



Appeal Decision

Site visit made on 18 July 2022

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 July 2022

Appeal Ref: APP/A1720/C/21/3283854

Land at 31 Rossan Avenue, Warsash, Southampton SO31 9JQ

- 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 James Hitchcock against an enforcement notice issued by Fareham Borough Council.
 - The enforcement notice was issued on 1 September 2021.
 - The breach of planning control as alleged in the notice is: Without planning permission, the carrying out of engineering operations to change the land levels in the rear garden of 31 Rossan Avenue.
 - The requirements of the notice are: (i) Reinstate the levels in the rear garden back to those which existed before the engineering works were carried out; and (ii) Remove any resulting spoil or waste material from the land.
 - The period for compliance with the requirements is three 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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Summary of Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

2. The appellant contends the notice is a nullity. However, the alleged breach of planning control, being the carrying out of engineering operations to change the land levels in the rear garden, is clearly only directed at the rear garden of the property, which is small. It then clearly requires the levels in the rear garden to be reinstated to those before the works were carried out. The plan attached to the notice then correctly identifies the relevant planning unit. There was no obligation on the Council to issue a planning contravention notice prior to taking enforcement action. The onus is then on the appellant to demonstrate on the balance of probabilities that there has not been a breach of planning control, amongst other things.
3. I therefore do not accept the notice lacks the necessary specificity or precision and so does not require any form of initial correction. Accordingly, no injustice has arisen and there is very little cogent evidence that the appellant has been prevented from making a ground (a) appeal. I shall therefore consider the appellants remaining relevant arguments within the grounds of appeal pleaded.

4. The appellant has provided a link to a video of a Council meeting. However, links are not accepted by the Inspectorate¹. In any event, I am not considering the basis upon which the Council decided to take enforcement action.

The ground (c) appeal

5. For the appeal to succeed on ground (c) the onus is on the appellant to demonstrate, on the balance of probabilities, that there has not been a breach of planning control. This could be because the matters alleged do not constitute development, planning permission has already been granted for the matters alleged in the enforcement notice or they are permitted development.
6. The appellant does not contest that the levelling of an area of garden is considered an engineering process and requires planning permission. There is also no ground (b) appeal before me. However, he considers that before taking any action the harm of the development should be assessed. He also provides photographs of neighbouring rear gardens.
7. That assessment of harm, and consideration of neighbouring developments, is however a matter for a ground (a) appeal, which is not before me.
8. The appellant then contends the works are de minimis and so are not expedient or proportionate. However, he provides very little evidence that the works are actually de minimis. The absence of documentary evidence from the appellant of the works undertaken in the changing of the land levels, or very limited evidence that the works enforced against were anything other than a single building operation, therefore casts significant doubt in my mind, when the onus is placed firmly on him. Based upon my site visit and the photographs before me, including that from December 2014, as a matter of fact and degree the engineering operations undertaken result in substantive changes to the land levels, which include walling and terraces, in this small rear garden. Development for the purposes of Section 55 of the Act has therefore occurred.
9. There is then very little evidence to demonstrate on the balance of probabilities that the engineering operations are either permitted development or have the benefit of planning permission.
10. The appellant has therefore not discharged the necessary burden of proof to demonstrate on the balance of probabilities that there has not been a breach of planning control.
11. The appeal on ground (c) therefore fails.

The ground (d) appeal

12. For the ground (d) appeal to succeed the onus is on the appellant to demonstrate, on the balance of probabilities, that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice. For this to be the case, the appellant will need to demonstrate that the engineering operations were substantially complete 4-years prior to the issue of the notice on 1 September 2021.
13. The appellant states that he purchased the property in December 2014 and has provided a photograph of the rear garden from that date. He then contends that if the notice is upheld, only de minimis works are required. This is however

¹ As detailed online, Planning Inspectorate Procedural Guide: Planning appeals - England

not a matter for a ground (d) appeal as it does not demonstrate when the engineering operations were substantially complete.

14. It is then asserted that the majority of the land has been raised for a period in excess of 4 years prior to the date of issue of the notice. However, this assertion can only be afforded very limited weight given that it is not in a sworn or declared format and the absence of other corroborating or sufficiently precise and unambiguous evidence. Whilst the Council accept the level of a very small area of patio adjacent to the house has not been altered, this does not demonstrate on the balance of probabilities that the engineering operations enforced against, being a wider single building operation, are then immune from enforcement action.
15. As there is very little such evidence before me, the appellant has not discharged the necessary burden of proof to demonstrate on the balance of probabilities that at the time the notice was issued it was too late to take enforcement action.
16. The appeal on ground (d) therefore fails.

The ground (f) appeal

17. The purpose of the enforcement notice is clearly to remedy the breach of planning control and it does not seek to under-enforce. Therefore, for an appeal on ground (f) to succeed it would be necessary for the appellant to explain why the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control and propose lesser alternatives steps.
18. The appellant contends that it is unclear what parts of the rear garden are the subject of enforcement action. However, it is clear the notice is directed at all the engineering operations that have changed the land levels. The appellant is then best placed to know the levels in the rear garden that existed before the engineering operations were carried out. He has also helpfully provided a photograph of the garden from 2014 which can be used as a reference point. Despite then saying the garden layout has changed several times since, there is no sufficiently precise evidence before me to assist and demonstrate his case.
19. The appellant says that he has only used soil to raise the levels of the land. However, it is clear from the photographs before me as well as my site visit, that other materials for hard landscaping have been used as part of the engineering operations to change the land levels. It is therefore not excessive or imprecise for the notice to refer to spoil or waste material to be removed, as this will arise from the reinstatement to the previous land levels.
20. The appellant asserts that if the soils are removed, he will replace it with decking, which could be worse than the current situation. That however does not demonstrate why the steps required by the notice exceed what is necessary to remedy the breach, which was an engineering operation.
21. As no other lesser steps are before me, the appeal on ground (f) fails.

Overall Conclusion

22. For the reasons given above I conclude that the appeal should not succeed. I shall therefore uphold the enforcement notice.

Formal Decision

23. The appeal is dismissed and the enforcement notice is upheld.

Paul T Hocking

INSPECTOR