



Appeal Decision

Site Visit made on 26 April 2021

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 June 2021

Appeal Ref: APP/V2635/C/20/3258107

Land North of The Coach House, High Street, Thornham, Norfolk

- 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 Andy Brand, The Abbey Group (Cambridgeshire) Limited against an enforcement notice issued by King's Lynn and West Norfolk Borough Council.
- The enforcement notice was issued on 15 July 2020.
- The breach of planning control as alleged in the notice is, without planning permission, the material change of use of agricultural land to garden (domestic) use and associated development including close boarded fencing, a shed, raised borders and domestic/ornamental tree planting.
- The requirements of the notice are:
 1. The use of the land as a garden permanently ceases.
 2. All associated paraphernalia on the land including the domestic/ornamental planting of trees, raised borders, timber structure and fencing are removed from the land and the land is restored to its former condition.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed, and the enforcement notice is upheld with a correction and variations.

The Notice

1. The appellant indicates that the alleged breach of planning control specified in the notice is imprecise. This is a point which goes to the validity of the notice. However, it seems to me that the notice is clear on its face that the alleged breach involves a material change of use from agricultural to residential use as a garden. Likewise, it sets out clearly elements of operational development which are alleged to amount to a breach of planning control. It follows, therefore, that I do not find the allegation to be imprecise or vague.

Background

2. An application for a certificate of lawfulness was refused by the Council on 15 June 2018 for the use of the appeal site for garden (domestic) purposes. This was subsequently dismissed on appeal¹ in September 2019, the Inspector concluding that the use had not been continuous for a period of 10 years or more prior to the application date and was not therefore lawful.

¹ APP/V2635/X/18/3209664

The appeal on ground (b)

3. For the appeal on ground (b) to succeed, it is necessary for the appellant to demonstrate, on the balance of probabilities, that the matters alleged to constitute a breach of planning control have not occurred as a matter of fact.
4. The notice alleges that a material change of use from agricultural land to a domestic garden has occurred including associated operational development. The appellant states that the use of the land has not materially changed since the time of the Council's previous site visits and the LDC application. It is said thus that the Council has always maintained the use of the land was agricultural. On that basis, it is the appellant's position that no material change of use has occurred.
5. However, it is clear from the Council's submissions that the 2018 LDC application was refused because it had not been demonstrated that the change of use had taken place 10 or more years prior to the date of the LDC application and continued throughout that period in order to become immune from enforcement action under section 171B(3) of the 1990 Act. It was not the Council's position that no material change of use to residential garden had taken place at all. This is the view shared by the previous Inspector who states in paragraph 27 of the appeal decision that: *"I consider it more likely than not that at certain times during the relevant period the land has been used as a domestic garden. However, on the limited evidence available to me, I am not persuaded that this use has been continuous, such that the Council could not have taken enforcement action against the use."*
6. The appellant states that, following the 2019 appeal decision, the landowners have maintained the land in the same manner as the previous owner. However, in that appeal the appellant's case was that the land was in use as domestic garden land. Indeed, that was the premise of the LDC application.
7. The appellant states that the Council has produced no evidence as to why it considers the use of the land has changed nor indeed when the change occurred. However, section 172(1)(a) of the 1990 Act makes clear that a Council may serve a notice where it appears (my emphasis) to them that there has been a breach of planning control. Given the site's history, it seems reasonable to conclude that would have been the case. Moreover, the notice makes clear that the breach has occurred within the last 10 years.
8. I saw from my site visit that the site comprises a large, square shaped parcel of land beyond the rear boundary wall of The Coach House and the rear boundaries of the properties either side. The land is almost entirely made up of a neatly mown lawn with decorative slate borders, sparse planting of ornamental trees and boundaries of close boarded fencing. Raised beds constructed from timber sleepers extend along a significant proportion of the southern boundary of the land.
9. I saw that the land is easily accessible from the rear yard of The Coach House via a gate such that people could move freely between the two. Moreover, whilst the amount of residential paraphernalia upon the land was limited, I nevertheless noted from my site visit that a basketball hoop and a barbeque were stored adjacent to the southern boundary, behind the rear garden wall of The Coach House. Overall, the neatly mown lawns, carefully placed ornamental planting, raised borders and close boarded fences give the land a

distinctly domestic appearance, akin more to a typical suburban garden than agricultural land of a functional appearance. Indeed, that contrast is no more apparent than when observing the land together with the adjacent field to the north which, at the time of my site visit, contained crops and had less formal boundary treatments.

10. I conclude, therefore, that the alleged breach of planning control had occurred at the date the notice was issued. The Council's approach in respect of planning matters on an area of land adjacent to the appeal site and any apparent inconsistency or otherwise in its approach to the two does not dissuade me from that view.

11. The appeal on ground (b) therefore fails.

The appeal on ground (c)

12. In an appeal on ground (c) it is necessary for the appellant to demonstrate, on the balance of probabilities, that the alleged breach of planning control does not constitute a breach of planning control.

13. The appellant's arguments in respect of the appeal on ground (c) in relation to the material change of use are largely ground (b) arguments – that the material change of use has not taken place. As set out above, I have concluded to the contrary and have found, as a matter of fact, that the alleged material change of use has occurred. Such a material change of use amounts to development for which planning permission is required and there is no evidence of any such permission having been granted.

14. The notice also attacks four aspects which are alleged to constitute operational development. They are domestic/ornamental tree planting, raised borders, close boarded fencing and a shed.

15. The raised borders comprise several timber sleepers which are arranged in a rectangular shape along the southern boundary of the site. They are arranged to a height of approximately 0.3m. I saw from my site visit that they are filled with soil and vegetation.

