed above about the unknown timing of the appeal decision. I have also aimed to simplify and make less onerous the details of the re-planting requirement, by specifying a reduced number of plants and allowing more random but still controlled spacing. A compliance period of 12 months for all the restoration requirements should enable those involved to choose suitable weather and ground conditions for earthworks and planting; then I am proposing a further 12 months for replacing planting which has failed (and for the term "failed" I suggest that that "died or become diseased" should be specified). The new compliance periods will run from the date of the appeal decision.⁶
59. In my recommendation the requirements are divided into three "steps": this is so that the compliance periods can be simply and clearly set out. A final recommendation refers to the list of enclosures, the last item of which as far as I can establish was incorrect in the issued notice.
60. The changes to the notice are aimed at making the notice factually and legally correct or reducing its requirements, so can be made without causing injustice.⁷ I conclude that subject to the amendments recommended below, the appeal should fail and that the notice as varied should be upheld.

⁶ This is provided for in Article 117(3) of the Law so does not need to be stated in the notice; but you could if desired add "from the date of this decision" to the revised compliance periods.

⁷ The enforcement notice as issued did not have a requirement for seeding the reinstated bank with a grass seed mixture. I think this may have been a mistaken omission and I have considered adding it; but I am not recommending it because that could be regarded as making the notice more onerous than it was originally and so lead to a claim of injustice.

Recommendations

61. I recommend that the enforcement notice be corrected and varied in the following ways:
- (1) In Part 2 of the notice headed "This Notice relates to land at", and in Part 3 of the notice headed "The Matters which appear to constitute the Breach of Development Controls", insert after the words "attached plan" the words "headed "Enforcement Notice Location Map – Field Identification".
 - (2) In paragraph 3.1 of the notice, delete the words "At the northern boundary of Fields MY294 and MY295" and substitute "At the northern end of the boundary between Fields MY 294 and 295".
 - (3) In the fifth line of paragraph 3.2 of the notice, after the word "hedgerow", insert "and banque".
 - (4) In paragraph 3.3 of the notice, delete the words "At the northern boundary of Fields MY296 and MY249" and substitute "At the northern end of the boundary between Fields MY296 and MY 249".
 - (5) In Part 5 of the notice headed "Steps Required to Rectify the Breach", delete all the text after the heading and substitute the following:

Step 1

Reinstate the previously removed banques as set out in 3.1, 3.2 and 3.3 above and as indicated by the red lines marked 3.1, 3.2 and 3.3 on the attached plan headed "Enforcement Notice Location Map – Removed Banques and Hegerows", so that the dimensions of the reinstated banques are between 2.5 and 3.0 metres wide at the base of the banque and between 1.0 and 1.7 metre high at the top. The reinstated banques are to be made up of topsoil mixed with stones in a proportion suitable for growing shrub vegetation.

Step 2

Plant the reinstated banques with hedgerow plants comprising 50% hawthorn (*Cretagus Monogyna*) and 50% a mixture of Elder (*Sambucus Nigra*) and Blackthorn (*Prunus Spinosa*), so that the following requirements regarding the number and spacing of plants are met:

Along the reinstated banque between Fields MY295 and 296: at least 25 plants, placed at random intervals so that the plants are a minimum of 60 centimetres apart and there is no gap between plants greater than 10 metres.

Along the reinstated banques filling the gaps at the northern end of the boundary between Fields MY294 and MY295, and Fields MY296 and MY249: at least 3 plants placed at least 60 centimetres apart in each infilled gap.

All plants must be planted with a spiral guard shelter and stake with either a mulch mat or wood chip for protection.

Step 3

Any plants which fail (ie die or become diseased) must be replaced with a similar plant in accordance with the requirements above.

- (6) In Part 6 of the notice stating the "Time Frame for Compliance", delete the heading and the text, and substitute:

"Periods for Compliance:

For Steps 1 and 2: 12 months.

For Step 3: 24 Months."

- (7) In the list of Enclosures, delete item number 4 ("Images from Field").

62. I also recommend that subject to the foregoing amendments, the appeal be dismissed and that the enforcement notice as corrected and varied be upheld.

G F Self

Inspector

14 November 2021.