



Appeal Decision

Site visit made on 10 July 2017

by Pete Drew BSc (Hons) DipTP (Dist) MRTPI

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

Decision date: 17 July 2017

Appeals A & B Ref: APP/N1160/C/16/3164102 & 3164103 207 Ridgway, Plympton, Plymouth PL7 2HP

- The appeals are made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mrs Dawn Perrins and Mr Steven Perrins, respectively, against an enforcement notice issued by Plymouth City Council.
- The enforcement notice was issued on 1 November 2016.
- The breach of planning control as alleged in the notice is: Removal of a 4.1 metre length of front boundary wall, and the creation of a front garden hard surface, to facilitate the formation of an off street vehicle parking area with access off a classified highway.
- The requirements of the notice are: Rebuild the demolished section of front boundary wall to its exact height, and appearance, as the demolished section of boundary wall.
- The period for compliance with the requirements is: One calendar month.
- The appeals are proceeding on the grounds set out in section 174(2) (b), (c), (e), (f) and (g) of the Act.

Appeals A & B: Decision

1. I direct that the enforcement notice be corrected by the deletion of the words in paragraph 3 of the notice and their replacement with the words: "*Removal of a 4.1 metre length of front boundary wall and the creation of a front garden hard surface*". Subject to this correction the appeals are allowed and the enforcement notice is quashed.

Procedural matters

2. The Planning Inspectorate [PINS] wrote to the Council in a letter dated 29 June 2017 and the Council responded in a letter dated 6 July 2017. The Appellants were then given an opportunity to comment on this exchange. I have taken all of this correspondence into account in reaching this decision.
3. An application for an award of costs has been made by Mrs Dawn Perrins and Mr Steven Perrins against Plymouth City Council and the Council has made a counter application for an award of costs against Mr and Mrs Perrins. These applications are the subject of a separate decision.

Appeals A & B: Ground (e)

4. Section 172 (2) of the Act provides that a copy of an enforcement notice shall be served on: (a) the owner and occupier of the land to which it relates; and (b) on any other person¹ having an interest in the land, therefore including such interests as a mortgagee, being an interest which, in the opinion of the Local Planning Authority [LPA], is materially affected by the notice. It is clear

¹ Person is defined in Schedule 1 of the Interpretation Act 1978 as: "includes a body of persons corporate or unincorporate".

- that the LPA has discretion to decide whether any other person that has an interest in the land would be materially affected by the enforcement notice.
5. However, as set out in PINS' letter to the Council, the Council does not appear to have asked itself the question, at the point of issue of the notice, as to whether the other person with an interest in the land², would be materially affected by the notice. Instead it candidly admits that: *"Due to an oversight by the Council the Enforcement Notice was served on Mr and Mrs Perrins only"*.
 6. The Council's original statement said that given the Appellants are the property owners and responsible for the works carried out: *"...the Council does not believe that the oversight affects the validity of the Enforcement Notice"*. On a pedantic point it has not been suggested that there are defects on the face of the notice that would result in a finding that the notice is invalid. However the thrust of the argument appears to be that the Council is now saying, if it had not made an oversight, that it would still not have seen fit to serve a copy of the notice on the mortgagee. However the language of section 172(2) of the Act is mandatory, *"shall be served"*, and in my view that subsection can only be met by a conscious decision at the point of issue of the notice as to whether the other person with an interest in the land would be materially affected. It is not therefore a matter that I am able to correct under section 176 of the Act.
 7. In relation to the generality of this argument it is perhaps helpful to contrast the language of section 172 (2) of the Act with section 187A (2) of the Act, which relates to service of a breach of condition notice. In that case an LPA has discretion [*"may"*] to merely serve such a notice on any person who has carried out the development. That is very different to section 172 (2) of the Act [*"shall"*] and the more comprehensive list of parties who must be served. The Council's response, insofar as it says the mortgagee was *"not responsible"* for the breach and, elsewhere, that *"...the Council is unaware of any other third-party...responsible in part for the breach"*, appears to be more reminiscent of the former rather than the latter, which applies to enforcement notices.
 8. The Council admits that on occasions in the past it has served a copy of an enforcement notice on a mortgagee. That chimes with my experience both as someone who has issued enforcement notices on behalf of LPAs in a previous life and as an Inspector who has dealt with appeals. I routinely find that LPAs serve a copy of an enforcement notice on mortgagees. However the Council says that it has done this in the past only for information purposes as it would never contemplate legal proceedings against them as, in short, the mortgagee would have a defence under the Act. I do accept that in the normal course of events proceedings for non-compliance might be brought against an owner, but what of a situation where a mortgagee takes possession, for example where an owner has defaulted on payments and the property has been repossessed?
 9. In my experience of precisely that situation the mortgagee went out of their way to ensure that the requirements were complied with, in that instance, by ensuring that vehicles or parts thereof, were removed. The mere threat of proceedings was enough to achieve full compliance. If the mortgagee had not been served it is conceivable that it might have allowed the property to be marketed for sale and the prospective purchaser might only have discovered the existence of the enforcement notice at the point where a local search was undertaken at an advanced stage when all relevant parties had incurred costs.

