



Appeal Decision

Site visit made on 12 July 2022

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 September 2022

Appeal Ref: APP/A3655/C/21/3281699

21 Whopshott Avenue, WOKING, Surrey GU21 4UE

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Andrew Statham against an enforcement notice issued by Woking Borough Council.
 - The notice was issued on 27 July 2021.
 - The breach of planning control as alleged in the notice is, without planning permission:
 - (a) the material change of use of part of the Land from amenity land to residential garden, shown in the approximate position hatched black on the Plan;
 - (b) erection of a close boarded timber fence, concrete posts and gravel boards along the boundary of the amenity land measuring approximately 1.95 metres in height as shown by way of the attached Photograph.
 - The requirements of the notice are:
 - (i) Permanently cease the use of the amenity land described at paragraph 3(a) above as residential garden;
 - (ii) Permanently remove from the land the fence described at paragraph 3(b) above;
 - (iii) Re-instate the approved boundary of the residential curtilage with a wall or fence no greater than 2 metres in height;
 - (iv) Restore the amenity land to its previous condition before the planning breach set out in this notice took place;
 - (v) Remove from the Land all materials, rubble and debris including all associated paraphernalia arising from compliance with requirements (i), (ii), (iii) and (iv) above.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (f) 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.
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Decision

1. It is directed that the enforcement notice is corrected by:
 - inserting the words 'close boarded timber' before the word 'fence' and inserting ', concrete posts and gravel boards' after the word 'fence' in paragraph 5.(ii);
 - deleting the word 'approved' from paragraph 5.(iii);
 - deleting the word 'curtilage' and substituting with 'garden' in paragraph 5.(iii); and
 - inserting the words 'in its previous alignment before the breach set out in this notice took place' after the word 'height' in paragraph 5.(iii).

2. Subject to the corrections, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matters

3. The appeal was made on grounds (a) and (f). However, the appellant has raised issues which amount to a hidden appeal on ground (c). The Council has had an opportunity to consider the representations made by the appellant and I will therefore determine the appeal with the additional ground.

The Appeal on Ground (c)

4. An appeal on ground (c) is that the matters alleged in the notice do not constitute a breach of planning control. The onus is on the appellant to make his case and the relevant test is 'the balance of probabilities'.
5. The appellant acknowledges that the alleged fencing constitutes development requiring planning permission. The hidden ground (c) appeal therefore only relates to the material change of use of part of the land from amenity land to residential garden.
6. It is argued that as the land is under the ownership of the appellant and forms part of his garden and residential curtilage, he is lawfully permitted to landscape it without requiring planning permission. It is further stated that the lawful use of the site is a Class C3 dwellinghouse and the alleged development does not involve a [material] change of use as amenity land is not a use class in itself and forms part of the residential use of the property.
7. Firstly, landscaping does not form part of the alleged matters. Secondly, the term 'curtilage' merely describes an area of land that has an intimate association with a building, such that it is part and parcel of that building; it does not describe what the use of the land might be. For this hidden ground (c) appeal, the question is whether the enclosed land has a lawful use for residential purposes because it is part of the same planning unit as the dwelling. Even if the land is within the appellant's ownership, it does not necessarily follow that the lawful use of the land is residential use.
8. The Council states that the site and surrounding area is part of an open plan estate approved in 1967, of which grass verges and open forecourts are an integral feature, and that the land's legal use is for amenity purposes. On this basis the Council say that a change of use to a private garden requires planning permission.
9. The Council has not produced an approved plan which shows the enclosed area to be amenity land, but, given that the permission dates from 1967 that is unsurprising. In any case, the appellant has not shown that the Council's description of the 1967 permission is wrong or that the enclosed land was included in the planning unit of the appeal dwelling under that permission. Nor has it been shown to have been lawfully incorporated through a later grant of planning permission for a change of use into the planning unit.
10. The photographs of the pre-existing situation clearly show that the enclosed land fell outside the walled enclosure to the residential garden of the appeal dwelling. It also displayed the characteristics of 'amenity land', which is essentially an area that is landscaped for the benefit and enhancement of the

estate as a whole, rather than private garden associated with a Class C3 use. I saw a similar arrangement to other nearby properties, including those siding onto the western side of Whopshott Avenue.

