
Appeal Decision

Site Inspection on 18 May 2022

by Graham Self MA MSc FRTPI

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

Decision date: 25 May 2022

Appeal A: Reference: APP/X0360/C/21/3285900

Site at: land adjacent to 20 Northway, Wokingham RG41 3PQ

- The appeal is made by Mr Nimesh Mistry under section 174 of the Town and Country Planning Act 1990 as amended against an enforcement notice issued by Wokingham Borough Council.
- The council's reference is RFS/2021/086312.
- The notice is dated 27 October 2021.
- The breach of planning control alleged in the notice is: "Without planning permission, the material change of use of the land from amenity land to residential garden".
- The requirements of the notice are:
 - i) Cease the use of the land for residential purposes.
 - ii) Remove from the land the fence including timber posts, timber panels and gravel boards shown edged black on the attached plan between the points marked A, B, C and D.
 - iii) Reinstall a fence between the points marked A and D on the attached plan.
 - iv) Remove all resultant material and debris resulting from step ii) from the land."
- The period for compliance is three months.
- The appeal is proceeding on grounds (a), (c), (f) and (g) as set out in Section 174(2) 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.

Summary of Decision: The enforcement notice is corrected and varied, and upheld as corrected and varied. The deemed application is refused. The appeal does not succeed.

Appeal B: Reference: APP/X0360/C/21/3285901

Site at: 20 Northway, Wokingham RG41 3PQ

- The appeal is made by Mrs Yogita Mistry. Other details are the same as those summarised above, except that the fee for the deemed application was not paid within the relevant period. Therefore the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.

Summary of Decision: The enforcement notice is corrected and varied, and upheld as corrected and varied. The appeal does not succeed.

Procedural Matters

1. I can see why the council used the description "residential garden" in the enforcement notice - it is a reasonably clear way of describing the disputed use of the land. However, for the purposes of planning law (except in unusual circumstances such as mixed uses which do not apply here), a garden attached to a house and within the same planning unit as the house is normally in "residential" use. This is also clear from the requirements of the notice, which refer to "residential use", and the requirements of an enforcement notice should normally match the allegation (except where there is deliberate "under-enforcement"). I shall therefore use the powers available to me under Section 177(5) of the 1990 Act to correct the allegation. This correction does not affect any party's case and can be made without causing any injustice.

Ground (c)

2. This ground of appeal is a claim that what is alleged does not constitute a breach of planning control.
3. The main basis of the appellants' case is that the land was never allocated as open space or amenity land, but was unkempt and un-maintained until after it was purchased from the developer of the adjacent housing area in 2020. The appellants acknowledge that the land has been enclosed as part of the garden of 20 Northway; but they say that "the allegation in the notice did not, as a matter of fact, take place, so this part of the enforcement notice is defective".
4. The appellants may have misunderstood the scope of ground (c). If they had wanted to claim that what is alleged in the enforcement notice has not in fact occurred, they should have pleaded ground (b) of Section 174(2). Be that as it may, an enforcement notice does not have to specify the previous (or "from") use of the land. Whether the previous use was better described as unused or as "amenity land" does not matter - it is clear from the available evidence that the change from the previous use to what the council termed "residential garden" amounted to a material change of use for the purposes of planning law. No planning permission was obtained. Therefore a breach of planning control occurred.
5. Moreover, an enforcement notice alleging a material change of use does not need to describe the previous use in its allegation (provided that a material change of use has occurred as a matter of fact). I shall allow for this point by deleting the reference to the previous use from the allegation, using the legal powers mentioned above.
6. I conclude that ground (c) of the appeal fails. If ground (b) had been pleaded it would also have failed.

Ground (a) and Deemed Application (Appeal Reference 3295900 Only)

7. Ground (a) and the deemed application only involves the appeal by Mr Mistry. He contends that planning permission should be granted for the change of use. A landscaping scheme has been offered, which in the appellant's view would provide an acceptable impact, would allow for an enlarged garden to the dwelling and provide appropriate visual amenity.
8. The main issue raised by this part of the appeal is the effect of the development on the appearance and character of the area, having regard to relevant planning policies.

