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## Appeal Decision

Site visit made on 17 August 2021

**by John Felgate BA(Hons) MA MRTPI**

**an Inspector appointed by the Secretary of State for Housing, Communities and Local Government**

**Decision date: 20 August 2021**

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**Appeal Ref: APP/X1545/W/21/3270330**

**Land to the rear of 13 Church Street, Tolleshunt D'Arcy, Essex**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Mr Tom Foster against the decision of Maldon District Council.
  - The application Ref FUL/MAL/20/00680, dated 6 July 2020, was refused by notice dated 28 September 2020.
  - The development proposed is change of use of land to residential garden and construction of timber fence.
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### Decision

1. The appeal is dismissed.

### Procedural matters

2. The development for which permission was sought was described in the application as change of use to residential garden. This description was subsequently amended to include the construction of a fence. The change appears to have been accepted by the appellant, and I have dealt with the appeal on this basis.
3. The development has already taken place, and permission is therefore sought retrospectively.

### Main issues

4. The main issues in the appeal are:
  - whether the proposed change of use is acceptable in principle, having regard to the relevant planning policies relating to amenity space land;
  - and the effects of the development on the area's character and appearance.

### Reasons for decision

#### *Relationship to amenity space policies*

5. Planning legislation<sup>1</sup> requires that the appeal be determined in accordance with the development plan for the area, unless material considerations indicate otherwise. In this case the relevant development plan is the Maldon District Local Development Plan (the MDLDP), adopted in July 2017.
6. On the MDLDP Policies Map, the appeal site forms part of an area designated as Amenity Green Space. Such spaces, along with most other types of open

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<sup>1</sup> Section 38(6) of the Planning and Compulsory Purchase Act 2004

space in the District, are protected by Policy N3, which seeks generally to resist development, except for a limited number of tightly-defined exceptions. These are: firstly, if the site is surplus to local needs; secondly, where a replacement site would be provided; and thirdly, where the development itself is for an alternative type of sports or recreational use. I note that this policy follows closely the approach to the protection of open spaces which is advocated in paragraph 99 of the National Planning Policy Framework (the NPPF).

7. The appeal site forms part of one of four small areas of grassed amenity space within the Festival Gardens estate, which were evidently laid out as part of the approved scheme, when the estate was built in the 1950s. From then until March 2020, the site evidently remained in much its original form and use, until part was acquired and fenced off by the appellant, as a rear garden for No. 13 Church Street. This history is largely undisputed, and I see no reason to question it.
8. Having regard to the above history, I can see no reason to doubt that the designation as Amenity Green Space fairly reflected the site's planning status and land use at the time when the MDLDP was prepared and adopted. The MDLDP covers the period to 2029, and the Amenity Green Space designation is intended to safeguard the site throughout that period. As and when the plan is reviewed, there may be an opportunity for the designation to be reconsidered, taking account of any change in circumstances, but at the present time there seems no reason to anticipate any change in the site's status. Whilst there has now been a 'de facto' change to garden land, that change is unauthorised, and therefore carries little weight. As things stand, I see no reason to doubt that the site's status as Amenity Green Space is likely to remain as part of the MDLDP for the foreseeable future.
9. The appellant contends that during recent years, when it remained in use as amenity space, the site was neither well used nor well maintained. However, these assertions are challenged by local residents. In the absence of any detailed evidence, I can draw no firm conclusions on these matters. Nevertheless, it seems to me that if the standards of maintenance did slip as low as the appellant suggests, then it would hardly be surprising if the level of usage also tailed off. In any event, there is no quantified evidence that Tolleshunt D'Arcy is over-provided with amenity space or open space. I therefore find no convincing evidence to support the suggestion that the appeal site is surplus to local needs. There is also no suggestion that a replacement site or alternative leisure use are proposed. Consequently, none of the exceptions within Policy N3 applies in this case.
10. I note the appellant's suggestion that the appeal site is of lesser value as amenity space than the other designated spaces in Festival Gardens. However, the purpose of these spaces seems to me to be to serve as a visual break, and also to provide informal play opportunities for children. The appeal site is of a reasonable size, and is located adjacent to the estate road, fronted by houses. To my mind these qualities are exactly what is required to serve both of these functions. I see no evidence that the site lacks intrinsic value as existing or potential open space, or that this should detract from its allocation as such in the MDLDP.
11. The appellant also states that he was unaware of the designation as Amenity Green Space, when he purchased the land. But a site-specific designation of

this nature would normally be revealed on a land charges search. In any event, the MDLDP is a public document. I appreciate that mistakes may have been made during the purchase, and I agree that this was unfortunate, but this does not justify setting aside the adopted MDLDP policy.

