

Appeal Decision

Site visit made on 27 February 2017

by A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 27 March 2017

Appeal Ref: APP/Z4718/C/16/3154329

Land at 28 New Street, Meltham, Holmfirth HD9 5NU

- 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 Act’].
 - The appeal is made by Mr Haigh against an enforcement notice issued by Kirklees Metropolitan Borough Council.
 - The enforcement notice was issued on 6 June 2016.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a raised platform.
 - The requirements of the notice are to demolish the raised platform and restore the land to its previous condition.
 - The period for compliance with the requirements is within 28 days.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be varied by:
 - a) The deletion of all of the text in section 5, *what you are required to do*, and the substitution therefor by the following text:

Step (1) demolish the raised platform and restore the land to its previous condition.
 - b) Insertion of the following text below step (1):

The period of compliance with the enforcement notice is six months.
2. Subject to the above variations, 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.

Ground (a) and the deemed application

Reasons

3. The main issue is the effect of the development upon: (1) The character and appearance of the host building and that of the locality and (2) the function and openness of a green corridor.

Character and appearance

4. The surrounding area is mainly residential in character with a mix of detached and terraced dwellings. Meltham Dike forms a welcome visual break from built development, because of its wooded and tranquil quality. This green corridor functions as an open space for both humans and wildlife. In contrast,
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the raised platform is a substantial structure. While an attractive human-made intervention, its overall height and scale is inconsistent with the external appearance of the host building. It forms a visually dominant addition to the rear elevation. It is prominent in views along the embankment due to its siting. The dimension of the timber deck draws the naked eye and represents spread of residential paraphernalia in this part of the green corridor. It causes significant visual harm to the pleasant setting of the open space and is out of keeping with the residential character of the locality, because of its prominent location. In my assessment, the extent and layout of the platform adversely interrupts the natural rhythm of the Dike and its setting.

5. I therefore conclude that the development has a materially harmful visual effect upon the character and appearance of the host building and that of the locality. Accordingly, the development conflicts with policies BE1 and BE2 of the Kirklees Unitary Development Plan [‘the UDP’] 1999, saved by Direction of the Secretary of State, which seek good quality design. The development is odds with national policy found in paragraph 56 of the National Planning Policy Framework, which these local policies are broadly consistent with.

Green corridor

6. The UDP identifies the whole length of Meltham Dike as a green corridor from the centre of the town to its outskirts from where there is access to a local walk, the Meltham Way and, eventually, the Pennine moors. Public access to these corridors is important and whenever development is proposed that would affect a green corridor agreement may be sought to incorporate, as part of the development, measures to enhance the quality of the corridor. These measures might include providing footpath or cycle links. The Council will seek to take advantage of any potential for creating new links in the public footpath network.
7. The green corridor is in reasonable proximity to the community it serves and has potential long-term amenity and recreational value. This is because of its wooded setting, wildlife and tranquil qualities. The raised platform prevents public access given its location. It physically obstructs its continuity and potentially restricts recreational opportunities and fails to safeguard this open space in the public interest. It has an adverse effect on public access and enjoyment of this green corridor. While the development does not affect plant or animals within the corridor nor the watercourse, the land’s use fails to retain the strip of land outside the residential garden so that it can be incorporated in a public path in the future. Mr Haigh suggests no alternative green corridor to overcome my concerns.
8. I therefore conclude that the development has a harmful effect on the function and openness of the green corridor and there is conflict with UDP policy D6, which seeks to protect designated green corridors. The retention of the raised platform is therefore at odds with national policy at paragraphs 58, 76 to 78 to the NPPF.

Other considerations

9. Uncontested evidence is that planning permission was granted for five dwellings in 1997. Pursuance to local planning policy then in force, a planning

obligation was agreed that required the developer to construct a footbridge over Meltham Dike and a footpath between the stream and the rear of the houses. From the end of the houses, the footpath was to have turned along the property boundary into and through a closed graveyard, from where an existing gate would give access onto Westgate. Before occupation of the dwellings, the bridge and footpath were to be constructed dedicated for public use and a commuted sum for maintenance of £6187 paid to the Council. However, the owners of the graveyard would not allow public access.