² A building society that was revealed in the answer to question 2 of the Planning Contravention Notice, dated 3 October 2016.

Whilst I acknowledge this is a hypothetical situation it underlines why, in my view, service on a party such as a mortgagee is not merely for information.

10. The Council contrasts the situation prevailing in these appeals with a failure to serve a copy of the notice on a tenant. If that had occurred then the arguments would have been more stark because a tenant would be an occupier of land and so service would have been mandatory, having regard to section 172 (2) (a) of the Act. For this reason the reference to another recent example in Plymouth is of no assistance to the circumstances prevailing in this case.
11. Nevertheless, in contrast to its statement, the Council's letter dated 6 July 2017, says the lack of service has not prejudiced any party. Section 176 (5) of the Act gives me the power to disregard non-service: "*...if neither the appellant nor that person has been substantially prejudiced by the failure to serve him*". In an appeal on ground (e) the onus of proof falls on an Appellant and, despite an opportunity to comment, the Appellants have not shown why the building society would be substantially prejudiced in this case. For this reason alone I decline to allow the appeals on ground (e) despite the admitted lack of service.

Appeals A & B: Grounds (b) and (c)

12. I propose to take these grounds together because they are closely related in the circumstances of these appeals. Under ground (b) the Appellants need to show that: "*...the breach of control alleged in the enforcement notice has not occurred as a matter of fact*" [as per section E. (b) of the appeal form]. The Guidance says³ in enforcement appeals the onus of proof in respect of matters of fact is on an Appellant and an Applicant is responsible for providing sufficient information to support an application for a Lawful Development Certificate⁴ [LDC]. Lawful development is development against which no enforcement action may be taken, for example because it did not involve development or require planning permission. Since this is the equivalent of ground (c) in an enforcement appeal the Appellant needs to show that: "*...there has not been a breach of planning control*" [as per section E. (c) of the appeal form].
13. There are in effect 3 components to the allegation. In respect of the removal of a 4.1 metre length of front boundary wall and the creation of a front garden hard surface, my site inspection confirmed that such development has occurred as a matter of fact. However the dispute as to fact, which is at issue between the parties, appears to relate to the third component, which is the formation of an off street vehicle parking area with access off a classified highway.
14. Section 4.1 of the Council's statement seems to equate the removal of the wall and the laying of the hardstanding with the formation of a vehicular access. However the Council has provided no evidence to show that the front garden of the property has been used as an off street vehicle parking area. It appears to rely instead on the summary of an appeal decision, which is available online⁵. That appeal concerned a proposed development in which the drawings showed a car parking space with a charging station for an electric car. The equivalent provisions at issue in that appeal are now set out in Article 3(6) of the Town and Country Planning (General Permitted Development) (England) (Order) 2015 [the 2015 Order]⁶. So, applied here, the question becomes whether this

³ See for example paragraph: 053, Reference ID: 16-053-20140306.

⁴ Paragraph: 006, Reference ID: 17c-006-20140306.

