

Appeal Decision

Hearing and site visit held on 3 April 2017

by A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 4 May 2017

Appeal Ref: APP/X2410/C/16/3155547

Land at 1 Burrow Drive, Rothley, Leicestershire LE7 7RZ

- 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 Miss Michelle Widdowson against an enforcement notice issued by Charnwood Borough Council.
- The enforcement notice was issued on 19 July 2016.
- The breach of planning control as alleged in the notice is without planning permission change of use of amenity land to garden area and erection of a wooden close boarded fence enclosing the land.
- The requirements of the notice are to:
 - (1) Remove all of the fencing erected in order to enclose the land, and
 - (2) Cease the use of the land as a domestic garden area in association with the host property.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (b) and (c) of the Town and Country Planning Act 1990 as amended¹. Since the prescribed fees have not been paid within the specified period, ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.

Summary of Decision: The appeal is dismissed and the enforcement notice is corrected and upheld as set out at paragraph 13 below.

Matters concerning the notice

1. The description of the allegation requires consideration prior to the determination of the appeal with a view to correct the notice using the powers available in s. 176 (1)(a)(b) of the Act. Virtually any correction can be made having regard to the essential test of injustice. The appeal relates to an area of land cross-hatched in the site plan (for convenient shorthand I will refer to the area as [*the notice land*]).
2. To accurately reflect the definition of development in s. 55(1) of the Act the allegation should refer to a *material* change of use. The label 'garden area' is not a planning land-use activity. A close-boarded timber fence has been erected marking boundaries. The construction of the fence amounts to operational development falling within scope of s. 55(1) and (1A) of the Act and the evidence is that it has been erected to provide privacy and security to the notice land. It sustains the alleged residential use and is integral to the change of use.

¹ Ground (b) is inserted at the Hearing by agreement because some of the arguments fall within that context.

For greater clarity the allegation should state the following: *Without planning permission, the making of a material change of use to residential use and the construction of a close-boarded fence to facilitate that change of use.*

The steps required to comply should flow from the corrected allegation. I am satisfied no injustice arises from any of these minor corrections. I will correct the notice.

Ground (b)

3. In this ground of appeal, the onus of proof is firmly on Miss Widdowson to show that the alleged matters had not in fact occurred by the time the notice was issued, on the balance of probabilities. The claim is a simple one, namely, that the alleged matters have not factually occurred because the land has been purchased as garden space to the dwelling-house.
4. No. 1 is a single dwelling-house with a rear garden. It constitutes a single unit of occupation². Before Miss Widdowson purchased the notice land, it was part of public open space located to the side of no. 1. Its primary lawful use being derived from an extant planning permission for the whole residential estate³, subject to conditions. The notice land is clearly identified as public open space in the landscaping scheme. A planning agreement covers matters like the provision of public open space. After its purchase, the notice land was included in the same unit of occupation; the extent of ownership is marked by a close-boarded timber fence. Nevertheless, I consider that the notice land's use is substantially different to a residential use given the significant degree of physical and functional separation. It constitutes a self-contained planning unit.
5. The evidence presented shows that, given the scale of residential activity, the notice land was mainly used for residential purposes in connection with use of no. 1 as a single dwelling-house during the period before the notice was issued. The fence that subdivided the rear garden was removed to facilitate that residential use. The notice land had merged into the residential unit and was exclusively used by no. 1's occupants for residential purposes.
6. For planning purposes the use of the notice land, as identified in the site plan attached to the issued notice, significantly changed to residential use by the time the notice was actually issued. As a matter of fact the alleged matter, as corrected, had occurred. Ground (b) must fail.

Ground (c)

7. In this ground of appeal, the onus of proof is firmly on Miss Widdowson to show that the alleged matters do not constitute a breach of planning control, on the balance of probabilities.
8. Section 55(1) includes in the definition of *development* the making of a material change of use of land. The conversion of public open space into residential use has both on and off-site impacts. For example, the appeal plot's physical layout has dramatically changed since the notice land's appropriation. The area is exclusively used by occupants of no. 1 and it is no longer for public enjoyment. Thus, there has been loss of public open space affecting the

² See *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

³ Council ref: P/12/1741/2 – Erection of 180 dwellings and erection of school with creation of associated sports pitches, changing facilities and access roads from Loughborough Road and Hallfields Lane was granted by committee authority and dated 26 July 2013.

ecological function of the green space that is a requirement of local plan policy. Given the nature and scale of the residential activity, as a matter of fact and degree, I consider that the definable character of the use of the notice land has materially changed from public open space to residential, which falls within the meaning of development.

9. I should examine whether, at the date of the notice, the residential use was lawful since it did not constitute development by virtue of the dwelling-house exception in s. 55(2)(d) of the Act⁴. The area immediately around and about the building is visually attached to the building. The area appears private and has a domestic appearance because of its intimate layout, close association and relationship with the dwelling-house. Due to the arrangement of outdoor furniture and display of domestic paraphernalia, the area immediately around and about the building is connected to the house; it has a sense of domesticity. In comparison to the size of the property, these are modest and serve a reasonably useful function as curtilage to the building.
10. In contrast, the notice land was physically disconnected and set apart from the dwelling-house. Visually all of this area appeared separate from the land closest to the building given its location and positioning. The notice land was physically and visually part of open space functioning as amenity land. The area did not appear or seem to have a close association with the dwelling. It did not have an intimate relationship with the land which is undoubtedly within the curtilage. Additionally, the evidence about the use shows that the area was distinctly disconnected and separate from the dwelling-house. Although the land is now part of the property's residential garden, on the particular circumstances of this case, the notice land cannot be regarded as part of the curtilage to the dwelling-house. At the date of the notice, the use of the land for residential purposes was not exempt by operation of law.
11. Development comprising the erection of a 2 m high fence is permitted by virtue of Article 3(1), Schedule 2, Part 2, Class A which, amongst other things, permits the erection of fence subject to conditions and limitations. The Council concede that, taken on its own, the building operations comprised in the erection of the fence is PD. However, the clear and precise evidence is that the fence was constructed to facilitate the residential use of the notice land. An enforcement notice directed at a material change of use may include development integral to and solely for the purpose of facilitating the unauthorised use even if the erection of the fence, on its own, would have been PD.
12. On the balance of probabilities, express planning permission is required for the making of a material change of use to residential use and the construction of a close-boarded fence to facilitate that change of use. It has not been obtained. I find that the matters alleged constitute a breach of planning control. Therefore, ground (c) fails.

Formal decision

13. It is directed that the enforcement notice be corrected by:

⁴ The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land; (d) the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such.

- (1) Delete the text, section 3 the matters which appear to constitute the breach of planning control and substitution therefor by:

Without planning permission, the making of a material change of use to residential use and the construction of a close-boarded fence to facilitate that change of use.

- (2) Deletion of the text '*domestic garden area*', section 5 what you are required to do subsection (2) and substitution therefor by: *residential use*.

14. Subject to the above corrections, the appeal is dismissed and the enforcement notice is upheld.

A U Ghafoor

Inspector

APPEARANCES

FOR THE APPELLANT:

Michelle Widdowson Appellant

Sharon Sheran On behalf of the Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Sara Coleman Planning Enforcement Officer, Charnwood
Borough Council

Jacqueline Jackson Planning Officer

INTERESTED PERSONS:

Peter Watson Local resident

DOCUMENTS HANDED AT THE HEARING

- 1) Hearing notification and those consulted.