10. Subsequently, a new agreement was entered into which modified the obligation by omitting the requirement to form a link to the graveyard. The practical consequence of this modification is that the footpath then became a dead-end. Although they were constructed, dedication of the footbridge and footpath for public use has not occurred and no commuted sum for maintenance has been paid to the Council.
11. Mr Haigh's property is subject to the s 106 agreement. It is the nearest property to the footbridge. He acquired from the developer the whole of the strip of land including the footpath situated between the rear gardens and the stream. He has extended its residential garden and built the subject decking over the footpath installing a gate at the end of the footbridge. Because of this work, the footpath is no longer accessible from the footbridge or from anywhere else. Given the evidenced incidents of anti-social behaviour, Mr Haigh applied to the Council to have the obligation discharged. That application was refused consent and subsequently dismissed on appeal¹.
12. Inspector Hellier found that the footpath could be extended to a bridge at Badger Gate that is about 50 m further upstream. From this point there is an existing public footpath following the south bank of the stream for some 300 m to a road bridge. This was completed in 2001 by means of s 106 agreement entered into in relation to an adjacent housing scheme. The provision of a footpath along the stream from the town centre to Badger Gate would not be inherently unsafe. Nor would it be inherently likely to lead to unacceptable levels of criminal activity. While the Council has attempted to negotiate public access to third party land since that decision, I have seen nothing to doubt the previous Inspector's findings. There is nothing that indicates these circumstances have materially changed.
13. Mr Haigh considers objections can be overcome because the raised platform could be removed at a later date if and when public access is required to the green corridor. The thrust of the main argument is temporary planning permission could be granted for the platform. I concur that unless and until the footpath becomes a through route there is no need for public access. However, pivotal to all of this is the retention of the footpath and strip of land outside the residential garden so that it can be incorporated in a public path at a later date as and when the opportunity arises. Otherwise the objectives of providing a green corridor would be defeated and seriously undermined by a grant of planning permission for the raised platform. I do not consider that such an outcome would be acceptable in the public interest.

¹ Appeal reference has the same digits ending with /Q/15/3005117. I have adopted descriptive elements of that decision as nothing has materially changed.

14. I am not persuaded that the removal of the raised platform could be achieved by imposing a condition on grant of planning permission. A condition would need to limit the duration of the planning permission which, in these circumstances, would be unreasonable. This is because it is unclear how long it will take for a public path to be constructed and linked to the local network, given the apparent difficulties in securing access rights over third party land.
15. Circumstances may materially change in the future and public access might be required in the longer term. As an alternative to imposing conditions, Mr Haigh offers a unilateral undertaking ['UU'] pursuant to s 106 of the Act. This is a material consideration and provides a means to retain control over the development in the public interest.
16. The initial UU contained significant discrepancies that rendered it invalid. Apart from erroneous clauses, it referred to a retrospective planning application refused permission by the Council (ref: 2016/62/90997/W). It did not even identify the enforcement notice appeal and the potential grant of planning permission by virtue of this deemed planning application. I also had some concern about the effectiveness of the obligation and in the interests of fairness I invited additional comment and gave a further opportunity to submit a properly drafted and executed UU within certain timescales².
17. The UU is a binding deed on owners and successors in title and it refers to the relevant legislative provisions. However, there are significant problems. Firstly, it is not properly executed; despite having an opportunity to redraft the document. A tracked document was submitted for my comment; I cannot draft the document for Mr Haigh and request him to submit it as a legally binding contract. That is his responsibility. Secondly, even if a signed and dated version had been submitted for my examination, there is a fundamental issue in the meaning and application of the planning obligation.
18. The obligation states the following:

To remove the decking which is the subject of the enforcement notice from the property within 28 days of written notice to do so by the council in order to restore a footpath through the property in the event that the council require that the said footpath will then operate as a green corridor link to other footpaths in the area.