16. I have had regard to the relevant tests of size, physical attachment and permanence as set out in case law. Whilst in the context of the scale of the land, the borders are not a particularly large feature, they do cover a large proportion of the southern boundary of the site. Given their purpose to provide a decorative edge to the land and a container for soil, they did not need to be larger than they are in order to provide sufficient space for planting. As such, in my view the border can be seen as a structure which performs the function of a boundary enclosure or feature.

17. Moreover, the border is not freely movable. The timbers are designed to remain in place in order to contain the soil and the vegetation therein. Their very purpose is to remain in situ. Removing the border would require a series of operations including the removal of any planting, the soil and the removal of the timbers. In terms of permanence, given the scale and function of the border, it seems to me that it is not intended to be anything other than a permanent feature.

18. On that basis, I consider the raised borders constitute development under section 55 of the 1990 Act. There is no evidence of planning permission having been granted for the raised borders.
19. It is also said that the fencing is development but benefits from a grant of planning permission under the Town and Country (General Permitted Development) (England) Order 2015 (the GPDO) as permitted development under Class A of Part 2 of Schedule 2. The fencing is no higher than 2m and is not adjacent to a highway. However, permitted development rights do not apply to land where there has been an unlawful material change of use², as is the case here. Planning permission for the fencing is not therefore granted by virtue of Article 3(1) of the GPDO.
20. The appellant accepts that the shed amounts to building operations and is therefore development for which planning permission is required. No such permission has been granted.
21. The Courts held in *Murfitt*³ that a notice can require the removal of works which have facilitated a material change of use, even where they are not in themselves development or where they have planning permission. However, the planting of trees is not in itself development under section 55 of the 1990 Act for which planning permission is required.
22. The appeal on ground (c) therefore succeeds in part. I will correct the notice to omit reference within the allegation to the associated domestic/ornamental tree planting.

The appeal on ground (f)

23. An appeal on ground (f) is made on the basis that the requirements of the notice exceed what is necessary. Section 173(4) of the 1990 Act sets out the purposes which an enforcement notice may seek to achieve. They are either (a) remedying of the breach of planning control or (b) remedying any injury to amenity which has been caused by the breach.
24. Section 173(4) is clear that a notice can remedy the breach of planning control by either: making the development comply with the terms of any planning permission; by discontinuing the use of the land; or, by restoring the land to its condition before the breach took place.
25. The requirements of the notice are to cease the use of the land, remove the planting, fence, borders and shed and restore the land to its former condition. I am therefore satisfied that the purpose of the notice falls within section 173(4)(a) of the 1990 Act on the basis that it seeks to restore the land to its former condition.
26. The appellant argues that the only breach which has occurred is the erection of the shed. However, as set out in my reasoning on ground (b) I have found that the alleged material change of use has occurred. Similarly, in the ground (c) appeal I have found that the fence and borders are development for which planning permission is required. Whilst I have found under the ground (c) appeal that the planting does not constitute development, the *Murfitt* case has established that a notice can require the removal of works which have

² Section 3(5)(b) of the GPDO

³ *Murfitt v SSE* [1980] JPL 598

facilitated a material change of use, even where they are not in themselves development. In this instance, the careful placement of the planting and its ornamental and domesticated appearance and design indicates that it has facilitated the unauthorised use.

27. On that basis, I consider the requirements of the notice do not go beyond what is necessary to remedy the breach of planning control.
28. The notice also requires the removal of a timber structure. No timber structure is referred to within the alleged breach. I did not see any timber structure on my site visit other than the shed which is already referred to in the breach and requirements. There is no evidence put forward by the Council of any other timber structure existing on the land at the date the notice was issued. On that basis, I shall vary the notice to delete the requirement to remove a timber structure.
29. In addition, I shall vary the wording of the first requirement to ensure it is grammatically correct and to remove the word 'permanently' which is unnecessary since section 181(1) of the 1990 Act states that compliance with an enforcement notice shall not discharge the notice. The notice can be varied without resulting in injustice to the appellant or the Council.
30. Otherwise, the appeal on ground (f) fails.

The appeal on ground (g)

31. An appeal on ground (g) is made on the basis that the time for compliance with the notice falls short of what should reasonably be allowed. The notice provides a period of three months for compliance.
32. The appellant argues that the removal of the shed, fencing, raised borders and trees would take several months, as would the requirement to restore the land to its former condition. It is said that the compliance works will be compromised by the lack of access to the land other than on foot and that only hand held machinery can be used. Therefore, the appellant argues that a six month period is reasonable.
33. However, it seems to me that the removal of a shed, fencing and raised borders are all undertakings which can be carried out in a reasonably short space of time using hand held equipment, particularly given the relatively small scale of the works. Moreover, the planting is not particularly high or difficult to remove and I see no reason why it could not be removed in a reasonably short period of time again using hand held equipment. I am unpersuaded therefore that compliance with the notice will reasonably require a period greater than three months.
34. The appeal on ground (g) therefore fails.

Formal Decision

35. It is directed that the notice is corrected by:
 - deleting the words "and domestic/ornamental tree planting" from section 3 of the notice;
 - inserting the word "and" between the words "shed" and "raised" in section 3 of the notice;

36. And varied by:

- deleting the words “the use of the land as a garden permanently ceases” from section 5(i) of the notice and substituting them with the words, “cease the use of the land as a garden (domestic) use”;
- deleting the words “timber structure” from section 5(ii) of the notice.

37. Subject to the correction and variations, the appeal is dismissed and the enforcement notice is upheld.

J Whitfield

INSPECTOR