



Appeal Decision

Site visit made on 2 April 2019

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 August 2019

Appeal Ref: APP/E2205/C/18/3202219

Land at 7 Collie Drive, Kingsnorth, Ashford, Kent TN23 3GR

- 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 Mr Christopher Brown against an enforcement notice issued by Dover District Council.
- The enforcement notice was issued on 11 April 2018.
- The breach of planning control as alleged in the notice is without planning permission the material change of use from amenity land to residential garden land and additionally operational development consisting of the erection of a 2 metre fence adjacent to the highway boundary and the erection of a domestic dog kennel.
- The requirements of the notice are:
 1. Remove from the land the dog kennel and all associated materials.
 2. Remove from the land the fencing and all associated materials.
 3. Cease permanently the use of the land as residential garden land.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld subject to corrections and a variation.

This decision is issued in accordance with Section 56(2) of the Planning and Compulsory Purchase Act 2004 (as amended) and supersedes the decision issued on 21 June 2019.

Preliminary Matters

1. The appellant was not present at the appointed date and time of my site visit. I was nevertheless satisfied that I could see all I needed to from public land. I therefore carried out my site visit unaccompanied by either of the parties.
2. As there is no appeal on ground (a), and thus no deemed application for planning permission, the planning merits of the development are not at issue in this appeal.

The Notice

3. The land to which the enforcement notice relates is shown on a plan attached to it. It was evident from my site inspection that the area within the black line on the plan includes a small part of the adjacent carriageway. The parties agree that no part of the carriageway forms part of the land on which the alleged breach of planning control has occurred. It is said that the carriageway was included because that is what is shown on the title register for the

property. A revised plan has been provided and this is annexed to my decision as Plan A and I shall correct the notice accordingly. I am satisfied that I can correct the notice to refer to the amended plan and no injustice would be caused to the appellant or the Council.

‘Hidden’ appeal on ground (b)

4. The notice in part targets the material change of use of the land to residential garden. The appellant, under his appeal on ground (f), indicates that the area is not being used as a residential garden. Rather it is said that it has been maintained in its previous use as highway verge. Whilst no such ground of appeal has been submitted, those arguments essentially amount to an appeal on ground (b) that being what is alleged to have occurred has not occurred as a matter of fact.
5. An image provided by the Council shows that, in August 2006, a considerable time prior to the breach taking place, the land comprised a grass verge with trees and vegetation infilling the space between the carriageway and the rear garden of the appeal property.
6. Photographs provided by the Council dated 27 and 31 August 2016, show a wire mesh fence having been erected around the edge of the land. The rear garden fence of No 7 was in situ and the land between the two was in a similar condition to how it was in August 2006 – that being laid to grass with mature trees and vegetation – albeit some vegetation appears to have been removed.
7. Since the original fence to the garden of No 7 remained, and the land remained laid to grass with trees and vegetation, there is no indication within the 2016 photographs that the Land was being used as a residential garden.
8. This is supported by the letter from the Council to the appellant dated 26 September 2016, in which the Council advise that planning permission would be required if the appellant intends to use any part of the land as domestic garden. The use of future tense suggests that the Council is not alleging that such a material change of use had occurred at that point.
9. Thereafter, the Council wrote to the appellant on 18 November 2016 and 9 December 2016 indicating that a dog kennel had been erected on the land. It was said by the Council that this suggested a material change of use to residential garden had occurred.
10. Photographs taken by the Council on 27 February 2017 shown the mesh fence remained in place and that a small wooden kennel had been erected on part of the land. A single dog is visible on the land within the photographs. Otherwise, the garden fence remained in situ and the land remained largely laid to grass with trees and vegetation.
11. The Council thereafter indicates that a site visit on 6 June 2017 confirmed the kennel and fence remained present. I have not been provided with any other observations of that site visit.
12. The notice was then issued some ten months later, on 11 April 2018. I have very little evidence regarding the use of the land between the Council’s visit on 6 June 2017 and the issue of the notice.

