



Appeal Decision

Site visit made on 6 December 2016

by Susan Wraith DipURP MRTPI

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

Decision date: 17 January 2017

Appeal Ref: APP/K5600/C/16/3152751

Land at 178 Holland Road, London, W14 8AH

- The appeal is made under s174 of the Town and Country Planning Act 1990 [hereafter "the Act"] as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Ms Cinnamon Heathcote-Drury against an enforcement notice issued by the Council of the Royal Borough of Kensington and Chelsea.
 - The notice was issued on 5 May 2016.
 - The breach of planning control as alleged in the notice is: Without planning permission, the installation of concrete hardstanding within the rear garden.
 - The requirements of the notice are:
 - 1. Remove the unauthorised concrete within the rear garden;
 - 2. Restore the land to its former condition;
 - 3. On completion of steps 1 & 2 above, remove all additional materials and debris from the site.
 - The period for compliance with the requirements is one calendar month.
 - The appeal is proceeding on the grounds set out in s174(2)(f) and (g) of the Act.
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Decision

1. It is directed that the enforcement notice be corrected, in step 1 of paragraph 5., by the insertion of "hardstanding" after "concrete".

The appeal is allowed on grounds (f) and (g) and it is directed that the enforcement notice (as corrected) be varied, in paragraph 5, by:

- (i) Deletion of step 2;
- (ii) Re-numbering of step 3 to "2", deletion of its text in entirety and substitution of "On completion of step 1 above, remove from the Land all materials and debris arising from the removal of the concrete hardstanding"; and
- (iii) Deletion of "one calendar month" and substitution of "nine months" as the time for compliance.

Subject to this correction and these variations the enforcement notice is upheld.

Preliminary matters

2. The appellant considers that the notice is poorly drafted in that, whilst it alleges a concrete hardstanding, it is unclear as to the extent of the concrete area concerned. Caselaw¹ has been referred to in which it was held that a notice must fairly tell the recipient what he has done wrong and what he needs to do to put it right.

¹ Miller Mead v MHLG [1963] 2 WLR 225

3. As well as the concreted area across the main part of the rear garden there is another area (abutting) which is immediately to the rear of the property. Planning permission has been granted for a replacement balcony above this area together with extensions to the basement flat. This existing concreted strip was identified in the application documentation and is visually distinguishable from the other concrete area. I am told, additionally, that some concreting was carried out in connection with the underpinning works to the property and also in connection with the construction and stabilisation of the garden wall to the south west boundary for which planning permission had been granted.
4. Whilst there is some other concrete within the area to the rear of the property, when reading the notice as a whole it can reasonably be drawn that the concrete hardstanding which is of concern to the Council is that upon the main part of the rear garden area (which can be distinguished from the other areas) and which the Council considers is harmful to the setting of the parent building, conservation area and adjacent listed building and adds to the prevalence of flooding in the area. I consider the allegation is framed with a sufficient degree of clarity and that the legal requirements for the description of the breach are met.²
5. The requirements of a notice should flow directly from the allegation. However, the word "hardstanding" does not appear in the requirement to remove the concrete at subparagraph 5.1 although it is included in the allegation. Bearing in mind the appellant's concerns about the extent of concrete to be removed I shall correct the notice by inserting the word "hardstanding" in the requirement. This will add clarity to the notice. I am satisfied that no injustice will arise to either party in this correction which I shall make under the available powers of s176(1)(a) of the Act.
6. Whilst the alleged breach is described as a concrete hardstanding the appellant has explained that it is her intention to surface the area with stone paving flags.³ The concreted area provides the foundation for the finished paved surface. The totality of the development, therefore, is yet to be completed. I shall bear this in mind in my consideration of the appeal.
7. No appeal has been made expressly on ground (c).⁴ However, the appellant describes the works as "reinstatement" and has argued that there is no material difference between the subject works and what was there before. I shall consider the matter of whether the works amounted to a breach of planning control as the other grounds of appeal only become necessary if that is the case.
8. The Council has drawn attention to a site plan submitted with a planning application in 2013 which indicated that a large part of the rear garden area was grass rather than paving. The Council also says it has photographs taken by its officer in March 2014 which show the rear garden before it was concreted although copies of these photographs have not been submitted in evidence.

² S173(1)(a) of the Act says an enforcement notice shall state the matters which appear to the local planning authority to constitute the breach of planning control. S173(2) of the Act states that a notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

³ The stone flags are presently stacked on the land as pointed out to me at my visit.

⁴ An appeal on ground (c) of s174(2) of the Act is that the matter alleged does not amount to a breach of planning control.

9. The appellant says that the site plan was only indicative and that her architect had not visited the site or carried out a survey. Amongst the appellant's evidence are photographs, taken before the underpinning works were commenced, which show a substantial paved area within the rear garden. On the basis of these photographs it is quite plausible that the 2013 site plan did not accurately portray the extent of the existing paving.
10. However, when comparing the "before" photographs with the photographs taken after concreting, and from what I saw at my site visit, I note that the land level has been reduced. The former paved area was accessed by steps from the basement level whereas the concreted area is at the stepping out level of the basement flat. Planting beds have been retained to the rear of the garden and adjacent to its northwest boundary. These now take the form of raised beds retained by rendered walls. The use of natural stone paving will also be discernibly different from the former square concrete flags.
11. Taking all these matters into account I consider that the installation of the concrete hardstanding, as part of works to form a paved area, would have amounted to an operational development, and thus a breach of planning control, as a matter of fact and degree.

