



Appeal Decisions

Site visit made on 17 May 2022

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 30 May 2022

Appeal A Ref: APP/A0665/C/22/3293926

Appeal B Ref: APP/A0665/C/22/3293929

Land at grid ref 365201 372590, Crabmill Lane, Norley, Northwich, Cheshire

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- Appeal A is made by Mr M Rutherford against an enforcement notice issued by Cheshire West & Chester Council. Appeal B is made by Mrs J Rutherford.
- The enforcement notice was issued on 2 February 2022.
- The breach of planning control as alleged in the notice is without planning permission, a material change of use of the land from an agricultural use to a residential garden.
- The requirements of the notice are:
 - i. Cease the use of the land for use as a domestic garden;
 - ii. Remove all non-agricultural planting from the land.
- The period for compliance with the requirements is (i) immediately and (ii) 4 months.
- The appeals are proceeding on the grounds set out in section 174(2)(d) and (f) of the 1990 Act as amended.

Summary of Decisions: The appeals are dismissed and the enforcement notice is upheld with corrections in the terms set out below in the Formal Decision.

Preliminary Matters

1. The compliance period to cease the use of the land as a garden (paragraph 5(i) of the notice) is "immediately", which is incorrect. This is because Section 173(9) of the 1990 Act makes it mandatory for the notice to specify "the period" at the end of which there has to be compliance with its requirements. The notice, as drafted, does not purport to specify a period for compliance, it simply requires compliance immediately the notice comes into effect "on 4 March 2022". I consider that the notice should be corrected to change the compliance period in paragraph 5(i) to 14 days, which is proportionate and reasonable. I shall also delete reference to 4 March 2022 as this does not allow for the appeals, which suspend the date at which the notice would take effect. In addition, the requirements should flow from the allegation so the reference to 'domestic' garden in paragraph 4(i) should be corrected to residential garden.
2. I consider that I can make these corrections without injustice as the terms and effect of the notice remain unchanged and the timescale for compliance remains relatively short.
3. In this type of appeal, the onus of proof is firmly upon the appellants. The Courts have held that the relevant test of the evidence on matters such as 'legal' grounds of appeal is the balance of probabilities. I must examine the submitted factual evidence, the history and planning status of the site in

question and apply relevant law or judicial authority to the circumstances of this case. For the avoidance of doubt, the planning merits of the alleged development are not relevant as there is no ground (a) appeal and associated deemed planning application.

4. The appellant refers to an LDC, which was granted by the Council in relation to use of land as residential garden at a property known as Manor House¹. However, I am unable to take this into account since it concerns a different site and different evidence. I must make a decision based on the factual evidence having regard to the site-specific circumstances.

The ground (d) appeals

Evidence

5. In order to succeed on ground (d), the appellants must show, on the balance of probabilities, that the matters alleged in the enforcement notice have occurred for a continuous period of 10 years or more, prior to the issue of the notice, such that it is too late for the Council to take enforcement action.
6. The appeal site is a triangular parcel of land (the land), which lies to the north of the appellants' residence known as The Moss. The appellants have provided evidence in support of their claim that they have used the land as residential garden for a continuous period of 10 years. The Council disputes the evidence on the basis of aerial images, which it considers show the land was not used as garden until 2017.
7. The appellants have submitted sworn evidence in the form of a Statutory Declaration². It is explained that they 'took ownership' of the land in September 2004 and subsequently sought to improve it through resolving a flooding issue, levelling and reseeded to enable its use as a garden. It is stated that the land has been maintained and used as part of their garden since ownership was assumed. Undated photographs are provided (MBR6 and MBR7), which show the site laid, or partly laid, with a lawn and including a vegetable patch.
8. In December 2017 the appellants successfully applied to HM Land Registry for 'adverse possession' of the land. The statement of truth in support of the application states that the appellants had possessed the land without interruption since September 2004, and it formed part of their garden. The statement details the works carried out to improve the condition of the land. It is explained that the land is managed for the benefit of wildlife and contains, or has contained, a pond and a natural meadow habitat, plus vegetable beds, shrubbery and flower beds.
9. A witness statement from a neighbouring farmer is provided, dated September 2017, which was in support of the adverse possession application. This described the condition of the land prior to the improvement works and stated that the appellants had occupied the land since 2004 and it is managed for their own enjoyment.
10. A supporting letter from the appellants' son, dated 14 April 2022, explains how the land has been used as a garden. I understand the appellants sought to

¹ Ref 16/3569/LDC dated 14 February 2017.

² Statutory Declaration Act 1835.

encourage wildlife into the garden through leaving it in a natural state, installing bird boxes and maintaining a pond. A further letter from a neighbour, dated 10 April 2022, confirms the appellants started to improve the land in 2004 and it has been used as a garden by the family ever since.