13. It was apparent from my site visit that the dog kennel shown in the Council's photographs had been removed. Nevertheless, the appellant's ground (f) submissions, dated 26 June 2018, refer to the presence of the dog kennel in the present tense. Furthermore, the fence that was present on the Council's final photographs before the issue of the notice was present at the time of my site visit, albeit the mesh had been reduced in height. The posts remained the same.
14. To that end, the evidence before me suggests, on the balance of probabilities, that at the time the notice was issued, the dog kennel and fence were present on the land.
15. However, whilst I note the use of the land for the housing of dogs can often be a domestic activity, there is little evidence before me which demonstrates that the activities on the land were of such a scale that they had materially changed the use of the land from highway verge to residential garden. Whilst there is access between the two via a gate, it seems to me that the land remained physically and functionally separated from the garden of the appeal property through the retention of the close boarded garden fence. Moreover, there is no suggestion of the presence of any domestic paraphernalia, aside from the kennel, that one would expect to see were it in use as residential garden.
16. Consequently, I find, on the balance of probabilities, that at the time the notice was issued, whilst the fence and dog kennel had been erected, the alleged material change of use to residential garden land had not occurred as a matter of fact.
17. The 'hidden' ground (b) appeal therefore succeeds in part. Accordingly, I will correct the notice to delete the material change of use from amenity land to residential garden land from the allegation, delete the relevant time period for the material change of use and vary it to delete the corresponding requirement. Consequently, the notice, as corrected, solely attacks the erection of a 2m high fence adjacent to the highway boundary and the erection of a domestic dog kennel.

'Hidden' appeal on ground (c)

18. Although no appeal on ground (c) has been submitted, the appellant indicates within his ground (f) appeal that the dog kennel subject to the notice accords with permitted development rights under the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). Such arguments essentially amount to an appeal on ground (c) that what is alleged to have occurred does not amount to a breach of planning control.
19. Article 3(1) of the GPDO grants planning permission for the classes of development set out in Schedule 2. Class E of Part 1 of Schedule 2 indicates that, subject to limitations, the provision within the curtilage of the dwellinghouse of any building required for a purpose incidental to the enjoyment of the dwelling house as such is permitted development. Regardless of whether the limitations under paragraph E.1 are met, the development must be within the curtilage of a dwellinghouse to fall within Class E.
20. For the purposes of Part 1, the term curtilage is defined in the Permitted Development Rights for Householders Technical Guidance published in 2017 by

the then Department for Communities and Local Government. It defines curtilage as, land which forms part and parcel of the house, which is usually the area of the land within which the house sits or to which it is attached, such as the garden.

21. In this instance, the land subject of the notice is not attached to the dwelling and does not form part of the enclosed rear garden. Rather it is physically separated from the dwellinghouse by the fence which encloses the rear garden of the property. The land was, prior to the alleged breach, grassed and open to the adjacent highway. Indeed, given my findings in respect of the hidden appeal on ground (b) above, I am satisfied that, on the balance of probabilities, the change of use of the land to residential garden had not occurred at the date the notice was issued.
22. I find, therefore, as a matter of fact and degree, that the land subject of the notice does not form part of the curtilage of the dwellinghouse. It follows that the kennel could not have benefited from the permitted development right under Class E. There is no evidence that the kennel benefits from planning permission granted under any other part of the GPDO or expressly by virtue of section 58 of the 1990 Act. The hidden appeal on ground (c) therefore fails.

The appeal on ground (f)

23. The appeal on ground (f) is made on the basis that the requirements of the notice exceed what is necessary. Section 173(4) of the 1990 Act sets out the purposes which an enforcement notice may seek to achieve. They are either (a) remedying of the breach of planning control or (b) remedying any injury to amenity which has been caused by the breach.
24. The notice, as corrected and varied, is not explicit about which of the two purposes it seeks to achieve. However, the requirement to remove from the land the kennel and the fence essentially seeks to restore the land to its condition before the breach took place. Thus, it seems to me that the purpose of the notice is intended to remedy the breach of planning control. To that end, the requirements to remove the kennel and the fence do not go beyond what is necessary to remedy the breach of planning control.
25. The appellant argues that his property has been subjected to numerous thefts. It is also said that the nature of the fence is such that it is transparent and not solid, in contrast to a close boarded fence found around 500m from the property. The fence and kennel are designed to provide security for the appellant.
26. However, in the absence of an appeal on ground (a) and a deemed application, general planning merit considerations are unable to be considered when determining the ground (f) appeal. Case law has established that in such circumstances I can only consider whether the requirements exceed what is necessary to remedy the breach.
27. It is incumbent on me nevertheless to consider an obvious alternative which would overcome the planning difficulties at less cost and disruption than total removal. I have considered the potential for the entire fence to be reduced in height and to accord with the provisions of Class A of Part 2 of Schedule 2 of the GPDO.

28. However, there is no indication that a fence of a lower height would serve the same security purposes which the appellant desires and no indication that he would erect a 1m high fence following removal of that which has been constructed. Indeed, the appellant indicates that hedging he has planted would serve an equal purpose in terms of protecting his property once it has established. As a result, I am not satisfied that there is an obvious alternative to the removal of the development.

