
Appeal Decision

Site visit made on 21 January 2020

by K Stephens BSc (Hons), MTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 April 2020

Appeal Ref: APP/T4210/C/19/3229682

49 Radcliffe New Road, Whitefield, Manchester M45 7QZ

- 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 Allan Wilson against an enforcement notice issued by Bury Metropolitan Borough Council.
- The enforcement notice was issued on 3 May 2019.
- The breach of planning control as alleged in the notice is: without the benefit of planning permission the erection of a raised decking area incorporating a supporting retaining wall in the rear garden of the property.
- The requirements of the notice are:
 - a) Dismantle and permanently remove the decking area, including timber balustrade and supporting retaining wall and steps.
 - b) Return the land to its former condition prior to the decking area and supporting retaining wall being constructed.
- The period for compliance with the requirements is 60 days.
- The appeal is proceeding on the grounds set out in section 174(2)(a) and (c) of the Town and Country Planning Act 1990 as amended. The prescribed fees have been paid within the specified period. Hence the application for planning permission deemed to have been made under section 177(5) of the Act, as amended, falls to be considered.

Decision

1. The appeal is allowed, the enforcement notice is quashed 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 development already carried out, namely the erection of a raised decking area incorporating a supporting retaining wall in the rear garden of the property, on land at 49 Radcliffe New Road, Whitefield, Manchester M45 7QZ referred to in the enforcement notice, subject to the following condition:
 - Within 1 month of the date of this decision, remove the timber balustrade and erect it in line with the top of the steps, and retain it in this position thereafter.

Procedural matters

2. The Council's Statement sets out a case against the appeal on grounds (a) and (f). However, the appellant has not appealed on ground (f).

3. The Council granted a split decision¹. It granted planning permission for a "single storey extension at side and rear", but refused planning permission for the "decking area at rear" that had already been erected and which is the subject of this appeal.
4. At the time of my visit the decking, a timber balustrade and retaining wall of substantial height with steps leading up to the decking area had been installed and the single storey extension was under construction.
5. I will consider the grounds of appeal in logical, not alphabetical order. The logic is that if an appeal against an enforcement notice (the 'Notice') succeeds on ground (c), the notice is quashed and ground (a) becomes redundant.

Appeal on ground c)

6. Ground (c) is that the matters alleged in the notice do not constitute a breach of planning control. It is a legal ground of appeal, distinct from any planning merits. The burden of proof lies with the appellant and the test of the evidence is on the balance of probability.
7. The key questions are whether 'development' has taken place which requires planning permission and, if so, whether planning permission is granted or the development is otherwise deemed to be lawful. Section 55(1) of the Town and Country Planning Act 1990 (the 'Act') defines 'development' to include the "carrying out of building, engineering, mining or other operations in, on, over or under land".
8. From my site visit observations the appeal property and a number of others in the road occupy a sloping site, with the rear gardens generally sloping up behind the houses.
9. The appellant's submitted photographs in Figure 2 and Figure 3 of his statement appear to show the garden before the decking was installed. But they are not taken from the ground level of the dwelling looking up the garden, and hence they do not clearly reveal the degree of the slope of the garden or the existing ground levels before the decking and retaining wall were installed. Figure 2 is taken from the upstairs window looking down onto a heavily overgrown garden, so it is not possible to establish with any certainty the profile or slope of the garden. Similarly, Figure 3 is taken from within the overgrown rear garden looking towards the back of the dwelling, but does not show how the garden meets the ground level or patio directly outside the house. Therefore these photographs do not conclusively show that ground levels have not been raised in the rear garden when the decking and retaining wall were constructed.
10. The photographs in Figure 5 of the appellant's statement show close-ups of the adjacent gardens. These show that adjacent properties do have sloping gardens, but that they have been fashioned differently with different degrees of slope and terracing effects. It is evident to me that the garden levels and slope of the appeal property are considerably different to the ground levels of the adjacent gardens.
11. The appellant's aerial photograph in Figure 1 of his statement shows the rear garden of the appeal property and of neighbouring properties. But due to the

¹ Application ref: 63138/FUL dated 19 October 2018

overhead angle of the photograph it is not possible to ascertain with any certainty the degree of ground level rise at the appeal property or compare garden ground levels with adjacent properties. However, it is possible to see what appears to be a patio directly behind the appeal dwelling (approximately where the single storey extension has now been erected) and then another non-grassed area, with what appears to be a flight of steps leading from a patio area up to the area. The shading along the front edge of this area, facing the dwelling, would indicate to me that the area is elevated at some height above the adjacent patio. This configuration appears similar to the raised decking area I saw on site.

