



Appeal Decision

Site visit made on 11 August 2020

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 September 2020

Appeal Ref: APP/D1780/C/20/3247117

Land at 33 Firtree Way, Southampton SO19 8AZ

- 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 George Hayes against an enforcement notice issued by Southampton City Council.
- The enforcement notice was issued on 15 January 2020.
- The breach of planning control as alleged in the notice is without planning permission, changes to existing ground levels in the rear garden.
- The requirements of the notice are: (i) Reinstate the rear garden ground levels to the levels they were prior to the unauthorised works taking place; and (ii) Remove all associated material and soil as a result of requirement (i) from the land.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal succeeds in part and permission for that part is granted, but otherwise the appeal fails and the enforcement notice is upheld as set out below in the Formal Decision.

Ground (a) appeal

Background

1. The appeal site contains a detached bungalow which is currently in the process of being altered and extended following the granting of planning permission¹. The bungalow has a long back garden in which, given the hillside location, the ground levels fall away steeply towards the rear boundary.
2. The bungalow is located in a row of residential properties which are similar in terms of their architectural style, plot size and sloping back gardens. Within its back garden, 31 Firtree Way (No 31) next door has extensive areas of lawn and maturing planting, as well as ornamental ponds. On the other side, 35 Firtree Way (No 35) has a shorter, well-cultivated back garden. Although both gardens are overlooked by neighbouring bungalows, this is from a significant distance. As a result, the occupiers of Nos 31 and 35 could reasonably expect to enjoy good levels of privacy and seclusion in their back gardens.
3. Before the unauthorised works were undertaken, ground levels at the site were probably not dissimilar to those of the adjacent properties. The works have involved significantly raising the ground levels over around ten metres towards the central part of the back garden to form a roughly levelled, raised surface. The raised surface is retained by walls formed of timber sleepers and structural

¹ Council Ref: 18/01783/FUL.

steel set in concrete. The highest part of the retaining walls is around two metres above the pre-existing ground levels. The retaining walls stand well above the ground levels of the raised surface and are topped with trellis adjacent to the common boundaries with Nos 31 and 35. Due to the increased ground levels and an absence of screen fencing adjacent to the common boundaries, when stood on the raised surface it is possible to directly overlook significant parts of the back gardens of Nos 31 and 35 at close quarters. This has considerably and unacceptably eroded the level of privacy previously enjoyed by the occupiers of those properties.

4. The appellant's case is not directed at the entirety of the works. Rather, he has advanced an alternative scheme in which the ground levels together with the retaining wall height would be lowered by around 0.5 metres compared with the 'as built' situation. As this scheme involves modifying the works, it constitutes a part of the development enforced against, for which permission has been sought under the deemed planning application pursuant to ground (a). At s177(1) (a), the Act provides for granting planning permission in respect of the whole or part of the breach described in the notice. Accordingly, it is relevant to consider whether permission should be granted for the alternative scheme.

Main Issue

5. The main issue in this ground of appeal is consequently the effect of the alternative scheme on the living conditions of occupiers of adjoining residential property, having regard to privacy and outlook.

Reasons

6. The proposed lowering of ground levels alone would not restrict overlooking of the adjoining back gardens from the raised surface. However, it is also proposed to erect screen fencing with an overall height of around 1.8 metres above the raised surface level, adjacent to the common boundary with No 31. At such a height, the screen fencing would be above the eye level of most persons, thereby substantially restricting inter-visibility between persons stood on the raised surface and those in No 31's back garden. The planting of a hedge on the inner side of the fencing would also assist in limiting opportunities for overlooking, as it would effectively make part of the raised surface closer to the boundary with No 31 inaccessible. Also, any overlooking of the end part of No 31's back garden would then largely be at an oblique angle. Provision of the screen fencing and planting could be secured by a suitable planning condition which, after seeking the views of both main parties, could also require such fencing to be provided adjacent to the common boundary with No 35, for substantially similar reasons to those set out above. Therefore, the alternative scheme would overcome the harm to the privacy of the adjoining occupiers caused by the works.
7. The raised surface ground levels in the scheme would still be considerably higher than that of the adjoining back gardens. In consequence, the screen fencing proposed would be significantly taller than 1.8 metres when viewed from those gardens. The overall height of the screen fencing would also be considerably in excess of that of pre-existing enclosures on the common boundaries. However, at around ten metres long the screen fencing would be of limited length relative to the overall extent of No 31's back garden. It would also be situated well away from No 31's rear elevation and raised terracing,

beyond a detached garage and at a much lower ground level. As a result, the overall height and length of the screen fencing would only be apparent from a relatively limited part of No 31's extensive back garden. Moreover, there is already significant maturing planting of notable height within No 31's back garden adjacent to the common boundary, in the vicinity of the raised surface. Such planting would provide further assistance in softening the appearance of the screen fencing.

