
Appeal Decision

Site visit made on 15 November 2016

by Iwan Lloyd BA BTP MRTPI

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

Decision date: 8 February 2017

Appeal Ref: APP/D4635/C/16/3153691
18 Grotto Lane, Wolverhampton WV6 9LP

- 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 Andrew Kenneth Morey against an enforcement notice issued by Wolverhampton City Council.
 - The enforcement notice, numbered 16/00008/ENCOMP, was issued on 17 May 2016.
 - The breach of planning control as alleged in the notice is without planning permission the creation of a raised patio to the rear of the 18 Grotto Lane.
 - The requirements of the notice are to:
 1. Remove the unauthorised patio area and steps.
 2. Return the level of the land to the level which existed before development commenced.
 3. Remove all waste materials arising from the required works to a lawful place of disposal.
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is allowed on ground g, and the enforcement notice is varied by the deletion of 2 months and the substitution of 6 months as the period for compliance.
2. Subject to this variation the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Ground (c) appeal

3. The appeal on ground (c) is that there has not been a breach of planning control. The appellant indicates that the development is covered by Section 55 of the above Act and the permitted development rights contained in Article 3 of Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the 2015 GPDO) Part 1 Class E and F, and Part 2 Class A.
 4. The development is recorded to have begun in April 2015. The relevant date to determine whether work is in breach of GPDO rights is the date when work commenced. In so far as the applicable provisions apply to the development had the development commenced prior to 15 April 2015 (the day the 2015 GPDO came into force) these are the same under the preceding version of the GPDO rights and those now current under the 2015 GPDO (as amended in
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- 2016). I shall therefore deal with the submissions as put under the 2015 GPDO, and having no prior knowledge of the actual date of commencement, other than sometime in April 2015, which does not change the assessment under this ground of appeal.
5. The appellant contends that levelling the ground beneath the raised patio does not require permission because it is a normal garden operation, and that the laying of slabs on the levelled ground is expressly covered by Class F in the 2015 GPDO, and so is construction of the steps. The appellant refers to the case of *Wycombe District Council v Secretary of State for the Environment and Trevor* [1995] J.P.L. 223.
 6. Section 57 of the Act establishes that planning permission is required for development. Development is defined in Section 55 of the Act as the carrying out of building, mining, engineering or other operations in, on, over or under the land, or the making of any material change of use in the use of any buildings or other land. There is no definition of 'engineering operations' except in the case of laying out of a means of access, but the courts have taken the view that an 'engineering operation' could be an operation which would generally be supervised by an engineer, but that it was unnecessary that it should actually have been so supervised.
 7. The before and after photographs of the development reveal that the garden land sloped down to a small patio in front of the conservatory and that this land was excavated back into the slope and the spoil laid and flattened to facilitate an area or platform for hard-surfacing. In order to secure and to retain the newly created area a retaining wall needed to be built together with steps to one side. The retaining wall extends along the width of the garden with a smaller return wall on the other side of the constructed steps.
 8. The area of the displaced soil now predominantly patio is considerable in area, and the retaining wall is commensurate with the eaves height of the conservatory. There are nine steps leading upwards to the platform with the final tenth step onto the raised patio. The works are extensive and could have required some engineering knowledge to ensure that the retaining wall would retain the remainder of the garden slope in situ and I suspect for this reason it was done in one continual operation until completion in June 2015. I consider that having regard to what has been done the extent of works amount by fact and degree to an engineering operation and planning permission is therefore required.
 9. Planning permission may be granted either on application to the local planning authority or by a development order. Whilst Class E Part 1 and Part 2 Class A have been referred to, no further submissions have been made in support of these provisions. Part 1 Class E does not permit the construction or provision of a verandah, balcony or raised platform. The allegation refers to a raised patio which is consistent with that of a raised platform. Raised in relation to a platform is defined in the 2015 GPDO with a height greater than 0.3 metres. The development is much greater than 0.3 metres.
 10. In relation to Part 2 Class A the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure, the case of *Wycombe District Council v Secretary of State for the Environment and Trevor* [1995] J.P.L. 223 and other cases indicate that a means of enclosure must function as such by providing some way of closing in an area.

