



Appeal Decisions

Site visit made on 10 February 2020

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 17th February 2020

120 Moffatts Lane, Brookmans Park, Hatfield AL9 7RW

Appeal A: APP/C1950/C/19/3219891

Appeal B: APP/C1950/C/19/3219892

- 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 Anthony Copsey (Appeal A) and Mrs Annamaria Copsey (Appeal B) against an enforcement notice issued by Welwyn Hatfield Borough Council.
 - The enforcement notice was issued on 30 November 2018.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a raised wooden decking, balustrade and swimming pool.
 - The requirements of the notice are: -
 - (i) Remove the raised wooden decking, balustrade, swimming pool and all related materials; and
 - (ii) Remove from the Land all materials, debris, waste, plant and equipment associated with requirement (i) above.
 - The period for compliance with the requirements is 3 months.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a)(c)&(f) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.
 - Appeal B is proceeding on the ground set out in section 174(2)(c)&(f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decisions

Appeal A

1. The appeal is dismissed, and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B

2. The appeal is dismissed, and the enforcement notice is upheld.

Preliminary matters

3. On the Appeal Form the box was not ticked to indicate that an appeal was being brought on grounds (a) and (c), but the Grounds of Appeal contained submissions under these headings. The Council has responded to these arguments. I shall therefore deal with ground (c) for both appeals and ground (a) in Appeal A where the requisite fee has been paid.

4. Retrospective planning applications for the development now enforced against (including with modifications) were refused by the Council in 2017 and 2018. No appeals were made against those decisions and the enforcement notice followed.
5. The enforcement notice is directed in part at a 'swimming pool'. The appellants dispute this description as the pool is only 1m deep and essentially for young children. Given that it can be used for swimming, even if the depth limits such use for children, the description is not inaccurate. The notice is clear on its face what is being attacked which clearly has been understood by the appellants.
6. Since the date of issue of the enforcement notice, the National Planning Policy Framework has been updated on 19 February 2019. Should the appeals on grounds (c) fail and ground (a) falls to be considered then it will be the updated national policy document that applies.

Appeals A & B – ground (c)

7. The onus is on the appellants under ground (c) to make out the case that the matters alleged in the notice do not constitute a breach of planning control.
8. The pool is built in the rear garden of the appeal property within a raised decking area with balustrade surround. The decking with pool abuts a 6m deep patio laid immediately next to the rear elevation of the house. The garden slopes downwards away from the back of the house. The decking has been laid level and at the same height as the patio. In consequence, the decking steadily increases in height above ground level from approximately 0.9m where it adjoins the patio to 1.55m¹ at the end point.
9. The appellants say that their professional advisers thought the scheme was permitted development and they did not intend to flout the law. They suggest even the Council was unsure at first. Ground (c) is concerned with matters of fact and law and so a belief, however firmly held, cannot be taken into account.
10. By virtue of the provisions of Article 3(1) and Class E(a) of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015 ('the GPDO') development is permitted for the provision within the curtilage of a dwellinghouse of any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such. This is subject to limitations and conditions.
11. Development is not permitted by Class E if it would include the construction or provision of a verandah, balcony or raised platform.
12. For the purposes of Part 1, "raised" in relation to a platform means a platform with a height greater than 0.3m.
13. Article 2(2) provides that unless the context otherwise requires, any reference in the GPDO to the height of a building is to be construed as a reference to its height when measured from ground level. The "ground level" means the level of the surface of the ground immediately adjacent to the building in question or, where the level of the surface of the ground on which it is situated is not uniform, the level of the highest part of the surface of the ground adjacent to it

¹ Measurements provided by the Council which have not been contested. Measurements taken by the parties during my site visit were 0.95m and 1.50m, respectively.

14. The Technical Guidance on 'Permitted development rights for householders'² explains that where the ground level is not uniform (for example if the ground is sloping, as in this case), then the ground level is the highest part of the surface of the ground next to the building.
15. The appellant argues that as the height of the swimming pool area is consistent with the patio to which it is linked, the height could be taken from this lower level. However, the development in this instance does not include the pre-existing patio. Quite clearly the development enforced against was undertaken as a separate building operation from the patio which would most likely fall within a different Class under the GPDO. The ground level is highest next to the raised platform where it joins the patio. At this point it measures about 0.9m above ground level and so it exceeds the 0.3m threshold.
16. I find that as a matter of fact the development is not permitted development within Class E to benefit from deemed consent. It therefore amounts to a breach of planning control. The ground (c) appeals cannot succeed.

