



Appeal Decision

Site visit made on 5 August 2020

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 August 2020

Appeal Ref: APP/Q0505/C/19/3236990

Land at 107 Argyle Street, Cambridge, Cambridgeshire CB1 3LS

- 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 Stephen Turvill against an enforcement notice issued by Cambridge City Council.
 - The enforcement notice, numbered EN/0194/17, was issued on 3 September 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised erection of a boundary fence structure (outlined in blue on attached plan for identification purposes) and the raising of ground levels in the rear garden (outlined in yellow on attached plan for identification purposes) in excess of parameters of Permitted Development rights, along with the erection of a metal framed Perspex canopy to the side of the premises not in accordance with permitted development conditions (outlined in green on attached plan for identification purposes only) at the Land.
 - The requirements of the notice are:
 - i. Either Permanently remove the rear boundary fence structure (outlined in blue on attached plan for identification purposes only) in its entirety, OR Permanently Reduce the height of the rear boundary fence structure (outlined in blue on attached plan for identification purposes only) to no higher than parameters as laid out in the Town and Country Planning (General Permitted Development) (England) Order 2015 and
 - ii. Either Permanently remove the additional ground levels laid down in the rear garden to the original ground level in the rear garden (outlined in yellow on attached plan for identification purposes) OR
 - iii. Permanently Reduce the height of the ground level in the rear garden (outlined in yellow on attached plan for identification purposes only) to no more than the parameters as laid out in The Town and Country Planning (General Permitted Development) (England) Order 2015 and
 - iv. Permanently Remove the metal framed Perspex canopy structure (outlined in green on attached plan for identification purposes only) from the premises and
 - v. Permanently remove all resulting materials from the Premises.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act as amended.
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DECISION

1. The enforcement notice is quashed.

REASONS

Grounds of appeal

2. The appeal was first made on grounds (a), (b) and (g). During correspondence with the Planning Inspectorate the appellant confirmed on 1 December 2019 he was not pursuing an appeal on ground (b) but that he wished to appeal on ground (c) and information was submitted to support this ground.
3. I will determine the appeal on this revised basis, noting that the Council addressed grounds (a), (c) and (g) in its statement and therefore has not been prejudiced by the revision to the appellant's case.

The Land

4. 107 Argyle Street is a semi-detached dwelling that has been extended at the back. It has a side passageway, now covered by a canopy and an enclosed rear garden that has been raised and landscaped. There is a slight fall in level from front to back. The attached dwelling is number 105 Argyle Street, while to the south is Romsey Mews, a short two storey terrace of flats with access from a walkway running along the side boundary to number 107. At the rear of the appeal property is 30 Romsey Mews, a detached dwelling that has a common boundary with number 107.
5. In April 2018 an application was made retrospectively for development described as "raised ground levels in rear garden and rear boundary fence in excess of permitted development parameters" (ref 18/0587/FUL). The Council refused planning permission on 7 August 2019. An appeal against this decision was dismissed by a decision dated 21 November 2019¹.
6. I carried out an accompanied site visit when agreed measurements were taken of the height of the boundary structures from within the garden and from the Romsey Mews side. These measurements were subsequently confirmed in writing with the main parties. The Council's officer explained from where he measured the increase in ground levels (the base level is now covered in pebbles).

Enforcement notice

7. With reference to section 173 of the 1990 Act an enforcement notice shall state the matters which appear to the local planning authority to constitute the breach of planning control and shall specify the steps which the authority require to be taken in order to achieve wholly or partly the purpose of the notice. In other words, the notice should tell the recipient fairly what he has done wrong and what he must do to remedy it. Importantly the use of the word 'specify' in the statutory provision relating to the requirement(s) denotes a greater degree of particularity than the word 'state' for the allegation, which is very relevant given the criminal liability that attaches where an enforcement notice is not complied with.
8. The enforcement notice in the alleged breach of planning control identifies three matters which the Council considers are unauthorised. The plan attached to the notice indicates the position and extent of:

¹ Appeal ref APP/Q0505/D/19/3236008

- i. the fencing that has been erected along the side and rear boundaries to the back garden,
- ii. the raised land levels of the landscaped rear garden, and
- iii. the canopy attached to the southern flank wall of the dwelling.

The notice does not include the section of fencing along the side boundary adjacent to the dwelling, to which the canopy is affixed.