11. In this case the development is principally one retaining wall with a smaller return wall. The patio area is not ostensibly enclosed by the development enforced against as a matter of fact and degree. Whilst there are existing boundary fences along the common boundaries these are largely freestanding of the development enforced against. Even if this interpretation is inaccurate the development is in excess of 2 metres above ground level in relation to Part 2 Class A.1. (b).
12. I do not regard the engineering operation in this case undertaken to facilitate the hard surface incidental to the enjoyment of the dwelling house as a matter of fact and degree. The engineering operation was integral to facilitate the laying of a hard surface on top and would therefore not fall under the provisions of Part 1 Class F. Even if this is inaccurate, the area of hard surface exceeds 5 square metres, as the appellant points out; it is some 42 square metres, conflicting with Part Class F.2. (b).
13. The appellant questions the precision of the notice and the absence of a detailed plan. I consider that the manner in which the appellant's case is put does indicate that the appellant is aware of what is complained of, and what he must do to remedy it. The plan accompanying the notice identifies the property and the land associated with it, when read as a whole the notice identifies the breach with sufficient clarity so as to be regarded as a proper constructed notice.
14. For the reasons I have outlined above, the operational development requires planning permission, and there is no evidence of a planning permission granting such a development. I conclude that the development represents a breach of planning control and the appeal on ground (c) therefore fails.

The ground (a) appeal and the deemed application

15. The main issue in this ground is the effect of the development on the living conditions of nearby residents in relation to privacy.
16. The properties on the west side of Grotto Lane have been built into the slope, so that rear gardens slope upwards to Church Hill Drive. No. 21 a detached property has been built behind Nos. 19 and 20 and shares a common boundary with No. 18. The northern elevation of this property faces this common boundary and has habitable room windows at first floor level. Given this rising landform to the rear most houses have gardens on tiers supported by retaining walls. Prior to the works undertaken, No. 18 had steps within the grass embankment leading up to a grassed area. This area permitted overlooking over the common boundaries to rear gardens either side of No. 18. The situation is largely replicated, so there is a degree of mutual overlooking. Further up the slope the opportunities for overlooking are increased, although most of these gardens have matured with significant and established planting.
17. The appellant indicates that the Council has failed to establish the garden levels before the works began and that the works are generally at the level of the original upper grass terrace, particularly on the northern boundary. The appellant also refers to the southern end of the development by the steps to have increased in level at about 900 millimetres, but reducing to zero where this meets the slope at the rear of the development. It is indicated that the level midpoint being some 400-500 millimetres higher. However, the photographs of the northern boundary show an embankment dropping down

from the large yellow plant in the picture and by reason of its construction this area was levelled off commensurate with the level of the remainder of the development. At this juncture the level is higher and there is clear sight of the garden of No. 17. On the other side the southern end, the higher position and orientation of the steps and the final turn onto the raised patio permits clear sight into the garden of No. 21. It also allows a view into the first floor of No. 21 being commensurate with the level and orientation of this property.

