



Appeal Decisions

Site visit made on 28 February 2020

by Andrew Dale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Date of decisions: 27th March 2020

Appeal A Ref: APP/V1505/C/19/3228385

Appeal B Ref: APP/V1505/C/19/3228387

15 Talisman Walk, Billericay CM11 1EE

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended.
 - The appeals are made by Nicola Eggett (Appeal A) and Lee Eggett (Appeal B) against an enforcement notice issued by Basildon Borough Council.
 - The enforcement notice was issued on 3 April 2019 under ref. 18/00216/UBW.
 - The breach of planning control as alleged in the notice is: "Without planning permission, the material change of use of amenity land to residential garden."
 - The requirements of the notice are to:
 - I. Cease the use of the Land as residential garden
 - II. Remove the close boarded fencing (as shown in the photographs at Appendix A and point 'a' to 'b', 'b' to 'c' and 'c' to 'd' on the plan) from the Land including all associated fixtures, fittings and waste materials therefrom."
 - The period for compliance with these requirements is 2 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.
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Decisions

1. It is directed that the enforcement notice be corrected by:
 - (a) The substitution of the attached plan in the annex to these appeal decisions for that attached to the enforcement notice; and
 - (b) The deletion of the word "red" within paragraph 2 and its replacement with the words "by solid black lines".
2. It is directed that the enforcement notice be varied by deleting the text "Two (2) months" in paragraph 6 and substituting therefor the text "Nine (9) months" as the time for compliance.
3. Subject to the corrections and variation, the appeals are dismissed and the enforcement notice is upheld.

Background, matters of clarification and the enforcement notice

4. No. 15 Talisman Walk is a 2-storey, semi-detached house. Talisman Walk and Foxhunter Walk are 2 pedestrian routes which pass by the front and side of the property respectively. The back garden reaches up to Brookside and was physically separated from a small open amenity area or green space at the side bordering Foxhunter Walk. The original brick boundary wall and fencing at the side are still in place. The appeal relates to the part of that open amenity space

which has been incorporated into the rear and side garden and enclosed on 3 sides with close-boarded fencing which is about 2 m high and supported by concrete posts and gravel boards. The longest line of fencing borders Foxhunter Walk. There are 2 shorter return sections, one is next to Brookside, the other reaches across from the front of the house to Foxhunter Walk.

5. The only objections from third parties that have been received in response to this appeal are from an occupier of 13 Foxhunter Walk. In effect, he objects to the idea of planning permission being granted. On the other hand, the appellants have provided letters of support from other neighbouring occupiers. I should clarify that as no appeal has been lodged on ground (a), an application for planning permission is not deemed to have been made. As such, the planning merits of the development alleged in the enforcement notice do not fall to be considered.
6. The appellants point out that the plan attached to the notice is incorrect. This was accepted by all the parties at the site visit. The area edged in red on the plan implies that the appellants have enclosed a further rectangular portion of open land adjacent to Talisman Walk into the residential garden, whereas that is not in fact the case. I am satisfied that the appellants have not been obviously misled by this matter and that it is within my powers to correct the notice since no injustice would be caused to the parties. In attaching a corrected plan, I have also corrected the description of the land in paragraph 2 of the notice as the affected area is now denoted by solid black lines.

The appeals on ground (c)

7. In order to succeed on ground (c), the onus is on the appellants to show, on the balance of probability, that the matter alleged in the enforcement notice does not constitute a breach of planning control.
8. In this respect the appellants have supplied evidence, including relevant documents, to show that the affected land is in their ownership, is not one of the public open spaces formally maintained by the Council, was not recorded as having any significance on the local authority search result and has no public rights of way running through it. These matters do not really go to the heart of the question of whether there has been a breach of planning control. In particular, whatever the ownership, open amenity land has been formally incorporated into the private residential garden through the erection of fencing, so as to form part of the residential planning unit of no. 15 Talisman Walk. That amounted to a material change of use of land which in turn constituted development for which planning permission was required.
9. I do not doubt that the erection of the fencing has curtailed the use of the former amenity land for the various antisocial activities described by the appellants in their written submissions. The pre-existing situation might have been relevant to weigh in the balance, had the planning merits fallen to be considered, in comparing what was happening before with the situation now. However, as noted earlier, no appeal on ground (a) has been brought. For similar reasons, the other boundary fences at various properties in the locality, as illustrated in the appellants' photographs (including at no. 60 Brookside at

the junction with Longtail diagonally opposite the appeal site), are not relevant to the grounds of appeal brought.

