



Appeal Decision

Site visit made on 28 October 2020

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 November 2020

Appeal Ref: APP/X1165/C/19/3242581 & 3242582

Land at 42 Tamar Avenue, Torquay

- 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 Act).
 - The appeals are made by Mr Martin McHugh and Mrs Theresa McHugh against an enforcement notice issued by Torbay Council.
 - The enforcement notice was issued on 7 November 2019.
 - The breach of planning control as alleged in the notice is without planning permission:
 - i. The construction of a retaining wall in the approximate position shown with a thick blue line on the attached plan;
 - ii. Back-filling the void created behind the said retaining wall to level that part of the rear garden shown hatched green and the formation of a patio (in the location shown hatched black) on part of the level garden area so created;
 - iii. The construction of a fence surrounding the newly-levelled garden area (as shown on the photographs attached to this notice)("The unauthorised development")
 - The requirements of the notice are:
 - 5.1 Remove:-
 - a. The unauthorised retaining wall;
 - b. The materials used to level the rear garden;
 - c. All fencing on the boundary with #40 Tamar Avenue which is higher than 2m above natural ground level (that is, the level of the ground before the Unauthorised Development took place); and
 - d. That part of the patio area constructed on artificially raised ground.
 - 5.2 Remove from the land all building materials and rubble arising from compliance with requirements 5.1 above and restore the land to the condition it was in before the unauthorised development took place.
 - The period for compliance with the requirements is 9 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decision

1. It is directed that the enforcement notice is corrected by:
 - Deletion of the plan and its substitution by the plan attached to this decision;
 - Deletion of the allegations set out in section 3 paragraphs 'i', 'ii' and 'iii' and their substitution in with:-

- I. The construction of a retaining wall in the approximate position shown with a thick blue line on the attached plan and the back-filling of the void created behind it to level the area of the rear garden shown coloured green on the same plan.
- Deletion of the requirements set out in section 5 paragraphs 5.1 'c' and 'd' and 5.2.
 - At the end of requirement 5.1 'b' the addition of the following words "restore the land to its condition before the breach took place."
2. Subject to the corrections, the appeals are allowed and the enforcement notice is quashed.

The Enforcement Notice

3. There are 3 elements to the alleged unauthorised developments each of which is a form of operational development. Upon visiting the site and going through the submitted evidence, it became clear to me that the way in which the allegations have been worded, does not described these entirely clearly. The requirements are also imprecise and would need to be re-worded to reflect the corrected allegations in a clear way. It has been held that an enforcement notice has to tell the recipient of a notice fairly what they have done wrong and what they must do to remedy it.
4. I have powers under the provisions S176(1)(a) & (b) of the 1990 Act as amended, to correct or vary any terms of an enforcement notice if I am satisfied that this would not cause injustice to the appellant or the Council. Furthermore, it has been held that where possible it is a duty of the Inspector at appeal to get a notice in order by using those powers.

The allegations

5. From what I saw on site it appeared to me that there are 2 retaining walls which are distinct from each other, albeit they are close to one another.
6. First of all, there is a wall which runs parallel with but separated from the back wall of the house by a paved area. This retains some land behind it. Another higher wall runs southwards along the boundary with the garden of the adjoining dwelling at No 40. I could see that there is a small but noticeable gap between this structure, with no obvious structural ties. The higher wall forms part of what I could see is a block-work structure that in part provides an edge to the remaining pavements which are part of the patio. Photographs submitted in evidence show that this blockwork had previously formed a complete rectangular frame around the paved surface of the patio.
7. Where part of this structure has been removed, it has revealed that it is several blocks higher than the first, lower retaining wall and is set back from it. From my inspection from the garden of No 40, I could also see through gaps in the fencing, that there has been a build-up of block work towards the rearmost part of the appeal site where seats have been constructed again from rendered blocks which protrude above the surface of the patio. In my opinion, as a matter of fact and degree, these elements are not distinct from one another as it appears that the wall on the boundary, the rectangular frame around the patio as well as the raised seats and a fire pit are part of one structure. They are all part and parcel of what can loosely fall within the Council's description of

the “formation of a patio” but there is also an element of further retention of the land given the additional degree of build-up to the surface level of the patio, that I could see.

8. The construction of the fence is clarified by the photographs that are attached to the notice and that is the third element of the allegation which is more straightforward.
9. These different developments would be clearer and the whole notice more logical if they were separated into clearly, separate allegations. Although I am not turning to matters of timing of the completion of the developments, which relates to ground (d), the staged construction I describe is consistent with the appellant’s statements that they carried out some work in 2015 and that it was not until 2017 that they constructed the patio and erected the fence. The Council also refers to the works being undertaken in 2 stages.
10. The blue line on the plan does not accurately reflect the staged way that the developments have been carried out or the distinction between the retaining wall and the other wall that is part of the patio structure. Furthermore, the notice limits the extent of the patio only to the hatched black area whereas to accurately reflect the revised allegation, if a plan is needed it should cover the whole area covered not only by the remaining pavements that are part of the patio but also the other integral elements. However, it is clear that the green area covers all land that has been altered in level albeit that in my view, the Council did not describe it correctly. The appellants have clearly understood what developments are subject to the notice and what had been done wrong.
11. In my view, this part re-ordering of the allegation does not extend the scope of the notice but would merely clarify the extent of each part of what, overall, the Council has raised concerns about. I can potentially correct the allegation and the plan to more accurately reflect the multiple breaches of planning control without causing injustice to the Council or the appellant.