The UU might address the development's impact on the function and openness of this green corridor because it seeks to secure public access to the footpath in the long term, which is in the public interest. Eventually the raised platform could be removed thereby limiting the duration of visual harm. The problem, however, is the terminology in the obligation. For example, the mechanics of achieving the removal of the decking, ceasing the residential use of the land, and reinstating the footpath is too vague and ambiguous. The document lacks precision and detail as to how operations are to be carried out in order to remove the raised platform and restore public access to the footpath. There is no obligation to submit a restoration scheme.

² Correspondence dated 16 March 2017 setting deadline of 24 March 2017. The letter made clear that any revised UU, properly executed, must be submitted by the deadline. I made it clear that I shall proceed to a determination on the evidence before me.

19. Additionally it is unclear as to what is exactly meant by the following purpose:

'...in order to restore a footpath through the property in the event that the council require that the said footpath will then operate as a green corridor link to other footpaths in the area'.

This statement seems to bind the Council yet it is not a party to the UU and introduces significant doubt over the purpose and effectiveness of the planning obligation.

20. I consider that the UU has the potential to create substantial interpretational problems as to its meaning and effect. While a planning obligation is necessary to secure public access to the footpath in the long-term, the submitted document amounts to an ineffective vehicle in achieving that purpose. In its current form, the obligation fails both the statutory and policy tests. Having regard to relevant Case Law and planning policy on this topic, on the balance of probabilities, I find that the UU would not achieve its intended purpose. In my judgement, it does not fall within the scope of s 106(1) subsections (a) – (c), and is unlikely to be enforceable.
21. It may be the case that these minor drafting problems could be addressed. Given Mr Haigh's willingness to enter into a UU, I have considered the possibility of requiring a revised planning obligation by imposing a condition instead of refusing planning permission. However, permission should not be granted subject to a positively worded condition that requires the applicant to enter into a planning obligation. Such a condition is unlikely to pass the test of enforceability. A negatively worded condition limiting the development that can take place until an obligation has been entered into is unlikely to be appropriate in the majority of cases. It is certainly not appropriate here because unauthorised development has already occurred.

Planning balance

22. The development causes significant adverse visual harm to the character and appearance of the locality. The raised platform physically obstructs public access to a designated green corridor. The development fails to retain the strip of land outside the residential garden so that it can be incorporated in a public path at a later date as and when the opportunity arises. The development therefore fails to accord with local and national planning policies cited elsewhere. To these findings I attach substantial weight.
23. On the other hand, it is difficult to control the development and make it acceptable in planning terms by imposing reasonable and enforceable conditions. A planning obligation is required to meet the long-term policy aims of securing the land for public access. However, the UU provided by Mr Haigh is fundamentally flawed as is ineffective. I attach it little weight in support of planning permission. On balance, the other considerations advanced, considered individually or collectively, do not overcome my findings on the main issues above.

Ground (f)

24. Mr Haigh should show that the steps specified exceed what is required to remedy the breach of planning control or, as the case may be, any injury to

amenity caused by the breach. The terms of the notice is to demolish the raised platform and restore the land to its previous condition; firmly falling within the scope of s 173(4)(a). Apart from rehearsal of the merits arguments advanced on ground (a), there is no lesser step advanced to remedy the breach of planning controls. I consider that the purpose behind the remedial requirements can only be achieved by full compliance and steps required are not excessive. Therefore ground (f) fails.

Ground (g)

25. For the following reasons, I am of the firm opinion that the specified compliance period, 28 days, is unreasonable. This is because of the nature and scale of the work required, which probably involves specialist operations and needs to be quoted and arranged. To overcome the planning difficulties short of total demolition, there is potential for the submission of a revised planning application together with a materially different, properly drafted and executed enforceable UU to the Council for determination. All of this will take time and an extended period of compliance of six months is reasonable and proportionate in the circumstances. Ground (g) succeeds.

Overall conclusions

26. For the reasons given above and having regard to all other matters, I conclude that the appeal should not succeed on grounds (a) and (f). I have varied the period of compliance and upheld the enforcement notice and refused to grant planning permission on the deemed application.

A U Ghafoor

Inspector