12. With regard to the future, if permission for use as garden land is refused, I accept that there is no certainty as to how the actual use of the land by the public could be secured, or by whom it would be maintained. In the submissions before me, there is no apparent evidence of any relevant condition or obligation in the original planning permission, nor any relevant covenant in any subsequent land transfer. But the evidence that I have on these matters is very limited, and therefore is not conclusive. In any event, the lack of an enforceable mechanism need not prevent arrangements from being entered into voluntarily.
13. I acknowledge that the appeal site only accounts for part of the designated amenity space site in question, and part of that designated site would therefore remain available as open space. But that area would be significantly smaller, and as such would no longer be capable of serving the intended purposes of the designation with the same effect. I note also that the appellant would be willing to accept a condition restricting any built development on the land enclosed as garden. But such a condition would not make the land available for use by the public. None of these matters alters my view that the proposed development is in conflict with Policy N3.
14. I appreciate that the use of the appeal site as garden land for No 13 Church Street would significantly enhance the enjoyment of that property by its occupants. The existing garden runs alongside the B1026, and as such is subject to traffic noise and overlooking from the footway. But that benefit would be limited to a single household, whereas the loss of the appeal site as amenity space would adversely affect the local community as a whole.
15. For these reasons, I conclude that the proposed change of use of the appeal site would result in the loss of an area designated as Amenity Green Space, contrary to MDLDP Policy N3. The scheme would not fall within any of the exceptions permitted by that policy. There are no other circumstances justifying the proposed change. The development would therefore represent an unacceptable loss of public open space, in conflict with Policy N3.

*Effects on the area's character and appearance*

16. The new fencing that has been erected is mainly 1.8m-high close-boarded, stained timber, with a further short section of 1m-high chestnut palings. These are materials widely used and accepted in garden fencing. All of the fencing appears to be of good quality and sound construction.
17. Viewed from Festival Gardens, the new fencing appears as a backdrop to the remaining part of the amenity space. Its effect on that view seems to me discreet and unobtrusive. From the connecting footpath to Church Street, the fence is seen at close range, and has the effect of enclosing that path to a greater degree than previously. But the path is of reasonable width, and therefore the effect over this short length is not unduly oppressive.
18. I agree that the fencing does divide the space, and to that extent it is an intrusive feature. But that is because of the site's status as amenity space,

rather than any aspect of the fence itself. If the site were not subject to that designation, it seems to me that the fence would simply appear a rear garden boundary, similar to any other.

19. In much the same way, whilst it is clearly true that the change of use has 'domesticated' the land, I can see nothing unusual or incongruous about that particular characteristic, given that the site is located in a residential area, surrounded by other domestic gardens. The harm that arises is therefore due to the loss of the site as public space, rather than the nature of the new use as garden land, or the visual character of that new use itself.
20. In coming to this view, I recognise that the existing property 13 Church Street falls within the Tolleshunt D'Arcy Conservation Area (the CA), and the remainder of the appeal site lies within the CA's setting. However, given the above, I am satisfied that the setting would be preserved, and that the significance of the CA as a heritage asset would be unaffected.
21. I therefore find no particular harm to the area's character or appearance, and in this respect no further conflict with any other MDLDP policies, including Policies D1, relating to design quality and the built environment, or H4 relating to the effective use of land. However, this does not in any way detract from my earlier finding that the loss of the site as part of an amenity space is unacceptable in principle.

## **Conclusion**

22. For the reasons explained in this decision, I conclude that the retrospective proposal for the change of use of the appeal site to garden land, enclosed and separated by fencing from the remainder of the previously existing open space, would represent an unacceptable loss of Amenity Green Space, contrary to MDLDP Policy N3.
23. This conflict with the development plan is not outweighed by any other material considerations. Accordingly, the appeal is dismissed.

*J Felgate*

INSPECTOR