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## Appeal Decision

Site visit made on 28 July 2020

**by S Hanson BA (Hons) BTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 19 August 2020**

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**Appeal Ref: APP/X3405/C/19/3241806**

**25 Surrey Close, Cannock, Staffordshire WS11 8UF**

- 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 Roger Wyles against an enforcement notice issued by Cannock Chase District Council.
  - The enforcement notice was issued on 25 October 2019.
  - The breach of planning control as alleged in the notice is without planning permission, the regrading of the rear garden to form two tiers.
  - The requirements of the notice are:
    1. Erect a 1.8 metre high fence at the edge of the top patio area marked by a green line on the attached plan. For the avoidance of doubt the fence shall contain a gate to access the lower patio area.
    2. Reduce the level of the lower patio area marked with a black hatched area on the attached plan by 0.3 metres to result in a rear fence height of 1.8 metres when measured from the inside of the lowered patio area hatched black on the attached plan.
    3. Remove from the land all building materials and rubble arising from compliance with the requirements above.
  - The period for compliance with the requirements is 4 months.
  - The appeal is 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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### Decision

1. The enforcement notice is quashed.

### The appeal on ground (c)

2. The ground of appeal is that the matters alleged do not constitute a breach of planning control. The onus of proof in ground (c) is upon the appellant, and the test of the evidence is on the balance of probability.
3. A breach of planning control comprises the carrying out of development without the required planning permission. The meaning of development is set out in s55(1) of the Act which defines the two limbs of development, namely operational development, which means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change of use. There is a further definition of "building operations" as s55 (1A) includes demolition, rebuilding, structural alterations or additions, and other operations normally carried on by a person in business as a builder.
4. The Council considers the works to be unauthorised because the works amount to engineering operations which have been carried out to regrade the rear

garden to form two tiers. However, whether engineering operations have been carried out or not, works which might ordinarily be granted by Article 3 of the GPDO are excluded by condition 6 of the original planning permission for the dwelling<sup>1</sup>. This condition removed permitted development rights for, amongst other matters, the provision within the curtilage of the dwellinghouse of a hard surface for any purpose incidental to the enjoyment of the dwellinghouse.

5. The appellant provides that, at the time of the development, he was not aware of the restricted development rights for the property. However, he provides no argument as to why he considers that the alleged development does not constitute a breach of planning control.
6. Based on the evidence before me, the creation of the two tier patio area to the rear of the property does not benefit from permitted development rights. Express planning permission is required for the development and it has not been obtained. The appeal on ground (c) must fail.

### **The appeal on ground (f)**

7. 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. In this regard the notice requires the erection of a 1.8 metre fence at the edge of the top patio and the reduction in the level of the lower patio by 0.3 metres, to result in a rear fence height of 1.8 metres when measured from the inside of the lowered patio area.
8. Given that the purpose of the notice is to remedy any harm to amenity resulting from the breach, the requirement to reduce the lower patio by 0.3 metres cannot be excessive because it goes no further than remedying the breach. I noted, at the time of my site visit, that works to lower the ground level on the lower tier had been carried out to partially comply with the notice.
9. However, the requirement to erect a 1.8 metre fence across the garden, with a gate for access to the lower level, is unspecific and its purpose has been questioned by appellant. There are no dimensions provided for the gate or a requirement for the gate and fence to be of any solid construction to restrict views towards the neighbouring property. There are also no requirements concerning whether the gate should remain closed when not being used for access.
10. Section 173(3) of the 1990 Act requires an enforcement notice to specify the steps to be taken, in this case, to remedy the injury to amenity which has been caused by the breach. Furthermore, established case law<sup>2</sup> imparts that a notice must tell a recipient of it fairly what he has done wrong and what must be done to remedy the breach or harm to amenity.
11. It is likely that what the LPA intended was for the fence and gate to be of solid construction in order to prevent overlooking of the neighbouring property, with the gate being kept closed when the upper patio is in use. However, without these specifications the requirement would fail to achieve what appears to be its only purpose. The notice does not therefore tell the recipient clearly what needs to be done to remedy the harm to amenity.

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<sup>1</sup> CH/14/0285 Erection of 2 pairs of semi-detached 2 bedroom bungalows. Land to the rear of ASDA, Surrey Close, Cannock. Dated 22 October 2014

<sup>2</sup> *Miller-Mead v Ministry of Housing and Local Government* [1963] 1 All ER 4592

12. Although wide powers to correct a notice are available to me under s176(1) of the Act, they only apply if I am satisfied that the correction will not cause injustice to the appellant or to the Council. In this instance, were I to amend the requirements of the notice, such action would cause injustice to the appellant because the requirements would necessarily be more onerous, and without the necessary specification the notice does not achieve its purpose. The notice is therefore flawed, but compliance with the notice as it stands would result in deemed planning permission by virtue of section 173(11) of the Act. This would be unsatisfactory in planning terms. Since the notice is flawed and beyond correction, the appropriate action is to quash it as invalid.

### **Conclusion**

13. For the reasons given above, I conclude that the notice is flawed and beyond correction. Accordingly, the notice will be quashed.
14. Should the Council wish to continue to pursue enforcement action, it may consider doing so by means of a replacement notice framed in the proper terms, having regard to the 'second bite' provisions of section 171B(4)(b) of the Act.

*S Hanson*

INSPECTOR