⁵ The search can be undertaken using reference 2221069 at: <https://acp.planninginspectorate.gov.uk/>

⁶ It says: "The permission granted by Schedule 2 does not, except in relation to development permitted by Classes A, B, D and E of Part 9 and Class A of Part 18 of that Schedule, authorise any development which requires or involves the formation, laying out or material widening of a means of access to an existing highway which is a

- development involves the formation of a means of access to a classified road? In order to assess the purpose underpinning the works I propose to review the exchange of correspondence that has taken place between the main parties.
15. Following the refusal of planning application [No 14/01078/FUL] for "*Demolition of existing front boundary wall, formation of new off-road parking area and new drop kerb*", there was an exchange of emails between the main parties. In an email dated 22 July 2014 Mrs Perrins explained why it was considered necessary to remove the wall, save for the pillars, and excavate the front garden. She said: "*Regardless of whether there is a drive way or not, we do have to excavate the front garden to alleviate the flooding problems*". However at that stage she was still hopeful that the front garden might be permitted to be used for parking as the email refers to a "*turntable*" to allow a car to turn.
 16. The Council was unable to support that idea and so in a subsequent email dated 29 August 2014 Mrs Perrins focussed on the works proposed to address the drainage issue. She said: "*...we plan to excavate the garden to the same depth as shown on the plans already lodged*". This appears to be a reference to section AA on drawing No DSP 04⁷. It also said: "*We do not plan to replace any soil or grass...we will be putting down a gravel product with a grate where the garden joins the pavement.... We want an easy care front garden with pots*".
 17. The Council's reply in an email dated 11 September 2014 contains no caveats and is unambiguous. It says: "*...you would not need planning permission to remove the front wall, but if you wanted to remove more than 0.5 of metre in depth of the front garden that would need an application*". I acknowledge that there appears to have been some intervening correspondence and that the email does not address the other works proposed, notably putting down gravel, but I am satisfied that this information was put to the Council at that time.
 18. Once the work commenced in January 2016, Mrs Perrins made clear in an email to the Council dated 5 January 2016 that she had: "*...no intention of adding a dropped curb [sic] as this has been refused*". The Council's email dated 6 January 2016 confirmed that: "*...you are able to remove or replace the wall as you please*". It continued: "*Significant engineering works to land would require planning permission, but as confirmed [in the earlier email] the limited works that you are carrying out would be considered permitted development and planning permission would not be required*". The Council's later email of 27 January 2016 said, amongst other things: "*I am grateful for your assurance that you will not be using the paving as any sort of vehicle hardstanding...*".
 19. Subsequently the Council issued a Planning Contravention Notice [PCN] and the unambiguous reply says: "*We have no intention of using the area as a car parking area, the works we have carried out are to alleviate dampness in our property...*". The PCN response also suggests that the works are needed to access the property with bikes, rubbish bins and to receive building materials, and that close family need to obtain disabled access via mobility scooters.
 20. The final submission on behalf of Mr & Mrs Perrins refers to: "*...a planter of significant weight*" being placed at the rear of the footway to prevent vehicular access, which I observed to be in place during the course of my site inspection.

trunk road or classified road, or creates an obstruction to the view of persons using any highway used by vehicular traffic, so as to be likely to cause danger to such persons".

⁷ I have an A4 sized copy of this plan, which is said to be at a scale of 1:50 @ A1. It is therefore not possible for me to scale from the drawing and in any event that would be inappropriate because any measurement would not be agreed by the parties. Nevertheless, by reference to the dimensions stated on the soakaway, it is possible to gain an impression that the magnitude of the excavation was up to around 500 mm adjacent to the front wall.

This broadly reflects the response to the PCN, which referred to: “...a range of garden pots” being put in place to demarcate the boundary of the property.

