

Appeal Decisions

Site visit made on 16 December 2016

by Anthony J Wharton BArch RIBA RIAS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 23 December 2016

Appeal Refs: APP/X1355/C/16/3155027 and 3155028

3 Witton Grove, Durham DH1 5AB

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr David Robson and Miss Sandra Burton against an enforcement notice issued by Durham County Council.
 - The enforcement notice was issued on 24 June 2016.
 - The breach of planning control as alleged in the notice is: the material change of use of the Land to Land is (sic) being enclosed as garden curtilage.
 - The requirement of the notice is to:
 - a. Permanently cease the use of the land as an extension to the domestic curtilage of 3 Witton Grove, Durham.
 - The period for compliance with the requirements is 56 days
 - The appeal is proceeding on ground (c) only as set out in section 174(2) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.
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Decision

1. The appeals are dismissed and the enforcement notice is upheld.

Introduction and matters of clarification

2. There is a minor error in the allegation to the notice. The word '*which*' is clearly meant to have been inserted between the words '*Land*' and '*is*' in part 3 of the notice. I shall, therefore, correct the allegation accordingly under the powers transferred to me. I am satisfied that this will not cause any injustice since both parties clearly understand what the notice is aimed at and what is required to be done. The allegation will now read '*the material change of use of the Land to Land which is being enclosed as garden curtilage*'.

3. As indicated above the appeal is proceeding on ground (c) only. Because the relevant fee was not paid, I am not able to deal with the merits of the case. Thus, I cannot consider whether or not planning permission ought to be granted for the development carried out. That is, the change of use of the appeal land to use as an extension of the garden to the appeal property and the operational development (the fence) which is related to that use.

4. The only matter which I am empowered to determine is whether or not planning permission is required for what is alleged to have been carried out. There is reference in the representations to the possibility of a ground (d) appeal being made. However, the 4 year and 10 year rules relate to when operational development and/or a change of use of land might have commence and not simply to the period of ownership of the land. Ground (d) cannot, therefore be pleaded in this instance.

5. On the appeal form, under ground (c), it is contended that the notice is legally and technically null and void. The reasons given for this are firstly, that the local planning authority (LPA) had confirmed to the appellants (Comment from the planning department on Tuesday, October 06, 2015 at 8:43 AM by e-mail) that the fence as erected was '*permitted development*'.

6. This contention is made on the basis that the land enclosed by the fence has always been part of the original property title. It is contended, therefore, that no material change of use of the land has occurred. Secondly it is stated that there are various other discrepancies in the correspondence which the Appellants received from the LPA and, thirdly, it is stated that the LPA offered agreed alternatives (relating to the hedging and brick wall options) which were then '*taken away*', presumably meaning, withdrawn.

The appeal site

7. The appeal land, now enclosed by a timber post and rail fence (approximately 1m in height) is located to the front (south) of No 3 Witton Grove which fronts on to the A691. This is one of several properties (of 19) on this short cul-de-sac, located to the north east of the Consett to Durham road (A691) on the outskirts of Framwellgate Moor, to the north west of the Durham and adjacent to Shiperley Park to the south east.. To the south west there is open agricultural land and further to the north there is the car park for the 'Park and Ride' facility to Durham City centre.

8. The appeal property, like No 4 on the opposite side of Witton Grove, is at the entrance to this small cul-de-sac estate and it is clearly noticeable from this major road. At the time of my visit there was a metal container on the site, as well as building materials and spoil which were clearly associated with the approved building alterations to No 3. I noted new planting within the fenced off area, mainly along its outer boundary. The land is also being used as a temporary storage site (including a metal container) for the building works.

9. To north west, the gardens of Nos 2 and 4 Witton Grove (which also front on to the A691) are enclosed by small, curved brick walls with a grassed, open amenity area between their boundaries and the highway. Before the appeal land was altered (and the fence erected), there appears to have been a similar open, curved and grassed amenity area between the curved brick garden boundary wall to No 3 and the main road. This land is in the ownership of the appellants and this is indicated on the title deeds to No 3. The land to which the notice relates does not take up the whole area of amenity land.

The validity of the notice

10. The notice contains all of the relevant statutory elements and has been served correctly. The fact that the LPA confirmed that the fence constituted '*permitted development*' does not invalidate the notice. Indeed a fence such as this, erected on private land can be permitted development under the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). In addition, where a gate, fence, wall or means of enclosure is adjacent to a highway and is no more than 1m in height, it can constitute '*permitted development*' under Schedule 2, Part 2, Class A of the GPDO. The advice given in October 2015 , therefore appears to have been correct in relation to just the fence.

