

Appeal Decision

Site visit made on 17 January 2017

by George Mapson DipTP DipLD MRTPI

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

Decision date: 7 February 2017

Appeal Ref: APP/W3005/C/16/3158028

132 Main Road, Underwood, Nottinghamshire, NG16 5GN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Martin Stephen Anthony against an enforcement notice issued by Ashfield District Council.
 - The Council's reference is E/2016/0004.
 - The notice was issued on 5 July 2016.
 - The breach of planning control as alleged in the notice is: *Without planning permission, the construction on the land of a brick boundary wall in excess of one metre in height adjacent to the highway. In the approximate location shown by a blue line on the attached plan.*
 - The requirements of the notice are: (i) *Remove the boundary wall; or (ii) Reduce in height the boundary wall so that no part of it exceeds 1 metre in height measured from ground level. (ii) Remove from the land all materials and rubble arising from compliance with requirements from (i) and (ii) above.*
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2)(e), (a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Background

The appeal site and surroundings

2. No. 132 Main Road is a bungalow that is located at one end of a ribbon of housing development known as Underwood Green. It lies outside the settlement boundary of Underwood itself and is 'washed over' by the Nottingham-Derby Green Belt.

Appeal development

3. The plan attached to the enforcement notice shows, marked blue, the unauthorised development. It is two sections of wall, one on each side of a gated drive, that have been erected along the front boundary of the property. Each section is about 1.8 metres high. The walls have replaced part of an established hedgerow that extends away from the site in an easterly direction towards Underwood¹. The walls are set back slightly from the back edge of the public footway, leaving a narrow strip of land

¹ The Council has provided Google Earth street view images of the site taken in April 2011 and June 2015. The change in the street scene is apparent from these 'before and after' images.

within which some ornamental (rather than native) species of shrubs and trees have been planted.

Planning history

4. In March 2015 the applicant applied retrospectively for planning permission (Ref V/2015/0233) for the erection of the walls and the replacement of existing gates. Permission was refused in June 2015 and an appeal² against that decision was dismissed in February 2016.

Appeals made on legal grounds

5. The appeal is made on 5 grounds, 2 of which - grounds (c) and (e) - are legal grounds. When considering such appeals the planning merits are not relevant and cannot be taken into account. The decision depends entirely on factual evidence about the history and planning status of the building, structure or land in question and the interpretation of any relevant planning law or judicial authority.
6. The burden of proof regarding decisive matters of fact rests on the appellant. Under ground (e) he has asserted that the notice was not properly served. Under ground (c) the assertion is that the matters alleged in the notice do not constitute a breach of planning control. He must therefore adduce enough relevant, clear and unambiguous evidence to demonstrate the truth of those assertions. The relevant test of the evidence is 'the balance of probability' (i.e., that it is more probable than not).

The appeal on ground (e)

7. An appeal on ground (e) is that copies of the notice were not served on everyone with an interest in the land.

Relevant provisions of the 1990 Act, as amended

8. Section 172(2) of the Act provides that a copy of the notice shall be served on the owner and occupier of the land to which it relates, and on any other person having an interest in the land, including mortgagees, tenants and sub-tenants, being an interest which, in the Council's opinion, is materially affected. It is for the Council to decide who is materially affected, but it risks an appeal on ground (e) if it exercises its discretion wrongly.
9. Section 176(5) gives the Secretary of State or an Inspector power to disregard non-service on a person, provided that neither the appellant nor that person has been substantially prejudiced by the failure to serve him or her.

The parties' cases

10. The appellant's case is that copies of the notice were served by hand to their former address and that they did not receive them until 22 July 2016. This delay restricted the time available to prepare his appeal³. The family had moved to No. 132 Main Road on 27 May 2016 and their change of address was notified immediately to the Council for council tax purposes and to the Electoral Registration Office. He should not be prejudiced by the Council's failure to send copies of the notice to the new address.
11. The Council's response is that copies of the notice were served on all interested parties at their last known address. This included the owners and occupiers of the land and the mortgage company. The Council says that copies of the notice were sent to Mr and Mrs Anthony's old and new addresses. It has submitted a document showing that copies notice were sent to Mrs Catherine Anthony at 117 Alfreton Road, Underwood

² Ref. APP/W3005/D/15/3133947. Appeal dismissed on 16 February 2016.

³ Section 174(3) of the 1990 Act provides that an appeal must be made before the date on which the notice is to take effect. In this case, the notice states that it takes effect on 8 August 2016. Any appeal must be made before that date. The appellant became aware of the notice on 22 July 2016 and made his appeal on 4 August 2016.

(the appellant's former address) and Mr Geoffrey Cooke at 132 Main Road, Underwood (the appellant's new address).

Reasons and conclusions on the ground (e) appeal

12. Although the appellant did not become aware of the notice until 22 July 2016, I am satisfied that the Council took all reasonable steps to ensure that all persons with an interest in the land were identified and served with a copy of the notice.
13. Since he made his appeal the appellant has submitted several documents (statements and letters) in support of his case, but in none of these has he presented a cogent argument to demonstrate that he had been substantially prejudiced by the delay in receiving a copy of the notice. I find that the burden of proof placed upon him has not been discharged and accordingly, the appeal on ground (e) fails.