The requirements

12. Requirements 5.1 ‘c’ and ‘d’ appear to be aimed at allowing some of the alleged unauthorised developments to remain but without providing a precise definition of what form they could take after compliance. At face value, the notice in respect of these requirements therefore has the purpose, with reference to S173(4)(a) and (b), of remedying injury to amenity rather than remedying the alleged breach. As such, those parts allowed to remain would be deemed to benefit from planning permission by reason of S173(11) of the Act, once compliance is achieved. These requirements are worded by reference to unspecified levels and extents and do not therefore adequately explain what the recipients of the notice need to do to comply.
13. There is however a further, catch-all requirement at paragraph 5.2. By using the words “restore the land to the condition it was in before the Unauthorised Development took place” appears to conflict with the above interpretation. Requirements 5.1 ‘c’ and ‘d’ appear to allow the retention of some elements that were not part of the “condition” of the site prior to the unauthorised development taking place. The notice is therefore unclear and contradictory.
14. It is common practice to require the restoration of land or buildings to their condition prior to when the breach took place. Whilst that in itself may not be

entirely precise, it is accepted that it is sometimes the best that can be done particularly where the requirements of a notice have the purpose of remedying the breach of planning control. I cannot extend requirements 5.1 'c' and 'd' in that way because they do not seem at face value to have that purpose. That would broaden the notice which would cause injustice for the appellants, leaving them potentially worse off through this appeal process.

15. If the Council has intended for parts of these developments to remain as would seem the case, the notice should have clearly described what those remaining parts can be. Given that I do not have an appeal under ground (a) to consider, I cannot consider the planning merits in order to assess to what extent any parts of those developments are appropriate to retain. I will therefore delete requirements 5.1 'c' and 'd' from the notice and it is also necessary to delete the corresponding parts of the allegations. This would not cause injustice to the appellants as it reduces the scope of the notice. Furthermore, this does not fetter the Council's ability to consider taking further enforcement action against those developments within the further 4 year period specified in S171B (b). It is also necessary to remove 5.2 due to the ambiguity it causes.
16. I have interpreted requirements 5.1 'a' and 'b' as relating to the initial retaining wall and any associated back-filling that was part of that operation, rather than the subsequent phase of further levelling of land as part of the formation of the patio. These requirements are clearly aimed at achieving the complete undoing of what had been undertaken and the clarifying that the land should be restored to its condition prior to the breach taking place is therefore appropriate with respect to those.

The Appeals on grounds (c)

17. The appeal on ground (c) is that the allegation does not constitute a breach of planning control. The onus is upon the appellant to demonstrate their case. The appellant's grounds of appeal refer only to the formation of the patio with respect to this ground of appeal and I do not need to consider that as I have deleted that element from the notice. For completeness however it is necessary to consider whether the remaining elements of the allegation constitute a breach of planning control.
18. The retaining wall is a large, robust block-built structure. Photographs within the submissions show that prior to this, the land sloped steeply down from the rear boundary towards the back of the dwelling. That is also consistent with the description provided by the occupiers of the adjoining dwelling at No 40 Tamar Avenue, whose evidence I go into more detail about with respect to the appeal on ground (d).
19. The retaining wall clearly holds back a substantial amount of back-filled material. Those elements of the allegation have together provided an initial levelling-off of the garden. This clearly took a lot of time and effort to plan and construct and their construction has involved the carrying out of building, engineering or other operations and as such falls within the definition of development in S55(1) of the Act. The appeal on ground (c) fails.

The Appeal on ground (d)

20. The appeal on ground (d) is whether, at the date that the notice was issued, it was too late to take enforcement action against the unauthorised development.

In this case, the allegation relates to building, engineering or other operations and by reason of S171B (1) of the Act, the material date by which the operations would need to have been substantially completed is therefore 7 November 2015. The onus is upon the appellants to demonstrate their case.