11. In this case, however, the notice relates to the change of use of the amenity land to garden curtilage in combination with the operational development of the fence which encloses that area and which facilitates the change of use. The cases

of *Murfitt v SSE and East Cambridgeshire DC [1980]* and *Somak Travel Ltd v SSE & LB Brent [1987]*, established the principle that that a notice directed at a material change of use can reasonably also relate to any operational development that facilitates and is part and parcel of the change of use. In this case the LPA has issued the notice on the basis that the fence has been constructed for the purpose of extending the residential garden curtilage of No 3.

12. I note that the Appellants have indicated that it is not used as garden and that a good amount of amenity space has been left as such. But, the matter which I must consider is whether or not the allegation set out in the notice is 'permitted development', or whether planning permission is required for the change of use of the land. I deal with this under the ground (c) appeal below.

12. With regard to the various other discrepancies in the correspondence, which the Appellants received from the LPA, and the fact that other alternatives were offered and then '*taken away*', I do not consider that these matters invalidate the notice. There are no details of these matters before me and, as indicated above, I am only empowered to deal with the notice and on the single ground pleaded. In conclusion, I do not find the notice to be null or void and I now turn to the main issue under ground (c) and whether or not there has been a breach of planning control.

The appeals on ground (c)

13. Under this ground the onus is on the Appellants to show that, on the balance of probabilities, the alleged matter does not constitute a breach of planning control. The nub of the Appellants' arguments is that the fence is permitted development and that the private area of land is not being used as a garden. The LPA submissions are that the appeal land is being used as an extended garden and that the fence area facilitates the change of use of the land.

14. Section 55 (1) of The Town and Country Planning Act 1990 as amended (the Act) includes in the definition of the word 'development' the material change in use of the land. In assessing whether or not a change of use is materially different from the previous use it is the character, type and nature of the alleged use that should be evaluated.

15. In this case there is no dispute that, prior to the fence being erected, the land to the front of No 3 was similar to the frontage opposite at Nos 2 and 4. This has been referred to as 'amenity land' and I consider this to be an appropriate description of its previous use. The land formed a green, curved and open space on the south east side of the entrance to the estate. The land on both sides was open without any sign of residential garden planting or any enclosures. The garden areas to Nos 2 and 4 and to No 3 lay beyond the amenity spaces, separated from the residential gardens, or curtilages by the low, curved brick walls.

16. The LPA and the Appellants refer to the land as being 'amenity' space and in particular the latter indicate that a good amount of 'amenity' land has been left. In terms of its character the enclosed appeal land is now completely different to the former amenity land. The planting along the inside of the timber fence is domestic in type and nature (small shrubs and conifers) and the fence is clearly perceived as the new boundary to the residential curtilage of No 3.

17. Irrespective of its appearance and its negative impact on the street scene, in my view and as a matter of fact and degree, I consider that the fence clearly facilitates and is seen to facilitate the use of the former amenity space as extended garden area to No 3. The nature of the new planting and the position of the fence

reinforces my view that there has been a material change in use of the land from open amenity space to enclosed garden area. The fact that the fence alone could constitute 'permitted development,' does not alter the fact that the use of the land has materially and significantly changed and that this change of use requires express planning consent.

18. There is no planning permission in place for the development of this land as enclosed garden curtilage. The unlawful use as now carried out negates any 'permitted development' rights for the fence itself. The appeal must fail, therefore, on ground (c).

Other Matters

19. In reaching my conclusions I have taken into account all other matters raised by the Appellants and the LPA. These include the planning history of the site; the photographic evidence; the initial ground of appeal and the final comments dated 21 November 2016.

20. The latter referred, amongst other things, to the title of the property; the Council's e-mail relating to the fence; the contention that the fence is in character; the wish to create a family home; the fact that No 3 was run-down; references to the caravan; container and skip; the condition of the wall and safety and the general criticisms of the Council's case as set out.

20. However, none of these matters carries sufficient weight to alter my conclusion on the main ground at issue and nor is any other factor of such significance so as to change my decision

Formal Decision

21. I direct that the enforcement notice be corrected in part 3 (THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL) by adding the word '*which*' between the words '*Land*' and '*is*', in the first line of the allegation.

22. The appeal is dismissed and the enforcement notice is upheld as corrected.

Anthony J Wharton

Inspector