21. By virtue of the terms of the planning application it would appear that the Appellants’ original intention was the formation of a means of access to a classified road. There appears to be no dispute that planning permission would be required for the works as described therein. If an application for an LDC had come forward for those works and been refused it is likely to have been directly comparable to the dismissed appeal to which the Council refers.
22. However the exchange of correspondence suggests that since approximately 29 August 2014 the Appellants have accepted that they would not be able to form a vehicular access onto the appeal site. No appeal against the refusal of application No 14/01078/FUL was lodged and my site inspection confirmed, amongst other things, that the kerb has not been lowered and the planter prevents vehicular access from being obtained.
23. Instead since that date the Appellants have sought to agree what works they were entitled to undertake without causing a breach of planning control, the stated purpose of which was to address a drainage and/or flooding issue. It is appropriate to attach the response to the PCN significant weight because a false declaration is a criminal offence⁸. This, together with the remainder of the exchange, leads me to find that the purpose underpinning the works that were undertaken was to address dampness and create a low maintenance front garden. In the particular circumstances of these appeals the Appellants have shown that the formation of a means of access to a classified road has not occurred as a matter of fact. Since this aspect of the alleged breach has not taken place it would be appropriate to delete this component of the allegation. Such a correction reflects my finding and would not therefore cause injustice.
24. In the context of that finding it is appropriate to test whether the remaining aspects of the allegation comprise a breach of planning control. Section 55(1) of the Act defines development to include building operations. Section 55(1A) of the Act says that for the purposes of the Act building operations include (a) the demolition of buildings. Section 336(1) of the Act defines a building to include any structure or erection. Based on the material before me⁹ it would appear that the wall that was demolished was within this definition.
25. However section 55(2)(g) of the Act then excludes from the definition of development any description of building specified in a Direction issued by the Secretary of State. By virtue of Article 3(1) of the Town and Country Planning (Demolition – Description of Buildings) Direction 2014, the demolition of: “(b) *the whole or any part of any gate, fence or wall or other means of enclosure*” does not involve development¹⁰. This finding is consistent with the Guidance¹¹.
26. Paragraph 4.2.1 of the Council’s statement acknowledges that individually the works could be considered to be permitted development. However this is not strictly correct as the demolition of the wall was not development, as defined. So whilst paragraph 4.2.2 of the Council’s statement says that the removal of the wall was not necessary, it seems to me that it is for the landowner to determine whether something that is not development is or is not necessary.

⁸ See section 171D of the Act.

⁹ Including, but not restricted to, the planning application form that refers to “Demolition of existing front boundary wall” [section 3] where the existing wall is described as “Random stone with brick capping” [section 10].

¹⁰ The 2014 Direction explains that it replaced an earlier direction from 1995 but “...does not change the law”.

¹¹ Paragraph: 065, reference ID: 13-065-20140306.

27. For completeness the Council's email dated 11 September 2014 records that the lowering of the ground level was not, in its view, an engineering operation and hence was not development. That is consistent with the omission of those works from the allegation. I have no basis to dispute the Council's assessment.
28. The Council has at no stage expressly said that the laying of a hard surface on the front garden would be permitted development, although that might now be inferred from paragraph 4.2.1. However Article 3 and Class F of Part 1 to Schedule 2 of the 2015 Order permits: "*Development consisting of—(a) the provision within the curtilage of a dwellinghouse of a hard surface for any purpose incidental to the enjoyment of the dwellinghouse as such*". F.2 says: "*Development is permitted by Class F subject to the condition that where— (a) the hard surface would be situated on land between a wall forming the principal elevation of the dwellinghouse and a highway, and (b) the area of ground covered by the hard surface, or the area of hard surface replaced, would exceed 5 square metres, either the hard surface is made of porous materials, or provision is made to direct run-off water from the hard surface to a permeable or porous area or surface within the curtilage of the dwellinghouse*".
29. My inspection would suggest that the hard surfaced area has been laid between a wall forming the principal elevation of the dwellinghouse and a highway and that the hard surface exceeds 5 m². However it appears to be constructed of pavements or similar with gaps around the edges that would allow water to soak into the ground. For good measure a drainage channel with a steel grate has been installed at the rear of the footway to ensure that water would not run onto the pavement. Nothing that I saw would suggest to me that the hard surface that has been laid does not comply with the condition set out above.
30. For the above reasons I conclude that the appeals should succeed on ground (b), to the extent that the notice should be corrected, and ground (c), because the corrected allegation does not comprise a breach of planning control. In the circumstances the enforcement notice will be quashed and the appeals under grounds (f) and (g) of section 174 (2) of the Act do not fall to be considered.

Appeals A & B: Other matters

31. I appreciate that if the front garden were to be used for the parking of vehicles at a future date then this is most unlikely to constitute a material change in the use of the land. Whilst it is conceivable that commercial vehicle parking might give rise to a breach of planning control¹², the parking of the family car is likely to comprise a "*purpose incidental to the enjoyment of the dwellinghouse as such*"¹³. However the installation of a vehicular crossover might involve an operation that might require planning permission. On this basis this decision is entirely without prejudice to the Council's ability to take enforcement action at a future date if the front garden is used for the parking of vehicles following the formation of a vehicular access.

Appeals A & B: Conclusion

32. For the reasons given, and having regard to all other matters raised, I conclude that the appeals should be allowed and I shall quash the enforcement notice.

Pete Drew

INSPECTOR

¹² Perhaps the simplest example is an ice cream van.

¹³ See section 55(2)(d) of the Act.