29. The appeal on ground (f) therefore fails.

The appeal on ground (g)

30. An appeal on ground (g) is made on the basis that any period specified in the notice in accordance with section 173(9) of the 1990 Act falls short of what should reasonably be allowed. Essentially, that the time given to comply with the notice is too short.

31. The notice requires the removal of the kennel and fence and associated materials within 3 months. The appellant argues that a period of 2 years would be appropriate to allow the hedge he has planted to established to provide adequate security.

32. However, a period of 2 years would be akin to the grant of a temporary planning permission, and in my view would not rectify the harm identified in the notice with sufficient expediency. In the, absence of an appeal on ground (a), it is not open to me to weigh the security benefits of the hedge against the harm alleged in the notice.

33. Consequently, in the absence of any compelling evidence to the contrary, it seems to me that, particularly since the kennel appeared to have been removed at the time of my site visit, a time period of 3 months for compliance with the notice is reasonable and proportionate.

34. The appeal on ground (g) therefore fails.

Formal Decision

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

- deleting the words "the material change of use from amenity land to residential garden land and additionally" from paragraph 3 of the enforcement notice;
- deleting the words "material change of use has taken place within the last ten years and that the" from paragraph 4 of the enforcement notice; and,
- the substitution of the plan annexed to this decision (Plan A) for the plan attached to the enforcement notice.

36. And varied by:

- deleting the words "cease permanently the use of the land as residential garden land" from paragraph 5 of the enforcement notice.

37. Subject to these corrections and variation, the enforcement notice is upheld.

J Whitfield **INSPECTOR**



Plan A

This is the plan referred to in my decision dated:14 August 2019

by **J Whitfield BA(Hons) DipTP MRTPI**

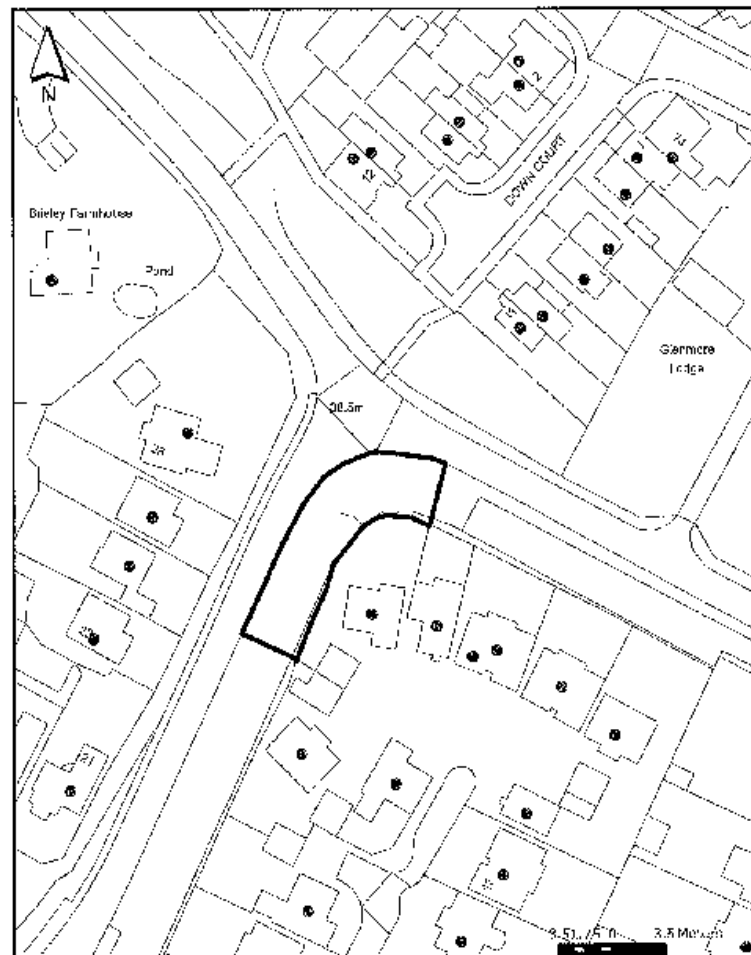
Land at: 7 Collie Drive, Kingsnorth, Ashford, Kent TN23 3GR

Reference: APP/E2205/C/18/3202219

Scale: NTS

Map

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Ashford Borough Council

Enforcement Notice

EN/16/00233 7 Collie Drive, Kingsnorth, Ashford, TN23 3GR

11/6/2019

Scale: 1:750

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