18. I consider that the development enforced against has a significant and harmful impact on the living conditions of nearby residents in relation to privacy. The impact of the development is materially worse than what existed there prior to the development. I do not consider that in relation to privacy of living conditions that returning the levels to the pre-development stage would be less desirable than the development carried out. In my view such a fall-back position is not a less desirable solution in terms of impact.
19. The appellant provides details of landscaping for conditional approval by suggesting that locating heavy planters filled with bamboo plants would screen the impact. Secondly, it is suggested that filling a planting pocket on the southern end of the patio with pre-grown hedge plants to a height of 900-1200mm would provide a long-term solution.
20. I am not convinced that heavy planters with bamboo plants strategically placed would address the issue given that planters are movable. Furthermore, there is little space to accommodate the same at the top of the steps. I concur with the Council that the planting bed does not address screening towards No. 17. I am not persuaded that the planting bed would provide sufficient space for the density of planting needed to effectively screen the view, and I am not convinced that bamboo plants which can grow relatively tall would provide the density of foliage necessary to screen the adverse impact. Fencing or other formal screen would in turn appear incongruous and dominant at this height. I therefore consider that conditions would not overcome or adequately mitigate the adverse effects of the development.
21. I note that the appellant suggests that lowering the level of part of the patio could address the issue of privacy. However, the appellant does not provide any detail of how this would achieve this objective. This point and the landscaping issue have been raised in the ground (f) appeal. The appellant does not address the issue in detail nor is there an alternative plan to demonstrate what could be done that would overcome such concerns. The Council requires the whole structure to be removed although accepts that it might be prepared by application to allow a lower structure. This would involve further engineering works to retain the land behind and would be a materially different development from that which is enforced against. I would concur with that view.
22. Section 177(1) (a) gives power to grant planning permission for the matters alleged in respect of any part of those matters. I also note that case law encourages a flexible approach in the context of ground (f) where there is a deemed planning application to be determined.
23. However, care is needed to ensure the desired outcome and that it is expressed with the necessary precision. There is no suitable scheme before me that is within the powers available. It is unclear as to the extent of the lowering needed so as to achieve the desired outcome or that which is now

practical having regard to the need for additional engineering operations and retaining structures. In my view there is an absence of an obvious and practical alternative which would overcome the planning difficulties at less cost and disruption. I am also not convinced that a lesser scheme would be the same development enforced against. Given the Council's position, relaxation of the ground (g) appeal would allow a scheme to be advanced by planning application.

24. I note the point that the removal of the evergreen trees in the garden of No. 21 near the common boundary allowed greater views into the affected gardens, but that situation existed when the notice was served, and demonstrates that reliance on landscaping to mitigate an adverse impact cannot be relied upon.
25. Saved Policy D8 of the Wolverhampton Unitary Development Plan seeks to ensure that proposals should not adversely affect amenity in relation to loss of privacy. I consider that the development conflicts with this relevant policy.
26. I therefore conclude that the development enforced against has a significant and harmful impact on the living conditions of nearby residents in relation to privacy. The ground (a) appeal and the deemed application should not succeed.

The ground (f) appeal

27. It appears that the notice requires complete removal of the development which is construed as falling within Section 173(4) (a), to remedy the breach by restoring the land to its condition before the breach took place. The appellant indicates that the requirements of the notice are excessive. However, the appellant also points out that changing the level of the patio would make no difference to what could be viewed from No. 21 and the notice has the effect of stopping the use of the garden. It is argued that the requirement to return the level of the land to a level which existed before the development took place is not precise because the Council has no measure to quantify what this would be to ensure compliance.
28. I have considered whether there is an obvious and practical alternative which would overcome the planning difficulties at less cost and disruption in the ground (a) appeal, and whether this could be expressed with a degree of precision. There is no alternative scheme before me which can be expressed with any degree of precision and therefore there is no lesser step. I note the concern about the precision of taking levels down to pre-development levels, there is sufficient precision in this requirement since the appellant will know what level this is and what he must do to remedy it.
29. I am satisfied that the requirements of the notice are not excessive and there is nothing before me that leads me to find that there are lesser steps that would satisfy the purpose of serving the notice. The appeal on ground (f) therefore fails.

The ground (g) appeal

30. The ground of appeal is that the time given to comply with the requirements of the notice is too short. The Council is willing to extend this to 4 months, but the appellant seeks 6 months.

31. I am mindful of the possibility that a revised scheme could be put forward by a planning application to address the concerns as detailed above. I therefore consider that allowing 6 months for such a scheme to be presented and allowing time for compliance with the notice should that fail is proportionate having regard to the competing issue of enforcing against the development in the public interest. To this limited extent the appeal on ground (g) succeeds.

Iwan Lloyd

INSPECTOR