9. The rear boundary fence structure and the raising of ground levels are said in the allegation to be in excess of the parameters of permitted development rights. The reasons for issuing the notice provide no further explanation. The requirements in paragraph 5 give two options for the boundary fence structure and the ground levels, as set out in the bullet points above. In each case one of the options is based on the parameters as laid out in the Town and Country Planning (General Permitted Development) (England) Order 2015 (*subsequently referred to as the GPDO in this Decision*). The parameters are not specified.
10. The canopy is stated not to be in accordance with permitted development conditions. The reasons explain that this is because it is not in matching materials to the host structure, although the relevant Part and Class of the GPDO are not identified.
11. Therefore, more particularly in the case of the fence and the ground levels, an understanding of the parameters of the GPDO are essential for the recipient of the notice to know what he has done wrong and what he has to do to remedy the alleged breach.
12. The GPDO through article 3 grants planning permission for the classes of development described as permitted development in Schedule 2, subject to certain provisos. For the purposes of this appeal Part 1 of Schedule 2 concerns development within the curtilage of a dwellinghouse. Part 2 concerns minor operations, including boundary treatments.

Ground levels

13. The appellant does not dispute that ground levels have been raised. The focus of his case is that 'the ground height rise is within the permitted 300 mm.' The Council considers that a ground raising of approximately 360 mm has taken place in the rear garden that is in excess of permitted development parameters. The parties were asked to explain where the figure of 300 mm had come from, with a view to identifying and confirming the specific provisions in the GPDO relevant to the works and to the requirement in section 5 of the enforcement notice.
14. The possible applicable Classes of the GPDO are:
 - Class A of Part 1 to Schedule 2 permits the enlargement, improvement or other alteration of a dwellinghouse. Development is not permitted by Class A if it would consist of or include the construction or provision of a verandah, balcony or raised platform (A.1(k)(i)).
 - Class E of Part 1, in summary, permits buildings, enclosures or other structures incidental to the enjoyment of the dwellinghouse as such.

Development is not permitted by Class E if it would consist of or include the construction or provision of a verandah, balcony or raised platform.

- Class F of Part 1 permits the provision of a hard surface for any purpose incidental to the enjoyment of the dwellinghouse as such, or the replacement in whole or in part of any such surface, subject to the Conditions set out in F.2.

For the purposes of Part 1 “raised” in relation to a platform means a platform with a height greater than 0.3 metres².

15. In the alternative, the raising of ground levels could be assessed in its own right, rather than being considered as falling within or facilitating a Class of the GPDO.
16. The Council explained that it had taken a pragmatic view that the raising of ground levels in this instance has been akin to that under Class E of Part 1 with reference to a platform for the incidental use to the dwellinghouse. In the Council’s view the definition of a platform does not stipulate a void underneath, should not in practical terms be limited to garden decking for example and includes raising of land up to 0.3 m. The work was not considered to be an extension of a building under Class A or a hard standing under Class F.
17. The GPDO, as set out above, includes the meaning of ‘raised’ but does not include a definition of a platform. The Technical Guidance Permitted Development Rights for Householders³, in the context of Class E of Part 1, sets out what is understood by a verandah and a balcony and also states, with reference to the GPDO meaning, that a raised platform is any platform that has a height greater than 0.3 m. Garden decking is confirmed to be permitted development under Class E subject to it not exceeding this 0.3 m height and subject to the other limits and conditions in this Class.
18. In my view the meaning of a platform for the purposes of Class E must be understood from the description of that Class. Class E permits ‘buildings, enclosures or other structures’. For the purposes of Class E a building includes any part of a building and any structure or erection but does not include mechanical plant or machinery or any gate, wall, fence or other means of enclosure⁴.
19. At number 107 the garden at the rear of the dwelling was redesigned and landscaped. It appears from photographs submitted by the appellant that the level of all the rear garden was raised by the deposit of materials and then levelled in order to form a solid base and an even surface. Surface materials were applied to complete the work, consisting primarily of ‘Global stone paving – porcelain and artificial grass’, as described on the submitted plan. The work involved remodelling the ground. The resulting new ground/ garden surface forms no part of a building, structure or erection. It follows as a matter of fact and degree that the raising of ground levels falls outside the scope of Class E.
20. The work as a matter of fact and degree was not confined to the provision or replacement of a hard surface, taking into account the increase in ground level

² See section I. Interpretation of Part 1

³ Technical Guidance Permitted development rights for householders, September 2019, Ministry of Housing, Communities and Local Government

⁴ Article 2(1) of the GPDO

and the inclusion of areas of artificial grass. The raising of ground levels is not within the scope of Class F. There were no alterations to or extension of the dwelling house and hence the work did not fall within Class A.

21. The issue therefore becomes whether the raising of ground levels as a matter of fact and degree was an act of development comprising an engineering or other operation. That indicates the requirement to reduce the ground level to no more than the parameters as laid out in the GPDO has no relevance and should be deleted.

