
Appeal Decision

Site visit made on 18 May 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 16 June 2020

Appeal Ref: APP/M1005/C/19/3234391

Land at 21a Peasehill Road, Ripley, Derbyshire, DE5 3JG

- 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 Robert Walters against an enforcement notice issued by Amber Valley Borough Council.
- The enforcement notice was issued on 5 July 2019.
- The breach of planning control as alleged in the notice is without planning permission, the construction on the Land of a raised timber deck with associated support posts and fencing.
- The requirements of the notice are: -
Remove the raised wooden deck, associated support posts and fencing and any associated rubble resulting from said removal from the Land.
- The period for compliance with the requirements is 1 month.
- The appeal is proceeding on the grounds set out in section 174(2) (c), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended (the 1990 Act).

Summary Decision: The appeal succeeds in part and the enforcement notice is upheld as varied in the terms set out below in the Formal Decision.

The Notice

1. The appellant has questioned whether the enforcement notice is valid given that the period for compliance with the requirements does not equate to that recommended within the Council's Enforcement Report (ER). I acknowledge that the ER recommended that a period for compliance of 2 months was considered reasonable. As such, it would be reasonable to consider that the appellant would have expected that the period of compliance contained within the enforcement notice would have also been 2 months.
2. Nevertheless, any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority. As such, I could correct the enforcement notice in relation to the period of compliance, subject to my consideration of the appeal on ground (g), with its requirements to ensure that it reflected that recommended in the ER.
3. I consider that I could carry out that correction without injustice to the parties.

The ground (e) appeal

4. A letter dated 5 July 2019 that accompanied the Enforcement Notice was addressed to Mr R Walters, 21 Peasehill Road, Ripley, Derbyshire and within

that letter it states that a copy of the Enforcement Notice has been served on Mr Robert Walters and Ms Kerry Holden of that address. The Council have acknowledged that there is a typographical error within these addresses. However, it goes on to state that, in any case, the letter was hand delivered to 21a Peasehill Road and the address within the enforcement notice and the plan relate to the appeal property.

5. Even if the notice had not been correctly served, section 176(5) of the 1990 Act provides that failure to serve may be disregarded if the appellant has not been substantially prejudiced by the failure to serve him. In this case the appellant has been able to submit an appeal against the enforcement notice and argue it fully in the course of these appeal proceedings. It cannot, therefore, be said that he has suffered any prejudice as a result of any failure to comply with the rules concerning service. There is no suggestion that any other person may have been prejudiced. I conclude, therefore, that in the circumstances of this case any failure by the Council in terms of service of the enforcement notice may be disregarded.
6. Consequently, the appeal on ground (e) fails.

The ground (c) appeal

7. This ground of appeal is that those matters, if they occurred, did not constitute a breach of planning control. In an appeal on this ground the appellants have to demonstrate on the balance of probability that the matters alleged, to have occurred, in the notice do not constitute a breach of planning control.
8. The alleged breach of planning control relates to a timber decked area that covers the rear garden area of 21a Peasehill Road (No 21a) with associated support posts and fencing. Based on the evidence before me and my observations at the site visit some of the vertical support posts to the decked area project a significant height above the level of that decked area and horizontal timber members extend between them. A UPVC fence has been erected on top of the decked area very close to these support posts/horizontal members.
9. The appellant has stated that he acknowledges that the boundary fence required planning permission as it exceeds 2 metres above ground level. However, it is not clear as to which part/s of the development the appellant considers to constitute the boundary fence.
10. Class A of Part 2 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure subject to certain limitations. There is no dispute that the relevant limitation in this case would be A.1.(b). Under A.1.(b) development is not permitted if the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2 metres above ground level.
11. It is not entirely clear how the UPVC fencing has been secured in place. However, it is reasonable to consider, given the close proximity of the UPVC and timber vertical and horizontal structure, that together they function to enclose the decked/rear garden area. The timber parts of that structure plainly play a part in the enclosure of the rear garden area of No 21a. Consequently,

whilst the vertical timber posts form an integral part of the decked area the parts of them that project above the level of the decking could also be treated as forming part of a means of enclosure. It is clear that if I treated these parts of the development as a means of enclosure that they exceed 2 metres above ground level therefore, they would not be permitted by Class A, Part 2 of Schedule 2 of the GPDO.

