
Appeal Decision

Site visit made on 6 July 2017

by Susan Wraith Dip URP MRTPI

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

Decision date: 04 August 2017

Appeal Ref: APP/N1540/C/16/3164832

Verge South-West of Markwell Wood Roundabout, Harlow, Essex, CM19 4NP

- The appeal is made under s174 of the Town and Country Planning Act 1990 [hereafter "the Act"] as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Kevin Pitt against an enforcement notice issued by Harlow District Council.
 - The notice was issued on 15 November 2016.
 - The breach of planning control as alleged in the notice is: Without planning permission, the change of use of the land from internal open space to private amenity space (shown shaded in green on the attached plan) including the erection of approximately 2.1m high close boarded fencing panels (shown hatched in blue on the attached plan).
 - The requirements of the notice are:
 - 1) Remove from the land the close boarded fencing shown hatched blue on the attached plan.
 - 2) Remove from the land to which the Notice relates all materials, debris and other paraphernalia which results from compliance with step one (1), and re-instate the land prior to the breach taking place.
 - The period for compliance with the requirements is two months.
 - The appeal is proceeding on the grounds set out in s174(2) (a), (b), (c) and (f) of the Act. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under s177(5) of the Act.
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Decision

1. It is directed that the enforcement notice be corrected, in paragraph 2, by:

- (i) Deletion of "South-West" and substitution of "south"; and
- (ii) Deletion of "CM19 4NP".

Subject to these corrections the appeal is allowed and the enforcement notice is quashed.

Matters concerning the enforcement notice

2. Before I proceed to deal with the appeal I must consider whether the notice is in good order.
 3. In paragraph 2 of the notice the land is described as being located to the south-west of the roundabout whereas it would be more accurate to describe it as located to the south. Also, in paragraph 2, an incorrect postcode is given.
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4. I shall correct the notice by deleting the post code and by deleting "south-west" and substituting "south". I shall make these corrections under s176(1)(a) of the Act. I am satisfied that no injustice will arise to either party in me so doing.

Other preliminary matters

5. The allegation is framed in terms of a change of use of the land. By using the word "including", the allegation includes the erection of the fence as an integral part of the change of use. Within this notice there is no allegation made of the erection of the fence as a separate act of operational development. I shall deal with the appeal accordingly.

The appeal on ground (b)

6. An appeal on ground (b) is that the matter alleged has not occurred as a matter of fact. The test of the evidence is one of balance of probability. The burden of proof is upon the appellant.
7. The land has the status of Internal Open Space as defined by the Adopted Replacement Harlow Local Plan 2006. Prior to the alleged development taking place it appears the land was an open grassed area containing some trees and vegetation. The appellant describes its use as a "nil" use.
8. Works were carried out to clear away some vegetation. A fence was erected to enclose the land. Planting to the front of the fence was undertaken. Whilst these works brought about changes to the character and appearance of the land, it does not necessarily follow that the works facilitated a new use of the land for private amenity purposes.
9. The Council's allegation is founded on the premise that the appellant could use the land for private enjoyment or that the land could be used in association with residential use in the future. "Private amenity space", when given its ordinary meaning, would usually be a space used as a garden or similar area associated with a dwellinghouse. However, the appellant denies that this is the intention and there is no evidence that such use has actually occurred.
10. The land is separated from adjacent dwellings by a wall and/or fencing and is in separate ownership. A photograph taken by the Council at the time the notice was issued shows an enclosed area with a tree surrounded by grass but does not give any indication of there being an active use for private amenity purposes. Neither is there any indication, in the comments made by interested parties, that the land has been brought into use as a private amenity space.
11. In its final comments, the Council draws attention to a planning application that had been made (albeit invalid at the time) for the development of the land. In the Council's view this clarified the proposed intent of use for the land. However, this evidence about the owner's future intentions adds nothing to the contention that the use of the land has already been changed to a use for private amenity purposes, as is alleged in the notice. On the evidence, I consider it more likely than not that the land (albeit enclosed) has remained unused as is argued by the appellant.
12. Clearly, a fence has been erected to enclose the land as a matter of fact. However, the fence is referred to in the notice only in the context of it being included within the change of use. No separate allegation of operational development to erect the fence is made. It is not for me, in this appeal, to

separate out the fence, such that I could go on to consider the further arguments relating to its legitimacy and planning merits. If I was to do so I would need to introduce an additional element of operational development into the allegation but that would go beyond the powers available to me under s176(1)(a) which are limited to correction. It would also widen the scope of the notice and be likely to cause injustice as both parties may have wished to bring additional evidence and/or to have framed their arguments differently.

13. On ground (b) I find, on balance of probability, that the land has not been brought into use for private amenity purposes. The change of use alleged in the notice has not occurred as a matter of fact. The appeal on ground (b) succeeds.

Other matters

14. In paragraph 4 of the notice, a period of four years is referred to whereas, for a change of use, the relevant period for enforcement is ten years; and an incorrect reference is given for the "permitted development" rights for fences. Also, the words "to its condition" appear to be missing from step 2) of paragraph 5.
15. Additionally, there is no requirement, expressly, in paragraph 5 to cease the use even though a change of use is alleged. Under s173(11) of the Act, where an enforcement notice could have required any activity to cease but does not do so and all the requirements of the notice are complied with then, so far as the notice did not so require, planning permission shall be treated as having been granted. I cannot be sure, however, that this is what the Council intended.
16. Had I been considering the appeal under the other grounds I would have needed to address these matters and the question of whether injustice would arise from further correction to the notice. However, as the appeal succeeds on ground (b), and the notice is to be quashed, these are not matters which I need to take further.

Conclusion

17. For the reasons given above I conclude that the appeal should succeed on ground (b). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under grounds (a), (c) and (f) and the application for planning permission deemed to have been made under s177(5) of the Act do not need to be considered.

Susan Wraith

Inspector