Boundary structure

22. Class A of Part 2 permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. Paragraph A.1 sets out the circumstances when development is not permitted by Class A. Of particular relevance to this site, a means of enclosure is not permitted if its height exceeds 2 metres above ground level. Where maintenance, improvement or alteration is involved the height of the existing structure has to be taken into account. There is no definition of ground level for the purposes of Class A of Part 2 and the GPDO prescribes no method for measuring the height when the ground is uneven⁵. Any breach of height limits would take the whole fence or other structure outside of the permitted development right.
23. There is no doubt from the representations and as confirmed on the site visit that new boundary fencing was erected as a means of enclosure as part of the redesign and works to the garden. Therefore the enforcement notice correctly identifies permitted development rights as the relevant reference for determining whether there has been a breach of planning control. This reference is in the alleged breach of planning control, rather than the reasons for issuing the notice. Following on from the wording of the allegation the Council has provided for an option in the requirements that relies on the GPDO, a matter to which I will return below.

The canopy

24. The reasons for issuing the notice explain that the metal framed Perspex canopy structure does not comply with permitted development conditions because it is not in matching materials to the host structure.
25. The canopy extends along most of the length of the side elevation to the original dwelling. The canopy is slightly curved and looks to be made of perspex with metal supports and rods. However, the appellant has confirmed that the material is in fact recycled maintenance-free plastic. The misdescription would need to be corrected in the description of the alleged breach of planning control and the requirement.

Corrections to the notice

26. Section 176(1) of the 1990 Act provides the power to correct any defect, error or misdescription in an enforcement notice provided that the correction will not cause injustice to the appellant or the local planning authority.

⁵ The provision in article 2(2), which allows for the measurement to be taken from the highest adjacent ground level, applies only to buildings, plant and machinery. Article 2(1) confirms that a wall, fence or other means of enclosure is not a building for the purposes of Class A of Part 2 in Schedule 2.

27. The considerations set out above show that the description of the alleged breach of planning control requires correction. The reference to "in excess of parameters of Permitted development rights" should be omitted, at the least in respect of the raising of ground levels, on the basis that work is concluded to be an act of development. The description of the canopy should be corrected to "a recycled plastic canopy".
28. As a result the alleged breach would read: "Without planning permission, the unauthorised erection of a boundary fence structure in excess of parameters of permitted development rights (outlined in blue on attached plan for identification purposes only), the raising of ground levels in the rear garden (outlined in yellow on attached plan for identification purposes only), along with the erection of a canopy made of recycled plastic to the side of the premises not in accordance with permitted development conditions (outlined in green on attached plan for identification purposes only) at the Land.
29. An important change is that in determining whether the raising of the ground levels amounts to a breach of planning control the test would not necessarily be same as previously, which could affect the respective cases on the ground (c) appeal.
30. A matter raised with the main parties concerned the wording of the requirements of the notice. The requirement in paragraph 5 of the notice gives two options in relation to the boundary fence structure and to the raised ground levels – either remove the unauthorised development or to modify the development to accord with the parameters as laid out in the GPDO.
31. Consideration of a fallback position under GPDO rights may be appropriate in drafting requirements of an enforcement notice. Therefore to give a choice between total removal of the unauthorised development or a reduction to limits permitted by the GPDO may be appropriate so long as the minimum requirement is able to be specified clearly.
32. The serious concern I have in this case is the lack of specificity in the general reference to the parameters of the GPDO, particularly bearing in mind the extensive content of the GPDO and the range of permitted development rights. There is no direction to the relevant Class and Part of Schedule 2, nor is there a specific reference elsewhere within the notice. The exploration of the nature of the unauthorised development has shown the importance of identifying the specific provision. A recipient needs to know from the enforcement notice itself what he is required to do, rather than having to identify the applicable section of the GPDO and interpret the provisions, which as has been shown above may not be straight forward. The local planning authority has been given the opportunity to provide an amended form of wording but nothing has been forthcoming.
33. By way of illustration with reference to reducing the height of the rear boundary fence structure, the notice should state the required height of the fence, making clear where measurements should be taken from and if the change in ground levels should be taken into account. In the alternative, if the minimum requirement is unable to be specified, consideration would need to be given whether to include such an option in the requirements.
34. As the notice stands, the requirements to remove the rear boundary fence structure and the additional ground levels indicate a purpose of the notice is to

remedy the breach of planning control. However, the local planning authority clearly considered it appropriate and proportionate to include provision in the notice for an element of under-enforcement. For me to delete from the requirements the options of reducing the height of the boundary fence and removing the additional ground levels would cause injustice to the appellant. He would be placed in a worse position than allowed for by the notice as issued and as judged expedient by the local planning authority.

Conclusion

35. For the reasons given above the enforcement notice does not specify with sufficient clarity the alleged breach of planning control and the steps required for compliance. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the 1990 Act as amended since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances the appeal under the various grounds (a), (c) and (g) as set out in section 174(2) of the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered.

Diane Lewis

Inspector