The appeal on ground (c)

14. An appeal on ground (c) is that there has been no breach of planning control, either because (1) no 'development' has taken place; or (2) planning permission has been granted; or (3) it is 'permitted development'. The situation is judged at the time that the enforcement notice was issued.
15. No reasoned ground (c) case has been made. The argument that he has set out on the appeal form, under ground (c), is that the planning application was not properly dealt with. In his view, it was wrong to apply Green Belt rules because the appeal site is "*previously developed land*" and, in the eyes of the law, is deemed to be "*brownfield land*".
16. This is not a valid ground (c) argument. The proper application of planning policy is a matter for a ground (a) appeal and I deal with it at paragraphs 40-41 below.
17. In his letter to the Planning Inspectorate of 6 November 2016, the appellant argues that if the wall had been built 0.6 metres farther from the road it would have been acceptable under permitted development rules. He poses the question: How can the wall be acceptable at a certain distance from the road but not slightly closer? This question relates to the application of permitted development rights and the interpretation of "*adjacent to the highway*", which is a ground (c) matter.

Reasons and conclusions on the ground (c) appeal

18. It is worth pointing out that, under section 57 of the 1990 Act, all building operations (or changes of use) falling within the definition of "*development*" require planning permission, but there are a number of different types of planning permission.
19. One type of planning permission is granted by a local planning authority, in which case the planning merits of the proposed development are a primary consideration.
20. Another type of planning permission is granted nationally by the GPDO⁴, in which case planning merits are not at issue.
21. With permitted development, the GPDO allows certain building works and changes of use to be carried out without having to make a planning application, but planning permissions granted by the GPDO are subject to detailed provisions, limitations, exceptions and conditions. Any claim of permitted development rights must be measured against each and every one of the sub-clauses of the relevant part of Schedule 2. If any of them are exceeded, the whole development is unlawful, not just the offending part.

⁴ The current version of the GPDO is the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended.

22. Part 2 of Schedule 2 to the GPDO deals with permitted development rights for minor operations. Within Part 2, Class A applies to gates, fences, walls, etc. Class A does not permit development for the erection of any gate, fence, wall or means of enclosure "*adjacent to a highway used by vehicular traffic*" which is more than 1 metre above ground level.
23. The appellant accepts that the front boundary walls are over 1 metre high, but asserts that if they had been built 0.6 metres farther from the road they would have been regarded as permitted development.
24. However, in seeking to interpret the meaning of "*adjacent to the highway*" there is no hard-and-fast rule that can be applied in all cases. Whether building operations fall within the ambit of works authorised by the GPDO is a matter of fact and degree in each case.
25. The gate, fence or wall in question does not have to actually touch the edge of a highway to be regarded as "*adjacent*" to it. It may be some distance back from the highway edge provided that it is close enough to have the perceived function of forming a boundary between the property and the highway.
26. In this case, the new front walls at No. 132 have replaced part of an established hedgerow that formerly served as the boundary between the property and the highway. Either with or without the planting that has taken place, the walls are sufficiently close to the highway to have the perceived function of forming a boundary between the property and the highway. These findings lead me to conclude, as a matter of fact and degree, that the walls are adjacent to a highway used by vehicular traffic for the purposes of interpreting the GPDO.
27. As they are more than 1 metre above ground level they exceed the limitations of Schedule 2, Part 2, Class A and are not permitted development. A specific grant of planning permission is required and accordingly, the appeal on ground (c) fails.

The appeal on ground (a)

28. An appeal on ground (a) is that planning permission should be granted for what is alleged in the notice.
29. The planning merits of the development are at issue, but in this case these have been considered already in a recent planning appeal decision relating to the same development on the same site. In a case such as this, where an Inspector has decided that the proposal was unacceptable, it is necessary for the appellant to demonstrate that circumstances have changed materially in the intervening period for the appeal to have a reasonable prospect of success.

Main issue

30. The main issue is whether there has been a material change in planning circumstances since the appeal decision of 16 February 2016 which found the same development to be unacceptable.

Green Belt policy

31. Government policy on protection for the Green Belt is set out in chapter 9 of the National Planning Policy Framework (NPPF). The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open. The NPPF states that the construction of new buildings should be regarded as "*inappropriate*" for the Green Belt. Some exceptions are listed but they do not apply here.
32. The Green Belt boundaries in Ashfield have been established in the following plans: (1) the Green Belt Local Plan prepared by Nottinghamshire County Council (adopted 1989); (2) the Ashfield Local Plan (adopted 1995); and (3) the Ashfield Local Plan

Review (adopted 2002). A Strategic Green Belt Review for the District (excluding Hucknall) was completed in August 2013 as part of the Local Plan process.