21. The appellants state that the retaining wall was completed by 27 June 2015. The Statutory Declaration by both appellants refers to work being completed by the end of June 2015. Photographs are submitted (appendix 1 to the grounds of appeal) to provide evidence of that. There is some dispute over the dates that the photographs were taken. The Council points out that the folder in which they are displayed in a 'screen-shot' from the appellants' computer shows a later date. However, the date of the folder is still well before the 7 November 2015 material date. The Council refers to the 'JPEG' versions of the photographs having a date in the future. This evidence cannot necessarily be relied upon therefore without further substantiating evidence.
22. In terms of what the 'Appendix 1' photographs illustrate, 2 of them show blockwork parallel with the dwelling, with the second showing somebody undertaking the rendering of that blockwork. At those times, the wall looks to be at a similar height to what I saw. The second 2 photographs from June 2015 shows the wall is rendered and the steps up to the garden have been constructed along with the adjoining lower rendered walls, some of which adjoin the boundary with the neighbouring property to the west. It would seem that material had been deposited behind the wall by the time of the first photograph and by the time of the last of the 'Appendix 1' photographs, this had been levelled-off. By the time the last of these photographs, the development is well advanced towards completion.
23. The appellant has also submitted some evidence that confirms that a significant amount of building materials were delivered to the property in June 2015 which, in my experience and based upon what the submitted photographs show, are of the general nature that would have been used in the construction of the retaining wall. This included 432 concrete blocks, bags of cement, dumpy bags of sand and aggregate as well as hardwall-plaster amongst other things. A 'hire note and invoice' for a cement mixer and stand is made out to the father of one of the appellants whom, their Statutory Declaration confirms, carried out the work in June 2015. This document gives a hire period of between 15 June to 25 June 2015 and the site address is the appeal site.
24. An email from one neighbour confirms that they can date a conversation on 14 June 2015 that they had with the appellants. The neighbour remembers activity with the delivery of materials and sacks of sand and cement being referred to. This date does not tie-in with the dates on delivery notes but is contemporary with the suggested period of construction. Taken together with the appellants' Statutory Declaration these parts of the submitted evidence help to confirm that a substantial amount of building work was being undertaken or at least under preparation in June 2015 which helps to corroborate the disputed dates on the 'Appendix 1' photographs.
25. The Council's submitted aerial images from 2016 and 2017 show the part of the retaining wall was in place with what appears to be a rough grassed surface between the top of that wall and the rear boundary. One of the images from 2017 which is taken from a side angle, looking towards No 40, shows the joint boundary fence stepping down. There does appear to be 3 basic levels within

the garden at that time. The lowest being the paved area at the immediate rear of the house which the notice does not relate to. To the rear of that, there is what appears to be a rough grassed surface which then graduates further up to the rearmost part of the garden. This graduation towards the rear of the site appears to be very roughly parallel with the top of the fence in place at that time which also steps up the slope. The appellants confirm that the patio was not constructed until 2017 and that is consistent with other evidence such as the aerial imagery, with a later 2018 image clearly showing the framed patio between the retaining wall and the rear boundary.

26. The neighbouring occupiers at No 40 Tamar Avenue have provided statutory declarations setting out what they have noticed about the activities within the appeal site. It seems clear that it was in 2017 that the developments within the appeal site first came to their attention. That evidence in my view is consistent with the construction of the patio and fence being around that time. Although the construction of the original retaining wall and retained land behind it was a substantial operation, that structure is significantly lower than the older fences on the boundary with No 40. It would have been much more difficult to see those works taking place from No 40. Prior to the 2017 activities, the neighbours do refer to noisy activities at the appeal site such as "very loud drilling and banging for months, possibly a year." Whilst much of this may have been attributable to internal works, it is not explained why that would not rule out some of the noise being related to work outside, within the garden. The reference to what appeared to be a "swimming pool" which turned out to be a "concrete patio" at the higher level within the appeal site, is resonant with how the patio appears to have been formed in 2017.
27. From the evidence submitted, given that the amount of building activity that was taking place in 2015 together with the appellants' photographs as clarified within their statutory declaration, the development appears to have reached an advanced stage before the material date. The Council's own evidence shows with some clarity that the structure was complete the following year and also that the earth that had been built up behind the retaining wall had to a significant degree, grassed over by then. There is no clear evidence to directly contradict this version of events.
28. It therefore seems on the balance probabilities that the initial work to construct the unauthorised retaining wall together with the back filling of the void created behind it to level that part of the rear garden, was substantially completed more than 4 years prior to the issuing of the notice. As such the appeal on ground (d) must be allowed.

Conclusions

29. From the evidence before me, I conclude that the alleged breach of planning control set out in the enforcement notice, the plan attached to the notice and 2 of the requirements are incorrect. On the balance of probabilities, the appeals on ground (d) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control. The enforcement notice will be corrected and quashed. In these circumstances, the appeals on ground (f) do not need to be considered.

A Harwood

INSPECTOR



Plan

This is the plan referred to in my decision dated: 19 November 2020

by Andy Harwood CMS MSc MRTPI

Land at: Land at 42 Tamar Avenue, Torquay

Reference: APP/X1165/C/19/3242581 & 3242582

Not to scale – stated scale is the original scale