Appeal A - ground (a) and the deemed planning application

Main Issues

17. The Council's reasons for issuing the enforcement notice refer to detriment to the character and appearance of the area and to an overly dominant form of development which is particularly detrimental to the living conditions enjoyed by the occupiers of No 122. This second reason could suggest that the Council's concern is confined to the outlook of neighbouring occupiers, but its statement includes issues of overlooking and this is the basis on which the ground (a) appeal has been made. Matters of privacy are also been raised by third parties.
18. Therefore, the main issues are the effect of the development on: -
 - the character and appearance of the dwelling and the surrounding area; and
 - the living conditions of neighbouring occupiers with particular reference to outlook and privacy.

Reasons

Character and appearance

19. The appeal property is a reasonably large two storey detached dwelling located in a residential road composed mainly of semi-detached and detached properties. A deep full width patio is laid immediately to the rear of the property. Steps lead down one side into the rest of the garden. The decking has been built up to the patio and extends some way into the garden. The timber balustrade around the outer edges of the decking serves a safety purpose and measures about 1m high.
20. When the Council considered the retrospective planning application in 2017 it made no objection to the raised platform in terms of its design and effect on the character of the dwelling. A contrary view was taken by the Council when it

² Published by the Ministry of Housing, Communities and Local Government, September 2019.

issued the enforcement notice.

21. From my own observations, the raised platform with balustrade looks very bulky. That is especially so when viewed from the lower part of the garden where most timber can be seen on display. As the garden slopes down away from the house the decking increases in height above ground level. Along the exposed side of the platform there is a long stretch of solid timber reaching maximum height at the end. The additional height of the balustrade exacerbates the impression of excessive bulk. Visually, it is a somewhat crude form of development which does not represent good design.
22. Even though the garden is quite long, there is continuous built form extending a considerable way into the garden which dominates the rear of the property. The fact that there are no other similar structures in neighbouring rear gardens does not of itself cause harm. However, given the height, scale and design of the raised platform with balustrade, it detracts from the dwelling and appears out of scale and keeping within its setting.
23. Views of the development are relatively confined. It is not visible from the public domain, but it will be seen from upper windows of neighbouring dwellings. Thus, the visual harm is localised, but it exists nonetheless. Additional planting might soften the appearance, but it would not alleviate sufficiently the harm arising from the extent of built form and its poor design.
24. The Council fears that an undesirable precedent would be set which would alter the character and appearance of the area if repeated elsewhere. This concern is not without foundation when neighbouring rear gardens also slope downwards. It is possible that others might want to extend further into their gardens in similar manner even if not for a pool. Allowing this scheme could make it difficult to resist similar forms of development. If that were to occur the character of the area could be harmed appreciably with boundary treatments being increased out of necessity in an attempt to prevent overlooking.
25. Therefore, the development has a material adverse effect on the character and appearance of the host dwelling and its immediate surroundings contrary to Policy D1 of the Welwyn Hatfield District Plan 2005 ('LP') which seeks high quality design and also LP Policies D2 and GBSP2 insofar as they seek development compatible with their surroundings. There is also conflict with the provisions of Paragraph 124 of the National Planning Policy Framework ('the Framework') for good design.

Living conditions

26. I have approached the issue of outlook in terms of whether the development constitutes an oppressive or overbearing form of development. Whilst the development will be seen from the upper windows of both the nearest neighbours, there is no right to a view. The decking has been built close to the shared boundary with No 122. People or their movement will most likely be seen from ground floor windows and the garden of No 122. This may well be disconcerting and feel intrusive for neighbours, but it raises issues more pertinent to privacy.
27. Potted plants have been placed alongside the boundary, but these do little to protect the privacy of the neighbouring occupiers. Due to the height of the

decking above ground level, there are clear views into much of the neighbouring garden and part of the garden beyond at No 124 from various points. Indeed, I could see the neighbour's patio closest to the house where they may have a reasonable expectation of most privacy. Overlooking or the perception of such, may be most keenly felt during the warmer months when the pool is in use, but the fact it may be time limited and seasonal does not mitigate the harm which could be intensive when it does occur.