The appeal on ground (f)

12. An appeal on ground (f) is that the steps required by the notice exceed what is necessary to remedy the breach or, as the case may be, to remedy any injury to amenity that has been caused by the breach⁵. The words "as the case may be" indicate that the main purpose of the notice will fall within one or the other category.
13. Unlike an appeal on ground (a), where the full planning merits of a development can be considered, an appeal on ground (f) is constrained by the Council's purpose in issuing the notice. In this case, because the notice requires complete removal of the concrete hardstanding, its purpose is to "remedy the breach".⁶ This is not a case where the Council has under enforced by seeking lesser steps to "remedy any injury to amenity" that has been caused by the breach.
14. As the installation of a concrete hardstanding has been alleged, the requirement to remove the concrete hardstanding cannot be excessive. This is simply what is necessary to remedy the breach.
15. Another requirement is to restore the land to its former condition. The appellant has interpreted this to mean the condition of the land before the underpinning was carried out when the garden had an area paved with concrete flags set on a solid base. To restore the land to its 2013 state would also involve raising the land level to its former height.
16. However, the allegation is narrowly drafted to attack only the concrete hardstanding. It does not include within its description the removal of the original concrete flags or the reduction in land levels together with the building of retaining walls around the raised beds. Neither is it inferred that these other

⁵ These provisions are set out in s174(1)(f) of the Act. They reflect the purposes of an enforcement notice that are set out s173(4).

⁶ S173(4)(a) of the Act states that remedy of the breach can be achieved by making any development comply with the terms of any planning permission which has been granted, by discontinuing any use or by restoring the land to its condition before the breach took place.

works are comprised within the allegation. A requirement to restore the land to its 2013 state (if that is what is intended) in fact goes further than is necessary to remedy the breach. I shall, therefore, delete this requirement.

17. There is another step requiring the removal of all additional materials and debris from the site⁷. However, it is only the materials and debris arising from the removal of the hardstanding which the notice can cover. I shall vary this step accordingly.
18. The appellant's case under ground (f) is that the development can be made acceptable by completing the stone paving together with drainage arrangements. On that basis (it is argued) the requirement to remove the concrete hardstanding is excessive. In other words the appellant considers these steps would be sufficient to overcome the harm.
19. There is no appeal made on ground (a), and thus no deemed application, under which the planning merits of what is proposed can be considered. As already explained, the scope of this appeal on ground (f) is limited to the steps necessary to remedy the breach. It does not extend to the consideration of steps necessary to make the development acceptable.
20. It has been argued that the development has no harmful effect upon the character and appearance of the abutting Holland Park conservation area or the setting of the adjacent Grade I listed building. I acknowledge that a Flood Risk Assessment has been undertaken by a consultant civil engineer which has concluded that there is no increase in the impermeable area and that the works, including an aco drain, will result in a betterment of the surface water drainage regime. I also note that the appellant's proposals include the retention of the raised planting beds with the inclusion of ground plants as demonstrated by the four trees already planted in the side bed, as well as potted plants. Further matters raised include the quality of the proposed paving, which was chosen with regard to other paving within the conservation area, that there are other neighbouring properties with paved back gardens and that the orientation of the garden and its overshadowing provide poor growing conditions. These are all matters which would be relevant to the consideration of a planning application. However, they are not matters which influence the outcome of the appeal on ground (f).
21. Even if the second limb of ground (f) did fall to be considered it provides only for the consideration of effect upon amenity whereas, in this case, the planning issues are much wider.⁸ To simply consider effect upon amenity without addressing all of the material considerations would be to pre-empt the due process of a planning application which would involve, amongst other things, technical consultations and due publicity.
22. I have considered in the round whether there is any obvious alternative involving any other lesser steps that could be included in the notice without the need for a planning application. However, there is none that I can identify in the circumstances of this case.

⁷ At my site visit I saw that there were various materials and debris within the rear garden of the premises which, at present, is in use by builders for access and storage purposes in connection with repair and building works being undertaken at the main property.

⁸ For example, effect upon the character and appearance of the conservation area, setting of the listed building and drainage are all issues to be considered.

23. The appeal on ground (f) succeeds only to the limited extent of the deletion of step 5.2 and the variation of step 5.3.

The appeal on ground (g)

24. Under ground (g) it is argued that additional time is needed to obtain clearance from the freeholder company to allow works to proceed unimpeded. Whilst the actual physical works of breaking up and removing the area of concrete could be completed within a relatively short space of time I acknowledge that this will require some organising and co-ordination when taking into account the ongoing maintenance works, the intended building works (involving extensions to the appeal property and installation of a balcony), the involvement of the freehold management company and the present use of the area by builders for access and storage.
25. I have taken into account the public interests of securing effective and timely enforcement action. In all these circumstances I consider that the nine month period suggested by the appellant is a reasonable timescale. I shall vary the time period for compliance accordingly.

Other matters

26. Attention has been drawn to an appeal decision where the Inspector imposed a programme of requirements to provide for the retention of the development. In that case there was an appeal against a refusal of planning permission which ran together with the enforcement appeal. The Inspector was able to consider the planning merits of the development through the planning appeal. Thus the case is distinguishable from this current appeal which does not involve a planning application or a deemed application.
27. I note that permission has been granted for PVC doors at Flat 2. However, this is not a consideration which influences my conclusions on the grounds of appeal that are before me.
28. The Council has explained its reasons for taking enforcement action. The notice (when varied) is not disproportionate to the breach alleged. I cannot see that there is any conflict with national guidance on enforcement as set out in paragraph 207 of the National Planning Policy Framework.
29. Unresolved private issues between the appellant and the freehold management company are not matters for this appeal. Neither is it for me to intervene in the matter of alleged unanswered correspondence sent to the Council.

Conclusion

30. For the reasons given above I conclude that the requirements are excessive and that a reasonable time period for compliance would be nine months. I am varying the enforcement notice accordingly, prior to upholding it with correction. The appeal on grounds (f) and (g) succeeds to that extent.

Susan Wraith

Inspector