11. The appellants' evidence includes a series of 'Google Earth' images which are apparently dated from 2003 to 2010. The images show alterations in the appearance of the land over the years, although none show a conventional lawn. Further images, said to date between 2013 and 2021, show the land's appearance continued to change. In April 2015, the images show what is described as overspill from the construction of the neighbouring dwelling, Meadowside. The building material occupies a significant proportion of the appeal site and does not appear in the 2016 image, presumably it was removed on completion of the building works. After that date the site has a more manicured appearance.
12. The Council has referred to its own images, which it says date from 2010 to 2017. The appearance of the land in these images is similar to those of the appellants in that they seem to show a conventional garden in 2017, but prior to that the land was more overgrown. The overspill from the adjoining development also appears in the 2015 image. Finally, the appellants have provided a number of undated photographs showing replacement fencing and various aspects of work being undertaken.

Analysis

13. The Statutory Declaration carries significant weight as sworn evidence. This details when and how the land came into the appellants' possession, the works undertaken to improve its condition and how it was used as residential garden. The witness statement from the neighbouring farmer, and that by the appellants in relation to their adverse possession claim, carry moderate weight. These corroborate the appellants' version of events about how the land was altered, occupied and used. The supporting letters are not sworn evidence, but they provide useful information. Although the photographs and aerial images are undated, and in some respects unclear, they show how the land has changed in appearance over time and cannot be discounted.
14. The Council relies on its aerial images that do not appear to show a mown lawn prior to 2017, which it says casts doubt on the evidence supplied. However, land does not have to be laid to lawn and regularly mown in order to be residential garden. It is necessary to show how the land was used and occupied, which the appellants have explained in their documentation. The land was cultivated and improved in order to provide additional area for normal residential activities by the appellants and their family. This included gardening, growing vegetables, as a place to stroll about, play games, sit outside or observe wildlife.
15. However, it is also necessary to show continuous use of the land for residential activities. This is important because a use can only become lawful if it continues throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time. If a use that is taking place in breach of planning control is ceased, the immunity 'clock' would need to start again. The Google Earth images of the Council and the appellants, which are said to date from April 2015, show that a significant proportion of the land was used for the storage of materials or waste in

connection with the erection of a house on the adjoining land. During that time, the land was not being used as residential garden.

16. There is very limited information about timescales other than planning permission was granted for the development of the neighbouring house sometime in 2014. It is not clear when the material arrived on the land or for how long it remained, but it is likely that it was present for the duration of the building works, which could be for six months or more. Consequently, it is not possible to determine that lawful rights had been acquired prior to the use of the land for the storage of building material or waste. In any event, lawful rights may be lost where there is a material change to some other use, which may well be the case here given that storage in connection with the adjoining development was taking place on the land.
17. Under these circumstances, I cannot conclude that the appellants' evidence is sufficiently precise and unambiguous. It has not been shown on the balance of probabilities that the material change of use to residential garden occurred for a continuous period of 10 years or more, prior to the issue of the notice, such that it is too late for the Council to take enforcement action. The appeals on ground (d) must fail, therefore.

The ground (f) appeals

18. Section 173(4) of the 1990 Act sets out the two purposes of an enforcement notice – (a) to remedy the breach of planning control that has occurred and (b) to remedy any injury caused by the breach. The steps set out in the notice require the unauthorised use to cease and the removal of matters that facilitate that use. Its purpose is to remedy the breach of planning control. What must be considered under the ground (f) appeals is whether the steps required exceed what is necessary to achieve that purpose.
19. The appellant argues that step (ii), the removal of all non-agricultural planting, is excessive and imprecise. The Courts have held that where an enforcement notice is issued in respect of a material change of use, and works were carried out to facilitate the material change of use, the notice may require that the works are removed in order that the site is restored to its previous condition and the breach is thereby remedied.
20. In this case, the flower beds are part and parcel of the change of use since they are integral to the use of the land as residential garden. I am satisfied that their removal would not be excessive, therefore. However, the wording "non-agricultural planting" is imprecise. Where a notice concerns a material change of use, the requirements would normally be to return the land to the condition it was in prior to the breach of planning control. The Council is not seeking this, as it would serve no useful purpose given the prior condition of the land. As such, the Council is 'under-enforcing'. It is clear from the Council's statement that it is the flower beds along the borders, and any domestic paraphernalia, that is being targeted. Domestic paraphernalia being a term often used in connection with garden furniture etc. Consequently, the requirement should be corrected to "remove the flower beds and domestic paraphernalia from the land". There is a consequential correction to 5(ii).
21. Subject to the corrections, I conclude that the steps required by the notice are not excessive to achieve its statutory purpose. The appeals on ground (f) fail, therefore.

Conclusion

22. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with corrections.

Formal Decisions

23. It is directed that the enforcement notice is corrected by:

- (i) the deletion of the words "domestic garden" and the substitution of the words "residential garden" in paragraph 4(i) of the notice;
- (ii) the deletion of requirement 4(ii) in its entirety and its replacement with - "Remove the flower beds and domestic paraphernalia from the land";
- (iii) the deletion of 5(i) in its entirety and replacement with "Requirement (i) - 14 days";
- (iv) the deletion of 5(ii) in its entirety and replacement with "Requirement (ii) - four months".

24. Subject to the corrections the appeals are dismissed and the enforcement notice is upheld.

Debbie Moore

Inspector