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## Appeal Decision

Site visit made on 18 January 2017

**by John Whalley**

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

**Decision date: 23 January 2017**

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**Appeal ref: APP/A0665/C/16/3153945; /46**  
**137 Norley Road, Cuddington, Northwich CW8 2TB**

- The appeals were made by Mr David Miller, (APP/A0665/C/16/3153945); and Mrs Mette Miller, (APP/A0665/C/16/3153946); under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by Cheshire West and Chester Council.
- The notice was issued on 3 June 2016.
- The breach of planning control alleged in the notice was: Without the benefit of planning permission, the erection of a treehouse.
- The requirements of the notice are to:
  - 1) Instruct a Bat licensed ecologist to ensure the bat boxes are checked for evidence of bat use.
  - 2) Remove the bat boxes
    - a. immediately if the Bat licensed ecologist determines the boxes are not used by bats or
    - b. at the next available/suitable opportunity in line with advice/recommendation issued by Natural England in the event that evidence of past or current bat use is present in the boxes, (NOTE: further surveys may be required to ascertain the level and type of use. If the box is currently used by bats, Natural England should be contacted for advice on their relevant procedures and guidance followed and a Natural England License obtained if necessary),and affix in an alternative location on site as determined suitable by the Bat licensed ecologist at an appropriate time of year as close to the original location as possible.
  - 3) Remove the treehouse.
- The periods for compliance with the requirements are as follows:
  - 1) A Bat licensed ecologist should be appointed to carry out the checks within four weeks of the date this notice takes effect and his instructions should require the provision of a report/determination within six weeks of the date this notice takes effect.
  - 2) (a) If the licensed ecologist determines the boxes are not in use by Bats, remove and re-erect the boxes within 8 weeks from the date this notice takes effect.  
(b) If evidence of Bat activity is present, remove and re-erect the boxes at the appropriate time of year as determined by the licensed ecologist

and/or Natural England in the determination received by complying with step 1 above.

- 3) Within 8 weeks from compliance 2(a) or 2(b) as above, whichever is the latter.

- The appeals were made on grounds (c) and (f).

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**Summary of Decision: The appeals fail. The enforcement notice is upheld**

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**Appeal development**

1. The enforcement notice was directed at a treehouse that has been built in the rear garden of No. 137 Norley Road, Cuddington, near the timber fence boundary with Park Crescent. The treehouse has the appearance of a pitched roof timber garden shed. It has been built some 2m above ground level to a total height of about 4m around a tree trunk running through its centre. Several bat boxes were fixed to the treehouse.

**The appeals on ground (c)**

2. An appeal on ground (c) asserts that there has not been a breach of planning control. In this instance, the Appellants, Mr and Mrs Miller, said the erection of the treehouse had been permitted development.
3. Section 55(1) of the Act sets out the meaning of development. It says: *Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, ....* Although the erection of the treehouse could have been carried out without the aid of a professional builder, the construction work involved would not have been so insignificant that it did not amount to development.
4. Schedule 2, Part 1 to Article 3 to The Town and Country Planning (General Permitted Development) (England) Order 2015, (the Order) at Class E – permits the provision within the curtilage of the dwellinghouse of – (a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such .... That concession is subject to conditions and limitations. Development is not permitted if the height of the building, enclosure or container would exceed 4m in the case of a building with a dual-pitched roof - Class E.1(e)(i). Development is also not permitted where the height of the eaves of the building would exceed 2.5m – Class E.1(f); or where it would include the construction or provision of a verandah, balcony or raised platform – Class E.1(h).
5. Most of what Mr Miller said in relation to the ground (c) appeals went to the planning merits of retaining the treehouse. Such submissions are not relevant to a legal ground of appeal. Where a legal ground of appeal is pursued, the burden of proof lies with the appellant. The case of *Nelsovil v MHLG* [1962] 1 WLR 404 is authority for that position. The test is the balance of probabilities, (*Thrassyvoulou v SSE No 1* [1984] JPL a732).
6. Whilst there was some dispute regarding the height of the ridge of the treehouse, that is, whether or not the ridge was just under or over 4m above ground level, the eaves of the treehouse were clearly considerably higher than 2.5m above ground, (E.1(f)). Also, there was a wide platform attached to the front of the treehouse. That fails the test of E.1(h) to Class E of the Order.

Where a development breaches conditions/provisions/limitations of the Order in any particular, permitted development rights cannot apply – (*Fayrewood Fish Farms v SSE [1984] JPL 287*). The appeals on ground must (c) fail.

### **The appeals on ground (f)**

7. An appeal on ground (f) says that the requirements of the enforcement notice are too onerous and that something less would be appropriate.
8. An enforcement notice should set out the steps required to be taken, or the activities which must cease, to achieve, wholly or partly, the purposes of either:
  - (a) remedying the breach of planning control. That is, making any development comply with the terms of any planning permission, discontinuing the use of any land, or restoring the land to its condition before the breach took place; or,
  - (b) remedying any injury to amenity caused by the breach.
9. In this instance the Council sought the removal of the treehouse to remedy the perceived harm to the character and appearance of the surrounding area. That comes under (b) purpose above. Mr Miller went into some detail to show that landscape planting might overcome the objections to the retention of the treehouse. If that was done and the notice's requirement to remove the treehouse was replaced with a requirement to provide screen planting, the bat care requirements would become otiose. If a new requirement or requirements were then met, planning permission would be conferred under s.173(11) of the Act by virtue of s.73A to retain the treehouse. However, it is not open to me, in the context of a ground (f) appeal, where there was no ground (a) appeal, to consider the merits of retaining the treehouse.
10. I note that an appeal against what was described as the "removal of old treehouse and replace with new structure", (effectively the retention of the treehouse), was dismissed by a decision issued on 14 January 2016 under our reference APP/A0665/D/15/3137012. Had an appeal on ground (a) been made in the present instance, I would not have been bound by that decision. But unless material circumstances had changed, a rehearsal of similar considerations that led to that appeal failing would have been unlikely to lead to a different decision. That type of situation is recognised by the incorporation of s.70A into the Act, whereby a local planning authority may decline to determine a similar application to one that was refused less than 2 years earlier.
11. In this case, bearing in mind the need to deal appropriately with any bats that may have made use of the boxes attached to the treehouse, I consider the requirements of the notice are apt, reasonable and not excessive. The appeals on ground (f) fail.

### **FORMAL DECISION**

12. The appeals fail. The enforcement notice is upheld.

*John Whalley*

INSPECTOR