



Appeal Decision

Site visit made on 11 February 2020

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 March 2020

Appeal Ref: APP/H2265/C/19/3219831

Hilden Oaks School 38 Dry Hill Park Road, Tonbridge, Kent TN10 3BU

- 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 Hilden Oaks School Educational Trust Ltd against an enforcement notice issued by Tonbridge & Malling Borough Council.
 - The enforcement notice, numbered 18/00248/WORKH, was issued on 6 December 2018.
 - The breach of planning control as alleged in the notice is without the benefit of planning permission, the formation of a children's playground area involving the erection of a timber climbing frame and picket fencing which amounts to operational development and new surfacing comprising a mix of artificial turf and wet pour rubber surfacing which amounts to an engineering operation within the curtilage of the Hilden Oaks Preparatory school.
 - The requirements of the notice are to remove the children's playground area by removing the erected play equipment and picket fencing. Remove the new hardsurfacing which comprises a mix of artificial turf and wet pour rubber surfacing from the curtilage of Hilden Oaks School and restore the land to its previous condition.
 - The period for compliance with the requirements is two months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

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

- Deleting the words 'and picket fencing' from the description of the breach.
- Deleting the words 'and picket fencing' from the requirements of the notice.

It is directed that the enforcement notice be varied by the deletion of the words 'two months' and the substitution of the words 'six months' as the period for compliance.

The appeal is allowed insofar as it relates to the artificial turf and wet pour rubber surfacing and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the artificial turf and wet pour rubber surfacing.

The appeal is dismissed and the enforcement notice is upheld as corrected and varied for the play equipment and planning permission is refused in respect of

the play equipment, on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matters

2. The appellant has advised that the ground (a) appeal has been brought only in relation to the artificial turf and wet pour rubber surfacing, and the ground (c) appeal relates only to the picket fence and play equipment. The Council has advised that it is no longer contesting that the picket fence needs planning permission. I have dealt with the appeal on this basis and I can correct the notice to delete the references to picket fencing without causing injustice, under section 176(1) of the Act.

The ground (c) appeal

3. This ground of appeal is that the matters stated in the notice which give rise to the alleged breach of planning control, did not constitute a breach of planning control. In this case it relates only to the play equipment, which consists of the climbing frame. The burden of proof lies with the appellant, and the standard of proof is the balance of probability.
4. The appellant argues that the climbing frame does not amount to development, which is defined in section 55 of the Act, as 'the carrying out of building, engineering, mining or other operations...' It clarifies in section 55(1A)(d) that building operations includes 'other operations normally undertaken by a person carrying on business as a builder'.
5. Case law in *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd*¹, endorsed by *Skerrits of Nottingham Limited v SSETR (No.2)*² has identified three primary indicators as being decisive of what is a building: (a) that it was of a size to be constructed on site, as opposed to being brought to the site; (b) permanence; and (c) physical attachment. No one factor is decisive.
6. The appellant also refers to the case of *Tewksbury Borough Council (1) Keely (2) Adams [2004] EWHC 2594*. This case identified that previous case law has incorporated into the definition of 'building' structures which would not ordinarily be called buildings. In that case, the structure was a mobile shed, that was capable of being moved about the site on its wheels, was not attached to the land in any way, was substantially constructed off site and towed to the site on its own wheels in two sections. It did not affect the physical character of the land, and had only a visual impact.
7. I shall take the primary factors identified above in turn. In terms of size, the overall dimensions of the climbing frame are identified by the appellant as 2.8 metres in height, 3.5 metres in length and 1.8 metres in width. The appellant states that it is a simple flat pack domestic scale item, that would not look out of place in a domestic garden. It is brought to the land principally already made and can be erected within an hour or two by one or two people. It would not be complex to dismantle using basic tools and a moderate degree of competence and fitness. It is stated to be comparable to common garden furniture such as a trampoline, swing or slide. However, as a flat pack item, while it may have been principally made off site, it would have been assembled on site, rather

¹ [1949] 1QB 385

² [2000] 2 PLR 10275

- than being brought to the site already assembled. It is not directly comparable to trampolines, swings or slides, which would normally be small and simple to assemble. It would also be too large to be moved without being dismantled.
8. Turning to permanence, there is no evidence that there is an intention for it to be mobile or re-sited within the playground, not that it could be moved relatively easily. It is relatively large in size, and I have seen no evidence that it could be moved without being at least partially dismantled. It is not comparable to canopies, trampolines and outdoor dining tables, which can be readily moved around the garden without being dismantled. It therefore has a degree of permanence and has made some physical change to the land upon which it is erected.
 9. It is not disputed that the climbing frame has a degree of physical attachment to the ground. The appellant argues that this is only for the health and safety of those using the equipment. The manner of its physical attachment has not been explained, and it was not evident at my site visit. Regardless of the reason for its physical attachment, this nonetheless undermines the argument that it has a degree of mobility.
 10. Based on the evidence before me, I conclude that the climbing frame is operational development for which planning permission is required. The Council asserts that it would not benefit from permitted development rights, as it would not comply with the limitations of Part 7 Class M of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended.
 11. The appellant refers to two appeal decisions. In one case,³ a hot tub roof cover was found not to be development. It consisted of a lightweight plastic cover, attached to four metal legs. The cover was not physically attached to the hot tub and the feet were not fixed to the roof. The cover could be dismantled in a relatively straightforward way. The Inspector found that the cover was comparable to common garden furniture which can be erected or dismantled relatively easily by a process of bolting together various sections, while the size of it did not preclude its portability. That it was likely to remain in the same position was found to relate to the fact that the appellants did not intend to move it, rather than the ease with which it could be moved, and was not therefore decisive.
 12. In the other case, a Scottish appeal decision⁴, it was found that hot tubs were not development. Decisive factors were that their size (2 metres by 2 metres by 1 metre high) was such that they could be moved without the use of mechanical lifting equipment and could be carried by four people, their lack of any substantial physical attachment to the ground, and that their installation did not require work to be undertaken by a builder. These cases are not directly comparable, as they relate to items that were not assembled on site and had a greater degree of portability than the climbing frame. These decisions do not alter my view that the climbing frame is operational development that requires planning permission.
 13. For the reasons set out above, the appeal on ground (c) fails.

