



Appeal Decisions

Site visit made on 11 June 2019

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 August 2019

Appeal A Ref: APP/D5120/C/18/3217480

Appeal B Ref: APP/D5120/C/18/3217481

Land at 17 Broomfield Road, Bexleyheath, Kent DA6 7PD

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Hiren Patel (Appeal A) and Mrs Priya Hiren Patel (Appeal B) against an enforcement notice issued by the Council of the London Borough of Bexley.
- The enforcement notice was issued on 29 October 2018.
- The breach of planning control as alleged in the notice is without planning permission, the unauthorised raising of the land to the rear of the property by the depositing of hard core and waste materials and erection of retaining walls.
- The requirements of the notice are: (1) Remove the retaining walls and deposited hard core and waste materials; (2) Remove all resultant materials from the land.
- The period for compliance with the requirements is two months.
- The appeals are proceeding on the grounds set out in section 174(2) (c) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Summary of decisions: The appeals are dismissed and the enforcement notice upheld.

Appeals A and B

1. The appeal property contains a detached dwelling with a generous sized rear garden. The dwelling has recently been extended pursuant to planning permissions granted by the Council¹. Due to the hillside location, the rear garden is at a much lower level than the ground floor of the dwelling. Before the works described in the allegation were undertaken, I understand that ground levels in the rear garden varied significantly. Part of the ground towards the end of the rear garden fell away considerably adjacent to the boundaries with residential properties at 19 Broomfield Road and 5 Woodlands.

Ground (c) appeals

2. The ground of appeal is that the matters alleged in the enforcement notice do not constitute a breach of planning control. The onus of proof in this respect is on the appellants, the relevant test of the evidence being on the balance of probability.
3. Ground levels have been raised towards the end of the rear garden by up to about 1.6 metres, to create a roughly level garden area. The raised ground is

¹ Council Refs: 17/01376/FUL & 18/02323/FUL.

retained by walls erected adjacent to the boundaries with adjoining residential property. The retaining walls are about 18 metres long in total and a maximum of around 1.6 metres in height above the ground level of adjoining property. The retaining walls are built of timber beams supported by a steel frame, on a concrete foundation.

4. In my opinion as a matter of fact and degree, the works described above amount to engineering operations falling within the definition of development at s55 (1) of the Act. No firm evidence was provided which might have suggested otherwise. No planning permission, either granted expressly following the submission of a planning application or granted by the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) exists in respect of the totality of the works.
5. I acknowledge that at Schedule 2 Part 2 Class A, the GPDO grants planning permission for erection of a wall, subject to the limitations in paragraph A.1. As the retaining walls are less than 2 metres in height above ground level, they do not exceed the height limit at paragraph A.1 (b). As the retaining walls are adjacent to the boundary, they close in a part of the rear garden from adjoining gardens. They adjoin walls and fencing along the other boundaries of the property and play a significant part in the enclosure of the rear garden. Provided a wall encloses something, it does not necessarily lose that quality because it is also a retaining wall. Consequently, as a matter of fact and degree and having regard to relevant case law², I accept that the retaining walls have an enclosing function.
6. Nevertheless, the retaining walls form an integral part of the engineering operations in the totality of the works. In practical terms without the retaining walls ground levels in the rear garden could not have been raised, as there would be nothing to restrain the raised garden in relation to adjoining property. As the whole operation is not permitted then neither, notwithstanding Class A above, are the retaining walls. This is because where a development has been undertaken in excess of permitted development limits, the whole of that development is unlawful³. Therefore, none of the development can be permitted by the GPDO Part 2, Class A.
7. Conditions 3 and 4 of planning permission reference 17/01376/FUL for extending the dwelling required prior approval by the Council of the external materials and of a Construction Method Statement (CMS). I am given to understand that the Council approved the CMS, which is dated October 2017 and included the details of external materials. I read references in the CMS to retaining walls as being specific to the extended dwelling. The extension retaining walls are annotated on the drawing referred to in the CMS. There is no reference to other retaining walls on that drawing or elsewhere in the CMS. Also, the CMS refers to retaining walls of concrete block construction; this is entirely different to the method of constructing the retaining walls in the works. The retaining wall design drawings and calculations were omitted from the CMS copy provided. The structural report and detailed drawings of the works provided are dated May 2019.
8. Reference in the CMS to re-using hardcore in the landscaping of the rear garden including filling in the ground to bring it up to one uniform level, is

² *Prengate Properties Ltd v SSE* [1973] 25 P&CR 311; *Wycombe DC v SSE* [1994] EGCS 61.