28. Increasing the height of the boundary fencing to that required to prevent overlooking would give a fortress like appearance having a wholly unacceptable effect on the character and appearance of both properties. It would also be liable to be oppressive for the neighbouring occupiers. As currently built, there is no room for planting beside the boundary.
29. Consequently, whilst I find no material harm in terms of outlook, there is a significant detrimental effect on the privacy of the neighbouring occupiers. The Council cites LP Policy D1 which promotes good design without specific mention of living conditions. Paragraph 127.f) of the Framework seeks a high standard of amenity for existing and future users and this provision is not met.

Conclusion on ground (a) and the deemed planning application

30. Whilst I have found no material harm to outlook, that does not negate or alter the fact that the development is otherwise harmful from its effect on the character and appearance of the host dwelling and the privacy of neighbouring occupiers.
31. For the reasons given above, and having had regard to all other matters raised, I conclude that the appeal on ground (a) and the application for deemed planning permission for the development as currently built should not succeed.

Appeals A & B - ground (f)

32. The ground of appeal is that the steps required by the notice to be taken are excessive.
33. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. These are either to remedy the breach of planning control which has occurred (section 173(4)(a)), or to remedy any injury to amenity that has been caused by the breach (section 173(4)(b)).
34. The Council submits that the notice is directed at both purposes. That corresponds with the requirement to remove the development being directed at the breach and the reasons for issuing the notice referring to injury to amenity from the effect on visual amenities and living conditions. It is not excessive to require removal of the development in order to achieve the purposes within section 173(4)(a) and (b). That said, the enforcement regime is intended to be remedial rather than punitive. Accordingly, it is appropriate to consider whether there are any other appropriate lesser steps short of complete removal of the development which could be undertaken at less cost and disruption.
35. The appellants invite me to consider a modified scheme similar to that previously rejected by the Council. In Appeal A there is a ground (a) appeal and deemed planning application which enables me to consider this alternative.

36. The deemed application is for the development as built on the date the enforcement notice was issued. It is possible to grant permission for the whole or part of that development. The revisions in this case involve the removal of part of the platform nearest to the boundary with No 122 and the construction of a 'trough' in its place for some form of hedging to be planted. In addition, the remaining narrow platform along that boundary would be fenced off to prevent access. A drawing is produced to illustrate the proposal which also shows the existing boundary fence extended at greater height.
37. If successful, permission would be granted on Appeal A for the raised wooden decking, balustrade and swimming pool as described in the allegation, but subject to conditions requiring submission and approval of a detailed scheme for removal of part of the decking and a landscaping scheme. If that scheme was not approved or implemented within a given timescale then the condition would require removal of the development
38. Landscaping conditions are commonly imposed to include provision for the replacement of dead, diseased and removed plants within a 5-year period. However, landscaping will not make an inherently unacceptable development acceptable. In this case, there is a significant interference with neighbouring privacy which will continue for many years if not suitably addressed. The overlooking is not limited to the area closest to No 122; it also includes some other parts of the decking around the pool. The interference is not a minor infringement that is capable of being overcome easily through planting particularly given how close the development has been built up to the boundary. The width of the platform beside the boundary was measured by the appellants' agent at approximately 1.25m up to the existing fence. If part of the platform is to remain it would leave only a narrow space for a hedge to be planted. It is unclear if the planting would provide an effective screen and could take some time to become established and reach the height needed. In the meantime, harm would continue and could do so for years to come. There are simply too many uncertainties.
39. As set out in my considerations under ground (a), increased fencing would not be satisfactory due to the harsh visual impact that would arise from the height required. Whilst the nearest corners of the platform to No 122 could be fenced, it would need to be accessible to maintain the planting/fence. Preventing access at other times would be difficult to enforce.
40. Thus, in this instance I am not satisfied that the proposal provides a satisfactory and workable solution to the overlooking for a variety of reasons. Furthermore, none of this helps in addressing the fundamental issue of a poorly designed development which impacts negatively upon the host dwelling.
41. Consequently, there is no obvious alternative scheme that would overcome the planning difficulties. I consider that the requirements of the notice in this case do not exceed what is necessary to remedy the breach and injury to amenity.
42. The appeals on ground (f) fail.

KR Seward

INSPECTOR