³ APP/K5600/C/16/3150682 and 3152123

⁴ Planning appeal reference PPA-170-2133

The appeal on ground (a) and the deemed application

14. This ground of appeal is that planning permission should be granted, and the appellant has advised that this appeal relates only to the artificial turf and wet pour rubber surfacing. Having regard to the reason for issuing the notice, the main issues are:
- Whether the artificial turf and wet pour rubber surfacing preserves or enhances the character and appearance of the Tonbridge Conservation Area (TCA); and
 - The effect of the artificial turf and wet pour rubber surfacing on the living conditions of neighbouring occupiers.

Conservation Area

15. The appeal site is in the grounds of a building that is in use as a school. The main building is on the frontage, with a rear garden which widens out to an irregular area of land to the rear of neighbouring gardens. The area of land in question falls within this wider part of the site and is set to the front of a single storey brick building within the school grounds. The site boundaries are generally marked by fences, hedges and trees. The land slopes downwards towards the rear of the site.
16. The TCA covers the centre of Tonbridge and surrounding areas. This part of the TCA is characterised by substantial buildings with mature trees and landscaping giving the area an established appearance.
17. The wet pour rubber surfacing is centred on an area to the immediate front of the building and on pathways in the surrounding area. It is brightly coloured and distinctive. However, the majority of it is coloured red, which is not dissimilar to the brickwork present on the adjacent building and other buildings in the vicinity. The small area of blue surfacing is located close to the building. While there are likely to be some views of it from neighbouring land and buildings, due to the topography and boundary screening, it is not visually prominent and there are no views of the surfacing from publicly accessible areas. Due to the small area of land affected, its degree of integration with the local brick colour, and the level of screening, the wet pour rubber has little visual impact on the site or surrounding area.
18. The artificial turf largely covers the areas further from the building. Except in close views it appears similar to natural grass, and is not out of keeping in this setting.
19. I therefore conclude that the artificial turf and wet pour rubber surfacing preserves or enhances the character and appearance of the TCA. It is thus not in conflict with Policy CP24 of the Core Strategy 2007 (CS) or Policy SQ1 of the Managing Development and the Environment Development Plan Document 2010, which seek, amongst other things, to ensure that new development is well designed and respects the site and its surroundings.

Living conditions

20. The appeal site is bordered by the rear gardens of several dwellings, which front onto Dry Hill Park Road and Dry Bank Road. The dwellings at 36 and 36a

Dry Hill Park road are set some distance away from the site due to the length of the plot. Dwellings on Dry Bank Road are set much closer to the site, and due to the topography, they are set at a higher level. The Council's evidence indicates that their concern relates to the level of noise generated by children using the area.

21. The all-weather surface replaced an outside learning area which was partly laid to grass and partly hard surfaced with a patio and tarmac path. The work has therefore increased the area of hard surfacing. I do not agree that this necessarily results in a more intensive use of the site and resulting noise generation, as there was previously an area of hard surfacing which would have allowed use all year round in this area. Whether the provision of the climbing frame has resulted in a greater level of use of the area and associated noise is not a matter that is before me, as the ground (a) appeal relates only to the wet pour rubber and artificial grass.
22. I therefore conclude that the artificial turf and wet pour rubber surfacing are not harmful to the living conditions of neighbouring occupiers. It is therefore not in conflict with Policy CP1 of the CS, insofar as it seeks to ensure that development preserves residential amenity.

Conclusion in relation to ground (a)

23. For the reasons set out above, I conclude that the appeal on ground (a) succeeds in part only, and I will grant planning permission for the artificial turf and wet pour rubber surfacing.

The ground (g) appeal

24. This ground of appeal is that the period for compliance with the notice is unreasonably short. The period for compliance is two months, and the appellant requests a period of eight months (based on an extension from the effective date of 7 January 2019 until September 2019).
25. The reason for this is to allow sufficient time to appoint an appropriate contractor, source appropriate replacement items, and to allow the works to be carried out during the summer holidays to avoid unnecessary disturbance to education and allow the children to have access to an outdoor learning area. while there is a balance to be struck between remedying the breach and the interests of the appellant, it would seem reasonable to allow some additional time for compliance with the requirements, in order to avoid unnecessary disruption to the children's education. I consider that a period of six months would be sufficient to allow the works to be timed appropriately.
26. To this limited extent the appeal on ground (g) succeeds and I shall vary the notice accordingly.

N Thomas

INSPECTOR