³ *Garland v MHLG* [1968] 20 P&CR 93.

vague. The extent of any change in levels in the rear garden cannot be accurately gauged from reference to the CMS. There is nothing in the CMS or its supporting documentation that clearly shows the significant raising of the levels in part of the rear garden that has taken place due to the works. Consequently, the CMS could just as easily refer to the infilling of some small depressions as opposed to the significantly larger scale of changes in ground levels comprised in the works.

9. For the above reasons, there is no firm evidence to indicate that the Council approved the works under conditions 3 and 4 of the above permission. Furthermore, as condition 5 of that permission refers solely to the provision of privacy screening to both sides of a terrace on the extended dwelling, it cannot reasonably be claimed as giving approval for the works. Neither can advice given by Council officers reasonably be construed as granting planning permission in respect of the works.
10. Consequently, on the balance of probability the available evidence does not show that the works do not constitute a breach of planning control and the ground (c) appeal must fail.

Ground (f) appeals

11. The ground of appeal is that the notice requirements exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any injury to amenity.
12. At s173, the Act sets out the two purposes which the requirements of an enforcement notice can seek to achieve. The first (s173 (4)(a)) is to remedy the breach of planning control that has occurred. The second (s173 (4)(b)) is to remedy any injury to amenity caused by the breach. The Council did not specify whether it was one or both of the above purposes that the notice sought to achieve. The notice required total removal of the works, rather than a reduction in ground levels in the rear garden and/or reducing the height of the retaining walls. It follows that the purpose of the notice must be to remedy the breach by restoring the property to its condition before the breach took place.
13. Relevant case law makes it clear that where as in this instance, there is an appeal on ground (f) but not on ground (a) and the purpose of the notice is to remedy the breach, the power in s176 (1)(b) of the Act to vary the notice to under-enforce is limited and general planning considerations or arguments about amenity cannot be entertained⁴. Consequently, ground (f) does not provide an alternative route for obtaining planning permission for the works. This means that the submitted alternative scheme for slightly lowering ground levels in the rear garden and erecting a timber fence adjacent to the boundaries cannot be considered in this appeal. For similar reasons, the appellants' comments together with those of interested residents on the planning merits of the works also cannot be considered. I understand that the Council refused planning permission for an alternative scheme in respect of the works earlier this year⁵.

⁴ *Wyatt Brothers (Oxford) Ltd v SSETR* [2001] PLCR 161; *Stamatios Miaris v SSCLG and Bath and North East Somerset Council* [2016] EWCA 1564 (Admin); *Keenan v SSCLG & Woking BC* [2016] EWCA Civ 438.

⁵ Council Ref: 18/03133/FUL.

14. The lesser steps in the above scheme would not remedy the breach, as the works would remain in situ. Accordingly, the scheme does not represent an obvious alternative to the steps in the notice.
15. Although the notice does not specify what ground levels are to be reinstated in the rear garden, the appellants are likely to be the persons with the best knowledge of what the previous levels were. Imposing more detailed steps regarding the reinstated levels runs the risk of the notice exceeding what is required to remedy the breach. Consequently, the notice requirements are sufficiently precise.
16. As a result, the requirements of the notice do not exceed what is necessary to remedy the breach and the appeal on ground (f) also fails.

Conclusion

17. For the reasons given above I conclude that the appeals should not succeed.

Formal Decisions

18. Appeals A and B are dismissed and the enforcement notice upheld.

Stephen Hawkins

INSPECTOR