8. The above factors would all significantly offset the visual impact of the screen fencing as it is perceived from the back garden of No 31. Additionally, the presence of the screen fencing would considerably limit any great sense of persons on the raised surface being at a significantly higher level than No 31's back garden. Therefore, the screen fencing would not give rise to an appreciably increased sense of enclosure compared with the pre-existing situation nor would it appear as an unduly oppressive or overbearing feature when viewed from No 31's back garden. Similar considerations also apply in respect of the effect of screen fencing on the outlook enjoyed by occupiers of No 35. It follows that the scheme would not unacceptably erode the levels of outlook currently enjoyed by the adjoining occupiers.
9. As a result, the alternative scheme would not cause unacceptable effects on either the privacy or outlook enjoyed by occupiers of adjoining residential property. This accords with criterion in Policy SDP 1 of the City of Southampton Local Plan Review (LP), as residents' amenity would not be unacceptably affected. As the scheme would not impact on surrounding uses and local amenity, it also accords with criterion in LP Policy SDP 9. For similar reasons, the scheme accords with criterion in Policy CS13 of the Southampton Core Strategy Development Plan Document. Moreover, as outlook and privacy would be maintained for neighbouring occupants in their private gardens, the scheme is consistent with advice in paragraph 2.2.1 of the Council's Residential Design Guide Supplementary Planning Document (SPD). LP Policy SDP 7 has limited relevance to privacy and outlook, being concerned with the effect on the character and appearance of the area, the latter not being part of the Council's reasons for issuing the notice.

Conditions

10. I have imposed a condition requiring the alternative scheme works to be undertaken within six months, with further schemes for erection of screen fencing adjacent to the common boundaries and for planting a native hedge to be submitted to the Council within two months and implemented within four months of their approval. This condition is necessary to safeguard the privacy of the occupiers of adjoining residential property.
11. The condition is drafted in the form set out below because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the alternative scheme and the subsequent approval and implementation of the further schemes, because development has already taken place. The purpose and effect of the condition is therefore to ensure that the works in the alternative scheme may only remain if the appellant complies with its requirements.
12. The Council also requested that a condition be imposed requiring their approval of the structural stability of the retaining walls and surface water drainage.

However, it is not clear why this condition is necessary, having regard to the information on such matters provided with the appeal, which I am given to understand had also previously been supplied to the Council. Those matters were not in the Council's reasons for issuing the notice and were not part of their case at appeal. Therefore, I have not imposed the suggested condition.

Conclusion on ground (a)

13. Although the works have unacceptably affected the privacy of occupiers of adjoining residential property, the alternative scheme would not result in such adverse effects and would also safeguard the outlook of the adjoining occupiers. The alternative scheme accords with the Development Plan and is consistent with the SPD. Therefore, the ground (a) appeal succeeds in part, insofar as the alternative scheme is concerned.

Ground (f) appeal

14. As the notice is being upheld in part, it is necessary to consider the remaining grounds of appeal. The ground (f) appeal is that the requirements of the notice are excessive, having regard to its purpose.
15. The two purposes which the notice requirements can seek to achieve are set out in s173 (4) of the Act. The first of those purposes is to remedy the breach of planning control that has occurred, including by restoring the land to its condition before the breach took place. The second is to remedy any injury to amenity caused by the breach. The Council did not specify whether it was one or both of the above purposes that the notice sought to achieve. However, the notice requirement is for the back garden ground levels to be reinstated to what they were prior to the works being undertaken. It did not for example, seek a lesser reduction in ground levels in the back garden, or other works such as landscaping. Therefore, the purpose of the notice must be to remedy the breach by restoring the site to its condition before the breach took place.
16. The nature and extent of the works attacked by the notice is readily apparent; from the appellant's ground (a) submissions, he clearly understands the scale of the works. Moreover, I am given to believe that the appellant owned the site prior to the works being carried out. Therefore, he is likely to be the person best placed to know what the pre-existing ground levels were. As a result, in practice the appellant can have little doubt about exactly what is required to be done to achieve compliance. The requirement wording is similar to that commonly used in enforcement notices. In the absence of clear details of the pre-existing ground levels, a more explicit requirement could run the risk of over-enforcement. Therefore, the requirement is sufficiently clear and precise in order to achieve the purpose of remedying the breach.
17. Whilst materials recovered from the demolition of pre-existing structures in the back garden might have been incorporated into the works, they now form an integral part of the breach. As a result, it is entirely appropriate to require the removal of such materials to achieve the purpose of the notice.
18. I am mindful that the Town and Country Planning (General Permitted Development) (England) Order 2015, Article 3, Schedule 2, Part 1 grants planning permission for certain development within the curtilage of a dwelling, including incidental buildings and hard surfaces at Classes E and F. However,

there was no firm evidence that development in those Classes would be other obvious alternatives to the notice requirements.