12. It would appear from the aerial photograph that Nos. 51 and 47 have some breaks in their garden that could indicate some terracing to deal with the sloping ground and these would appear to correspond with the photographs in Figure 5. But the adjacent gardens do not appear to correspond with the ground levels and profile configuration of the appeal garden. This would indicate to me that the garden levels in the appeal property differ to those in the adjacent gardens and have been raised in creating the decking and retaining wall.
13. Furthermore, Figure 4 of the appellant's statement, which is a diagrammatic representation of the appeal garden and that of No.47, does not appear to tally with the aerial photograph or photographs Figure 5. Figure 4 shows the front of the appeal decking in line with a stepped raise in ground level at No. 47. But the aerial photograph shows the front of the decking in line with an extension and a patio area around it. This does not persuade me that ground levels have not been raised.
14. The raised decking area is elevated between 1.2 - 1.3m above the ground level at the back of the house, according to the Council's delegated report and the appellant's plan extracts in Figure 5 of his statement, and this broadly corresponds to what I saw on site. There is a breeze block retaining wall of approximately the same height with steps up to the decking area. Along the front of the decking there is a timber balustrade, approximately 1m in height.
15. The alleged works would have involved some pre-planning to order and purchase materials, bring them to site, dig foundations and build the retaining wall with steps, lay the decking and install the balustrade. The works also reveal a degree of permanence due to the block retaining wall, steps up to the decking and a balustrade for safety of users of the decking.
16. Based on the evidence before me, I am of the view that operational development has taken place to raise ground levels to a substantial degree to create the high level decking area with the need for a retaining wall of a substantial height.
17. Having established that the decking and retaining wall are 'development', it is now necessary to establish if planning permission is required for the said development.
18. Section 57(1) of the Act states that planning permission is required to carry out any 'development' of land. However, section 55(2) expressly provides that certain operations and uses do not involve development. The erection of decking and retaining walls are not one of the exclusions.

19. Section 58 of the Act grants planning permission for certain developments by various means and Orders. The Town and Country (General Permitted Development) (England) Order 2015 ('the Order') grants planning permission for certain types of development as "permitted development" which does not need the express grant of planning permission.
20. Schedule 2, Part 2, Class A (b) of the Order permits the erection or construction of any gate, fence, wall or other means of enclosure provided it does not exceed 2 metres above ground level. The retaining wall is less than 2 metres in height and therefore the retaining wall itself is permitted development and does not require express planning permission.
21. Decking or raised platforms are permitted development provided they are no more than 30cm above ground level. Whilst there may be a gap of no more than 30cm between the boards of the decking and the part of the ground over which they lie, the constructed raised decking area as a whole is approximately 1.2-1.3m above ground level, as already described, and therefore exceeds the permitted development allowance. Therefore the raised decking requires express planning consent.
22. In light of the above and on the balance of probability, I find there has been a breach of planning control with regards to the erection of a raised decking area incorporating a supporting retaining wall. Whilst the retaining wall is permitted development in itself and not a breach of planning control, any breach of planning control in relation to the matters alleged in the Notice means that the appeal fails. Accordingly, the appeal on ground (c) fails in regard to these matters.

Appeal on Ground (a) and the Deemed Application

23. The appellant has made an appeal on ground (a) – that planning permission ought to be granted for the matters alleged in the notice.
24. I consider the main issues are the effect of the development on the living conditions of existing occupants of neighbouring properties, with particular regard to privacy.
25. I acknowledge that due to the existing sloping topography of the appeal site garden and adjacent properties, there will have always been some degree of accepted overlooking. The issue is therefore whether the degree of overlooking has been made significantly worse by the unauthorised works as to cause harm.
26. The raised decking extends across the entire width of the rear garden up to the shared timber fence boundaries with the adjacent properties Nos.47 and 51. During my site visit I was able to stand on the decking and lean over the balustrade. The existing side boundary fences are of a height that prevents direct looking sideways into either of the adjacent gardens.
27. However, standing at the front of the decking against the balustrade and standing at the top of the steps I was able to look towards the window and French doors in the side of No.47. According to the Council's delegated report these openings serve a combined kitchen/dining room. I find the proximity of the decking and its elevated position affords anyone standing by the balustrade the opportunity for increased overlooking of the adjacent properties and gardens. This is compounded because the decking area takes up a substantial

