



Appeal Decisions

Site visit made on 27 May 2020

by Nick Fagan BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 01 July 2020

Appeal Refs: APP/D1780/C/19/3225973 & 3225974 59 Burgess Road, Southampton SO16 7AL

- 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 Mrs Mahreen and Mr Jamil Akbar respectively against an enforcement notice issued by Southampton City Council.
 - The enforcement notice was issued on 20 March 2019.
 - The breach of planning control as alleged in the notice is without planning permission, construction of a raised bank and retaining wall as identified on the plan attached.
 - The requirements of the notice are to:
 - (i) Remove the raised section of land adjacent to the boundary with 3 Burgess Gardens (as identified on the plan attached);
 - (ii) Remove the retaining wall as identified on the attached plan;
 - (iii) Restore the land level to the level it was prior to the bank being created;
 - (iv) Remove all resultant materials.
 - The period for compliance with the requirements is 28 days.
 - The appeal is proceeding on the ground set out in section 174(2)(b) of the Town and Country Planning Act 1990 as amended.
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The Notice

1. The description of the matters alleged are referenced by identification on the attached plan. The plan denotes the location of a 'retained wall' along the northern part of the boundary to 3 Burgess Gardens. This is clearly a typographical error and should read 'retaining wall'. It also identifies a cross-hatched area; neither the allegation nor requirements expressly refer to this. However, requirement (i) does refer to an area of land adjacent to the boundary with 3 Burgess Gardens (as identified on the plan). This would correspond with the cross-hatched area on the plan. I do not consider any uncertainty arose and I could correct the allegation to refer to this cross-hatched area on the plan.
2. Requirement (iii) requires the land to be restored to the land levels prior to the bank being created. Prior to the construction of the alleged raised bank, the land profile was a bank that sloped regularly upwards from the garden to the northern boundary of the site. For clarity, I intend to correct the wording of requirement (iii) to require the land to be restored to its levels prior to the breach. Requirement (i) is superfluous as the requirement to remove the raised section of land next to 3 Burgess Gardens would be achieved by compliance with requirement (iii) in any event. I intend to delete it and re-order the requirements.
3. I note the appellants' concerns about adjacent ground levels potentially collapsing. The notice can do no more than require the levels to be restored to

their original levels prior to the breach – i.e. the level and profile that existed prior to the alterations being made. I intend to vary the requirements to reflect this.

Decisions

4. It is directed that the enforcement notice be varied by:

- removing reference in the allegation and plan to a “retaining wall” and replacing it with “retaining structure”;
- replace reference in the allegation to “on the plan attached” with “on the cross-hatched area of the plan in the north west corner of the site”; and
- by deleting the requirements of the notice and replacing them with the following requirements: *“(i) Restore the land level to the level it was prior to the breach; (ii) Remove the retaining structure; and (iii) Remove all other material from the site.”*

Subject to these variations the appeals are dismissed and the enforcement notice is upheld.

Preliminary Matters

5. S171B of the Act sets out the time limits within which the Council can take action, the period of four years being the applicable period where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations, as is alleged here.
6. The appellants refer to loss of privacy as a result of the height of some of the adjoining land. Although I understand the points they make they are irrelevant to the consideration of this appeal, the relevant issue being whether or not the ground levels have been altered on the appeal site as set out in the enforcement notice.
7. The appellants state that there is no planning breach. This is a matter more appropriately addressed under ground (c) – that no breach of planning control has occurred. However, they do not elaborate further on why the matters alleged should not be found to be development or if they are development, why they consider there is no breach of planning control. The appeal is only brought under ground (b) and I have determined the appeal on this basis.

Reasons

8. Ground (b) is that the matters identified in the notice have not occurred. The onus is upon the appellants to demonstrate, on the balance of probability, that the matters alleged in the notice have not occurred as a matter of fact.
9. The Council has provided photographic evidence taken within the last four years during site visits by Council officers that clearly shows the original slope of the rear garden up to the northern boundary fence.¹ The land adjacent to this boundary is very different now.

¹ In Appendix C i of its appeal statement

10. There is a flat raised section in the north west corner of the garden adjacent to the boundary with 3 Burgess Gardens and the house to the north annotated as All Saints Lodge on the OS map attached to the Notice.
11. It is clear from the photos in Appendix C i that the profile of the garden in this area was not like it currently is. Indeed, there was a large mature tree situated in the north west corner of the garden.
12. These photos show that the garden sloped uniformly up to the northern boundary fence in the form of a bank. The rest of this bank to the east of the above raised area has been drastically reduced in height leaving a sheer earth wall, which has been secured in place by sheets of plywood propped up by timber struts. Given the current weathering of this timber it appears that this is the same timber as shown in Photo 2 of the Council's Appendix C iii.
13. Photos 1 and 2 in Appendix C i clearly show the original slope of the ground. For these reasons I conclude that a raised bank has been constructed that is markedly different in profile to that which existed before the earth moving occurred, and that the earth to the rest of the northern boundary has been drastically lowered necessitating the exposed vertical earth face to be propped up by timber boarding. These works have, on the balance of probability, occurred. The appeal on ground (b) therefore fails in this regard.
14. The appellants state that there has always been a raised bank at the back of the garden. It was not possible during my visit to see a retaining wall as alleged in the notice's requirements and documented in Photo 3 of the Council's Appendix C iii because of the quantity of earth in this area and extent of vegetation at present, but it seems very likely given the evidence in this photograph that some form of retaining structure exists. The appellant has not provided any substantive evidence to demonstrate otherwise, on the balance of probabilities. I do not accept that its location is not clearly defined on the plan. However, I consider it would be better described as a 'retaining structure' rather than 'retaining wall' in both the allegation, requirements and on the plan.
15. I consider the Notice would be made clearer by simply amending it to the wording as set out in paragraph 4. There is no reason why the profile of the previous bank in this area cannot be restored.

Conclusion

16. For the reasons given above I conclude that the appeals should not succeed. I uphold the enforcement notice with the above variations.

Nick Fagan

INSPECTOR