10. I find on the balance of probability that the matter alleged in the enforcement notice, as corrected, amounts to development for which there is no grant of planning permission. The matter so alleged therefore constitutes a breach of planning control. I conclude that the appeals on ground (c) should not succeed.

The appeals on ground (f)

11. This ground allows arguments to be put that the steps required by the enforcement notice to be taken exceed what is necessary to remedy the breach of planning control, or as the case may be, to remedy any injury to amenity which has been caused by the breach.
12. The manner in which the Council has prepared this enforcement notice, including the formulation of its requirements, indicates to me that its purpose is to remedy the breach of planning control by restoring the land to its condition before the breach took place.
13. Although the fencing has not been included in the alleged breach of planning control, it is established in case law that a notice directed at a material change of use may require operational works to be removed provided they have facilitated or formed an integral part of the material change of use, whether or not they would have been permitted development or outside the definition of development. The fencing is an integral part of the material change of use of the land since it provides enclosure and the means by which the land was incorporated as part of the existing garden.
14. The appellants suggest an alternative to the notice's requirements. This would be to reposition the long boundary fence back sufficiently to incorporate the planting of hedging/shrubs between it and the path along Foxhunter Walk. It is said that the fence could set back *a foot* (appeal form) or *18/24 inches* (written submission dated 17 October 2019). In this regard, at the site visit all the parties noted the land between 24 Talisman Walk and the path along Foxhunter Walk. Even so, no fully worked up scheme showing the new fence line, details of soft landscaping or proposals for the maintenance of such landscaping has been submitted. In any event, such an approach might have been more appropriately dealt with as a condition attached to a planning permission, had an appeal been brought on ground (a) and a decision favourable to the appellants been reached, having considered all the planning merits of the development. Upholding the notice would not prevent the appellants from entering into discussions with the Council about alternative ways forward.
15. In instances where no ground (a) appeal has been made and no application for planning permission is deemed to have been made, such as in this case, it is not appropriate for the appellants to introduce arguments on the planning merits of their appeal in the context of an appeal on ground (f). The power available to an Inspector under section 176(1) of the Act cannot be used to attack the substance of the enforcement notice. As it is, given the purpose of the notice, the requirements set out within it cannot be judged to be excessive since any lesser steps would not fully remedy the breach of planning control. That being the case, I conclude that the appeals on ground (f) should fail.

Other matters

16. The appellants appear to be disgruntled with the way in which they have been treated by the Council, in particular the lack of a site meeting prior to the development taking place in June 2018, the lack of interest in discussing alternatives and the failure of the Council to respond to a letter from their solicitor. These are not matters for me to directly investigate. My remit must be to determine these appeals based on the specific grounds brought.
17. I have had due regard to the appellants' Human Rights (HR) in general or to the Public Sector Equality Duty (PSED) contained in section 149 of the Equality Act 2010 in relation to their son. As far as the appeals are concerned, these matters are not engaged for the legal ground of appeal (c) since there is no discretion to be exercised; the decision on this ground is a matter of law which neither creates nor removes rights. With regard to the appeals on ground (f), section 173(3) and (4) of the Act enable the Council to specify steps to remedy the breach. I have already found that the requirements in the notice are not excessive. Moreover, I find that they are not a disproportionate remedy bearing in mind effective enforcement is important to maintain public confidence in the planning system which is applied in the wider public interest. I would also add that from what I could see the existing lawful garden area is sizeable and provides a safe open space for the appellants' son and that not all alternative options have necessarily been exhausted.
18. I am, however, concerned about the time given (2 months) for compliance with the notice, even though no appeal has been lodged on ground (g). This would leave little time for the appellants to enter into discussions with the Council about alternative ways forward. There is also the possibility of a planning application being required should a potentially favourable outcome be found. This and the serious and ongoing public health crisis (COVID-19) facing this country suggests to me that the compliance period ought to be extended to 9 months. I have varied the enforcement notice accordingly.

Andrew Dale

INSPECTOR