part of the garden area and is obviously intended to be used as part of the main outdoor recreational space, likely used for entertaining and sitting on. Furthermore, the only means of access to the decking area is via the steps that are located close to the shared boundary with No.47. Whilst I acknowledge that views would be oblique, I consider that there is an unacceptable degree of overlooking that has a harmful effect on the privacy of existing occupants of No.47.

28. Views into the rear of No.51 and its patio area at the back of the dwelling are impeded to some extent by the existing boundary fencing and the roof of the appellant's own single storey extension. As a result, overlooking of No.51 is less than for No.47, but more than it was previously. Overall, I find the raised decking harms the living conditions of existing occupiers of No.47 and 51.
29. The appellant has not appealed ground (f) - that the requirements of the notice to dismantle and permanently remove the decking area, timber balustrade, supporting retaining wall and steps, are excessive. However, the appellant suggests that obscure glazed privacy screens 1.7m high and 0.5m wide could be erected along the boundaries of the decking to mitigate overlooking and planters could be placed along the front of the decking area to prevent people standing close to the balustrade.
30. With regards the proposed privacy screens, section 177(1)(a) of the Act effectively requires me to analyse the 'as built' scheme with the suggested alternative for the retention of the decking area, balustrade, retaining wall and steps, but with privacy screens erected either side. In doing so, I must have regard as to whether I could grant planning permission for the privacy screens in relation to whether they relate "to the whole or any part of those matters" stated in the Notice.
31. The Notice has been served on the decking area, balustrade, retaining wall and steps. The suggested privacy screens would project approximately 1.7m in height above the decking area and would extend beyond the 1m high balustrade. Therefore, the privacy screens would extend beyond the matters alleged in the Notice and modify the development in such a way as to make it substantially different from that set out in the Notice and the split-decision planning application. Hence the privacy-screen option would not be within the 'whole or any part of' the matters alleged against, for which the Notice was issued. Therefore, I am unable to take them into account.
32. There would be nothing preventing the appellant from placing planters along the front of the balustrade in any event. But this would be vague and unenforceable and not a permanent or effective solution.
33. The Council has suggested a condition requiring the 1m high balustrade to be repositioned and set back from the edge of the front of the decking, so that the balustrade would be in line with the top of the steps. The Council also mentioned this as suitable mitigation in their delegated report. This suggestion would not modify the development in such a way as to make it substantially different and would still ensure the development was within the 'whole or any part' of those matters stated in the Notice as constituting a breach of planning control.
34. I find the suggested condition would be a more permanent and effective means of ensuring people stand far enough back on the decking to reduce the

opportunity for overlooking, and the existing shared boundary fencing would provide more effective screening. From my observations on site, I am satisfied it would overcome the harm I have identified, but still leave the appellant with a sizeable decking area. The appellant has had the opportunity to respond to the Council's suggested condition but did not submit any Further Comments or objection.

35. With the imposition of a condition requiring the balustrade to be set back from the front edge of the decking area in line with where the top step meets the decking area (approximately 1.5m back), the development would no longer conflict with Policy H2/3 of the Bury Unitary Development Plan (adopted 1997), which seeks to ensure that household alterations and raised decking does not reduce privacy of adjacent properties. Nor would it be contrary to the advice in the Supplementary Planning Document 6 'Alterations and Extensions to Residential Properties'² in relation to ensuring decking does not reduce privacy to neighbouring properties.

36. Other Matters

37. A number of nearby residents raise a series of other concerns about the single storey extension, but in view of the alleged breach of planning control, the split planning permission granting the single storey extension and my conclusions on the main issue there is no need for me to address these in the current decision.

Conclusion

38. For the reasons given above I conclude that the appeal should succeed on ground (a) and planning permission will be granted.

K. Stephens
INSPECTOR

² Adopted March 2004 and updated January 2010