33. It is for local authorities to define and maintain Green Belt land in their local areas. The boundary can be altered only as part of the Local Plan review process. It is not within the remit of a planning or enforcement appeal to question the rationale that underpins the definition of a Green Belt boundary in any particular location.
34. As mentioned in paragraph 2 above, the main built up area of Underwood is excluded from the Green Belt, but other areas of housing that lie outside the identified built up areas, such as Underwood Green, are 'washed over' by the Green Belt. This means that the policy restrictions on new built development in the Green Belt apply to the houses in Underwood Green and their residential curtilages.

The appeal decision of 10 February 2016

35. It is clear from the previous appeal decision that the Inspector determined the appeal in accordance with the objectives of 'saved' policies EV1 and ST1, criterion (b), of the Ashfield Local Plan Review and paragraphs 17, 56, 79-80 and 87-89 of the NPPF. Those policies and that guidance provided the planning policy context to his consideration of the appeal development in February 2016 and they remain relevant.
36. On the main issues that he identified, he found that the development was inappropriate development in the Green Belt (which is by definition harmful to the Green Belt); that it harmed the openness of the Green Belt, by virtue of its location, height and scale; that it represented encroachment into the countryside (and therefore conflicted with one of the purposes of designating land within the Green Belt); and that it was a visually dominant feature in this part of the street scene.
37. He considered the other considerations that the appellant had put forward. These included the "fall-back" position (to which he attached only limited weight) and the planting that had been carried out. He acknowledged that this would soften the intrusive effect of the development but would not address the objections to it.
38. In conclusion, the Inspector found that the harm arising from inappropriate development in the Green Belt, together with the other harm identified, was not clearly outweighed by any other considerations. As such, the very special circumstances necessary to justify inappropriate development in the Green Belt did not exist and accordingly, planning permission was refused.

The appellant's case

39. The appellant has not put forward any material changes in planning circumstances that could result in a different outcome from his previous planning appeal. He asserts, in essence, that the planning application and appeal were determined on a flawed basis, because - as mentioned in paragraph 15 above - it was wrong to apply Green Belt policy to the appeal site.

Reasons and conclusions on the ground (a) appeal

40. The appellant asserts that the land on which the appeal development has been carried out is "previously developed land" or "brownfield land". This is incorrect. The glossary to the NPPF states that the definition of "previously developed land" excludes "land in built-up areas such as private residential gardens".
41. There is no definition of "brownfield land" in the NPPF or in planning legislation. The term came into common parlance in 1998 when the government set a national target to ensure that 60% of all new development was built on brownfield as opposed to greenfield (i.e. undeveloped) land.

42. It is clear to me that the previous Inspector correctly identified and applied the relevant local and national planning policies. I concur with the decision that he made and the reasoning process that he followed in reaching it. The points now raised by the appellant do not persuade me to consider the development any differently⁵.
43. For the reasons given, I conclude on the main issue that there have been no material changes in the facts and circumstances of the case, or in the planning policy context, to indicate that a different approach should now be taken to the appeal development. Accordingly, the appeal on ground (a) fails.

The appeal on ground (f)

44. An appeal on ground (f) is that the steps required to comply with the notice are excessive and lesser steps would overcome the objections.
45. No specific lesser steps have been suggested. The gist of the appellant's case is that there is no need to remove the walls because once the planting has become established the structure would not be visible from public vantage points.
46. This is a reiteration of the argument that was put to the previous Inspector and is addressed in paragraph 18 of his decision. He concluded that because of the height and scale of the development, landscaping alone would not overcome the objections to it. I concur with that view.
47. On the facts and circumstances of this case I find that the requirements are proportionate. They seek nothing more than is necessary to remedy the breach of planning control that has occurred. No lesser steps would give effect to the notice. Accordingly, the appeal on ground (f) fails.

The appeal on ground (g)

48. An appeal on ground (g) is that the time given to comply with the notice is too short. The appellant asserts that three months, rather than one month, would be needed to do the job properly, but no evidence has been submitted to support his assertion. In the absence of such evidence, or any other good reason for extending the compliance period, I find that one month provides adequate time to meet the requirements of the notice. Accordingly, the appeal on ground (g) fails.

Overall conclusions

49. I have taken account of my observations at the site and the surrounding area and all the matters raised in the written representations, including the representations made by local residents and a county councillor. For the reasons given above I conclude that the appeals should not succeed and I shall uphold the enforcement notice. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

George Mapson

INSPECTOR

⁵ My own view is that this stretch of Main Road is part of the transition from the built-up area of Underwood to the countryside and it leads through part of an attractive rural setting to the settlement. Underwood Green is not part of that settlement; it is an isolated cluster of houses in the countryside that is more rural than urban in terms of its character and appearance. The mature roadside hedgerow is an important and attractive natural feature that enhances the entrance to Underwood and Underwood Green. Replacing a significant part of it by the large brick walls at No. 132 has significantly eroded the character and appearance of the street scene. The appellant has drawn attention to other high brick boundary walls in the locality, but I consider them to be equally incongruous in this setting. These walls do not provide strong grounds for permitting the appeal development which compounds the harm that they have caused. Whether or not Green Belt policies had applied to the appeal site, the overly dominant and intrusive nature of the appeal development, and the significant harm that it has caused to the street scene of Main Road, justifies the refusal of planning permission.