12. The appellant considers that the timber decking does not constitute a raised platform and is permitted development under Class E of Part 1, Schedule 2 of the GPDO. Due to the slope of the garden the height of the timber decking varies from no higher than 0.3 metres adjacent to the dwelling to considerably greater than 0.3 metres adjacent to the rear boundary of No 21a. The structure of the timber decking is attached to the dwelling.
13. The Ministry of Housing, Communities and Local Government's publication 'Permitted Development Rights for Householders' Technical Guidance (September 2019) (TG) whilst not determinative provides a useful guide to interpretation of the GPDO. It states that buildings which are attached to the house are not permitted under Class E of Schedule 2, Part 1 but that they would be subject to the rules in Class A of Schedule 2, Part 1 of the GPDO.
14. Article 2 (1) of the GPDO states that a 'building' includes any structure or erection including part of a building, but it does not include plant or machinery or any gate, fence wall or other means of enclosure. The timber decking in this appeal clearly amounts to a structure or erection and it could not accurately be described as an item of plant or machinery. However, parts of the timber structure that support the decking also act as a means of enclosure.
15. The courts have held that structures which might not ordinarily be described as 'buildings' can be included in the definition. These include marquees, polytunnels and other similar structures. The timber decked area is substantial in size and weight, it was constructed on the site, it is physically attached to the house and is resting on the ground under its own weight.
16. Article 2 (2) of the GPDO states that unless the context requires otherwise, the height of a building refers to its height as measured from 'ground level', this being the level of the surface of the ground immediately adjacent to the building in question or where 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. Article 2 (2) does not provide any indication that the height of a decked area should be measured differently to other buildings.
17. Therefore, where no part of a decked area exceeds 0.3 metres in height when measured from the highest part of the surface of the ground adjacent to it that decked area would not amount to a raised platform as defined at paragraph I, Part 1 of the GPDO. As such, if the timber deck was to be treated as a building it would not fall foul of the limitation at paragraph A.1.(k)(i) of Class A of Schedule 2, Part 1 of the GPDO. Moreover, it would amount to an alteration of a dwellinghouse rather than an enlargement therefore the limitation at paragraph A.1.(f) of that Class is not relevant.
18. Nevertheless, when considered holistically, it is reasonable to consider that the whole of the development described in the alleged breach has been designed and constructed as a single operation. That operational development as a

whole does not fall within permitted development rights. Therefore, express planning permission is required.

19. I conclude that the matters alleged constitute a breach of planning control. There is no evidence that planning permission has been granted, therefore, the appeal on ground (c) must fail.

The ground (f) appeal

20. An appeal on ground (f) is a claim that the requirements of the notice exceed what is necessary to remedy the breach of planning control, or to remedy any harm to amenity resulting from the breach. Given that the requirements in paragraph 5 of the notice require the complete removal of the development, the purpose of the notice is clearly to remedy the breach of planning control.
21. The appellant argues that the requirements of the notice could be amended to retain the decked area and remove or reduce the height of the boundary fence or amend its design. However, as stated above, the timber structure that supports the decked area also acts as part of the means of enclosure and the whole development is unauthorised. Furthermore, the appellant's argument is not supported by any drawings of how the development could be altered. Consequently, without drawings I am unable to fully assess whether the changes being proposed are possible and would be in line with permitted development tolerances. Neither am I able to vary the notice to the necessary level of precision in this respect.
22. In addition, amendments to the design of the development would require me to assess the planning merits of those alternatives. There is no ground (a) appeal or deemed planning application in this case therefore I am not empowered to consider those planning merits. I also note that the section 78 appeal¹ for the development was dismissed and that the Inspector stated that *'the proposed alterations to the top of the fence would not result in a significant reduction in the impact of the fence, as the overall height would not be substantially reduced'*.
23. The appellant has also stated that there is no need for the materials to be taken off the site since they could be retained and stored for use on another project, without harming amenity. However, this would not fully remedy the breach of planning control. Given, the materials involved in the construction of the structure it is reasonable to consider that they could be utilised within another project at the dwellinghouse. However, given the amount of materials that are involved there is no indication as to where or how the materials could be stored on the site or what impact that would have.
24. Given that the notice does no more than seek to achieve the purposes of section 173(4)(a) of the 1990 Act, it is not excessive. The appeal on ground (f) fails.

The ground (g) appeal

25. That any period specified in the notice in accordance with section 173(9) of the 1990 Act falls short of what should reasonably be allowed. As stated above, it is reasonable to consider that the appellant would have expected to be given 2

¹ APP/M1005/W/19/3234388

months to comply with the requirements of the enforcement notice given the Council's Enforcement Report.

26. Furthermore, the appellant has stated that given the balance of work commitments and the need to visit London on a very regular basis associated with a relative's medical care that 3 months is a reasonable period of compliance.
27. However, since the enforcement notice was issued it is of course now clear that the current Coronavirus pandemic has placed severe restrictions on the ability of people, services and businesses to move about freely and to carry out works. The main parties were given the chance to comment on this issue.
28. The Council has stated the site can be accessed via a side gate, there would be no requirement to enter the landowner's home to do the works and the job could be undertaken whilst keeping to current social distancing rules. The current lockdown restrictions would therefore not be a barrier to the requirements of the enforcement notice.
29. Nevertheless, the appellant has stated that he is of the opinion that in the current circumstances it would be difficult to get tradesmen. He would therefore suggest 3 months as an absolute minimum and would prefer 4 months in relation to the compliance period.
30. I consider that even though restrictions are being slowly lifted and that access to the rear garden can be gained through a side gate 2 months may not give sufficient time for the appellant to carry out the required works given the size of the development and/or for scheduling contractors to undertake them. As such, I agree with the appellant that 3 months is a reasonable time period for compliance in these circumstances and I intend to vary the notice in this respect.

Conclusion

31. For the reasons given above I conclude that a reasonable period for compliance would be 3 months, and I am varying the enforcement notice accordingly, prior to upholding it. The appeal under ground (g) succeeds to that extent.

Formal Decision

32. The appeal is allowed in part, on ground g, and it is directed that the enforcement notice be varied by: -
 - Deleting, in paragraph 5, '*1 month*' and substitution of '*3 months*' as the time for compliance.
33. Subject to these variations the enforcement notice is upheld.

D. Boffin

INSPECTOR