19. Therefore, I find that the notice requirements do not exceed what is necessary to achieve the purpose of remedying the breach. The ground (f) appeal fails.

Ground (g) appeal

20. The ground of appeal is that the time for compliance in the notice is too short.
21. The remedial works are likely to involve re-profiling part of the back garden. This would be a relatively small-scale and straightforward operation for the appellant's firm, which I understand specialises in construction and landscaping works. Such works are unlikely to be particularly complex or to require significant structural support. There is vehicular access at the side of the bungalow, the back garden is of generous size and although sloping, it is not excessively steep. As a result, it is not clear why items of plant and equipment normally used in such works, such as a mini-digger, could not be brought to the site as opposed to carrying out the works entirely by hand.
22. Similarly, the above factors do not indicate why the removal of materials or the bringing onto the site of any new materials required to restore the pre-existing ground levels would be unusually difficult. Whilst periods of inclement weather could make the works more challenging, I am not convinced that this would necessarily correspond to an unduly lengthy delay in completion. Moreover, as there currently appears to be a hiatus in terms of working on the bungalow, the works are unlikely to conflict with other construction activity at the site. As a result, I estimate that the remedial works are unlikely to take more than a few weeks at most to complete.
23. Given the above factors, in my view the three-month period specified in the notice strikes the right balance between remedying the planning harm caused whilst still allowing sufficient time for remedial works to be completed and is not unreasonably short. Against that background, extending the time for compliance to twelve months as suggested by the appellant would simply perpetuate the breach and its associated planning harm.
24. Accordingly, the ground (g) appeal also fails.

Conclusion

25. For the reasons given above I conclude that the ground (a) appeal should succeed in part only and I will grant planning permission for one part of the matter the subject of the enforcement notice, but otherwise I will uphold the notice and refuse to grant planning permission on the other part. The requirements of the upheld notice will cease to have effect so far as they are inconsistent with the permission which I will grant by virtue of s180 of the Act.

Formal Decision

26. The appeal is allowed in part 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 changes to existing ground levels in the rear garden, to the extent shown on drawing number 20.01.101 dated February 2020, on land at 33 Firtree Way, Southampton SO19 8AZ, subject to the condition in the attached Schedule.

27. The remaining part of the appeal is dismissed, the enforcement notice is upheld and planning permission is refused in respect of the application deemed to have been made under Section 177(5) of the 1990 Act for the development already carried out, namely the changes to existing ground levels in the rear garden on land at 33 Firtree Way, Southampton SO19 8AZ.

Stephen Hawkins

INSPECTOR

CONDITION SCHEDULE

- 1) Unless within six months of the date of this decision, the ground levels in the back garden have been reduced by 0.5 metres to accord with the proposed levels shown on drawing number 20.01.101 dated February 2020 (the approved drawing) and; unless within two months of the date of this decision schemes for:

- a) The erection of screen fencing for the whole length of the raised ground levels adjacent to the boundaries with 31 and 35 Firtree Way; and
- b) The planting of a hedge of native species adjacent to the fencing including a full schedule of plants, details of the mix, species and density of the plants together with cultivation proposals for their maintenance and management;

are submitted in writing to the Local Planning Authority for approval; and unless the approved schemes under (a) and (b) above are implemented within four months of the Local Planning Authority's approval, (or, in the case of the scheme approved under (b) above, if the Local Planning Authority's approval is given after the end of the planting season, implemented no later than the end of the first planting season following that approval); the back garden ground levels shall be reduced to the ground levels that existed prior to development taking place and all associated material and soil shall be removed from the site until such time as the ground levels in the back garden have been reduced by 0.5 metres to accord with the proposed levels shown on the approved drawing and the schemes required at (a) and (b) above have been approved by the Local Planning Authority and implemented.

If no schemes in accordance with this condition are approved within six months of the date of this decision, the back garden ground levels shall be reduced to the ground levels prior to development taking place and all associated material and soil shall be removed from the site until such time as the schemes at (a) and (b) above approved by the Local Planning Authority are implemented.

Upon implementation of the approved scheme specified in this condition at (a) above, the screen fencing shall be maintained in accordance with the approved details.

Any plants comprised in the planting scheme approved under (b) above which within a period of 5 years from the date of planting are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.