9. Northway is part of a mainly residential area most of which was apparently developed about 40 years ago, though the house at 20 Northway was the subject of planning permission granted in 1999. The layout of the area varies: parts have a relatively high density with houses quite close to each other and small gardens; other parts are more spacious. Some properties are set well back from the road behind grassed spaces; others have their plots bordered by walls or fencing immediately next to the highway. The parcels of land where there are trees, shrubs or grass cover help to give this area of housing an attractively open quality.
10. The development enforced against has given the immediate locality a more enclosed and less spacious quality than it would have had previously. What appears in photographs to have been a small wooded area with mature or semi-mature tree and shrub growth has been replaced by the harshly "urban", austere-looking lengths of fencing, and the area of open space in this part of the estate has been significantly reduced. The visual impact of the fence is heightened by its prominent position close to both the road and a public footpath. The overall effect has been to detract from the area's appearance and character.
11. Decisions on applications for planning permission have to be made having regard to local and national planning policies. Local plan policy CC03 in particular states that development which would result in the loss of "green infrastructure networks" will not be acceptable. Whilst the use of such convoluted jargon in policy documents is regrettable, its aim is reasonably clear, and the development conflicts with it. The development also conflicts with Local Plan policy TB21 referring to the importance of retaining features which contribute to the landscape. These local policies are in line with national policy as set out in the National Planning Policy Framework referring to the need for development to be visually attractive and to accommodate green public space.
12. Numerous local residents or other interested parties have submitted written comments, expressing views both for and against the development. Those supporting the appellants say that the land was unkempt in the past and that incorporating it into the appellants' garden has improved its appearance. In my judgment that is not a good reason to grant planning permission. Photographs submitted in evidence do not appear to show the land as noticeably unkempt in the recent past; but in any event, if there has been a lack of maintenance this should be a matter to be pursued with the relevant council department rather than justifying its enclosure and change to residential use.
13. Some comments refer to anti-social behaviour at the site when it was open to public access. Although I can understand the viewpoint, it is a sad reflection on society if taking land out of public space and enclosing it as part of a private garden is regarded as beneficial to the local community. Part of the character of this area of housing as originally laid out is the provision of publicly accessible open space. Permitting this development would not only undermine and detract from that character, but also would set an undesirable precedent which could make preventing further loss of open space difficult for the planning authority to resist. Moreover, incorporating the land into the garden of the appeal property might well only move the alleged anti-social behaviour problem a short distance rather than solving it, and such behaviour could be reduced or prevented by more appropriate ways than permitting this development.
14. The appellants' suggestion about planting and landscaping could help to soften the direct visual impact of the fencing around the appeal site, but would not overcome the objections to the development. I saw fences and walls close to the highway elsewhere in the neighbourhood, but that does not justify this particular

development or make it acceptable - indeed if anything it increases the importance of safeguarding what remains of the area's spacious character.

15. I have taken into account all the other matters raised in evidence on which I have not specifically commented, including the history of ownership by the developer of the Northway area. I conclude that planning permission should not be granted. Therefore the appeal on ground (a) does not succeed.

Ground (f)

16. Under this ground it is argued that the requirements of the enforcement notice are excessive and go beyond what is reasonable to remedy the breach of planning control. The appellants also say that the fencing around the extended garden area is permitted development under the Town and Country Planning (General Permitted Development) Order (the "GPDO") and that the council does not have power to remove it, or to require a fence to be erected as specified in the notice.
17. As regards the argument about permitted development, the erection of the disputed fencing is closely linked with, and facilitates, the unauthorised use. There is established case law that in such circumstances, including development which would normally be immune from enforcement, the fencing can be subject to the requirements of an enforcement notice.¹
18. The requirement to replace the original fence is less justified. It is also imprecise, as it uses the words "reinstate a fence" (note the indefinite article "*a*" fence) without specifying details such as materials or height. I note the council's concern about maintaining privacy for nearby residents, but it seems unlikely that the appellants would want to leave their garden open and unenclosed along one side next to an area accessible by the public. I consider that in this respect the enforcement notice goes beyond what is reasonably necessary to remedy the breach of control.
19. I conclude that ground (f) partly succeeds, to the extent just explained.

Ground (g)

20. This ground concerns the compliance period. The appellants say that it is difficult to obtain contractors to carry out the required work and that the compliance period is unreasonably short.
21. No supporting evidence (such as written statements from local contractors) has been supplied for those arguments. The actual process of removing the disputed fencing should only take a few days at most, and three months should allow enough time for obtaining quotations (if that is necessary) and selecting a contractor. The planning authority has powers to delay prosecuting for non-compliance if a contractor had been appointed but was unable to carry out the work for, say, a few weeks. Taking those points into account I do not see good reason for extending the three month compliance period (which will now run from the date of this decision), so the appeal on ground (g) does not succeed.

¹ The two leading court judgments most often quoted on this point are *Somak Travel v SSE [1987]* (where an enforcement notice required the removal of an internal staircase which did not require planning permission) and *Murfitt v SSE and East Cambridgeshire DC [1980]* (which involved the removal of surfacing which would normally have been immune from enforcement).

Detail of Requirements

22. I comment here on one other matter relating to the requirements of the notice. As far as I could tell from what I saw during my inspection, the references to "timber" parts of the fencing are not entirely accurate, as some components appeared to be made of metal. I am therefore making a minor re-wording of the requirements.

Formal Decisions

Appeal A

23. I direct that the enforcement notice be corrected and varied² in the following ways:
- (i) by deleting from the allegation the words "from amenity land to residential garden" and substituting: "to residential use";
 - (ii) by deleting the words "timber posts, timber panels and gravel boards" from sub-paragraph (ii) of the requirements and substituting "posts, fence panels and gravel boards";
 - (iii) by deleting sub-paragraph (iii) (relating to the requirement to reinstate a fence) from the requirements of the notice and re-labelling sub-paragraph (iv) as sub-paragraph (iii).
24. Subject to the correction and variations above, I dismiss the appeal, refuse to grant planning permission on the application deemed to have been made under Section 177(5) of the 1990 Act, and uphold the enforcement notice as corrected and varied.

Appeal B

25. I direct that the enforcement notice be corrected and varied as set out above. Subject to the correction and variations, I dismiss the appeal and uphold the notice as corrected and varied.

G F Self

Inspector

² The reason for referring to both correction and variation is that amendments to the allegation in an enforcement notice are normally treated as corrections, whilst amendments to requirements are normally treated as variations.