11. Although the appellant asserts that his position on amenity land is widely accepted in caselaw, no evidence is provided to that effect. It is not demonstrated that the alleged material change of use of part of the land from amenity land to residential garden is not in breach of planning control on the balance of probabilities. For that reason, the appeal cannot succeed on ground (c).

The Appeal on Ground (a) and the Deemed Planning Application

Main Issues

12. The main issue is the effect of the alleged development on the character and appearance of the area.

Reasons

13. The predominant pattern of development on the western side of Whopshott Avenue is that of detached bungalows with open plan frontages. Where side elevations face onto the street, there is a clear and coherent approach of using brick walls, in materials matching the dwellings, set back from the edge of the footway behind a strip of amenity land. Collectively the amenity land combines with the open plan design of the frontages to create a spacious and attractive landscape setting to the estate. The photographs show that the pre-existing arrangement at the appeal site was largely consistent and in keeping with that design.
14. Due to the orientation of the appeal site dwelling and its corner location, its side boundary faces onto Whopshott Close. Although the appellant refers to that as a secondary frontage, all of the other dwellings in the Close face onto the street with open plan frontages. Given the relative extent of the side boundary fence facing the Close, combined with its height, forward alignment and appearance, it has an unduly imposing presence in the street scene. It dominates the entrance to the Close and because of its corner location, is prominent in views from both Whopshott Close and Whopshott Avenue.
15. Although not extending forward into the Whopshott Avenue frontage, the enclosure now extends up to and in line with the front elevation of the appeal dwelling, whereas previously it was set back from both the side and front. That alignment, together with the amenity land, afforded the boundary treatment a more subservient and softer relationship with the street scene. In contrast, the alleged fencing appears harsh and unsympathetic to its context and visually disconnects the appeal property from its surroundings.
16. Combined with the loss of amenity land, the fencing undermines the openness and spaciousness of this part of the estate. Moreover, because of its height and alignment close to the back of the footway, the enclosure is also somewhat overbearing to pedestrians.
17. The appellant considers that the reasons for issuing the enforcement notice do not take issue with the fencing materials. However, the reasons do take issue with its appearance. The use of timber contrasts with the predominant use of brick for solid enclosures, making it more obvious. Although timber will appear

less stark as it weathers, that will take time. So too would any meaningful coverage of creeping vines, whilst the effectiveness of other planting is likely to be compromised by the limited space between the fence and the back of the footway. In any case, the harmful alignment and loss of amenity land would remain.

18. I've noted the enclosure examples submitted by the appellant but the soft appearance of hedgerow planting cannot be reasonably compared to the stark appearance of the alleged fence. The other examples of timber fence enclosures are located in Nursery Close where the character and appearance of the street scene is materially different. I acknowledge that one of those properties backs on to Whopshott Avenue but that is peripheral to the main context of the estate and how the alleged development is experienced.
19. I therefore conclude that the alleged development results in unacceptable harm to the character and appearance of the area, contrary to Woking Core Strategy (October 2012) Policies CS21 and CS24 and to paragraphs 126 and 130 of the National Planning Policy Framework. Those policies state, amongst other things, that all development proposals will provide a positive benefit in terms of landscape and townscape character, and local distinctiveness. The harm and policy conflict would not be overcome by marginally reducing the height of the fence to 1.8 metres, not least as the alignment and loss of amenity land would remain.

Other Matters

20. On the issue of precedent, there is more than a reasonable prospect of similar development being able to be repeated elsewhere in this estate. If I were to allow this appeal, it would make it more difficult for the Council to resist further applications for such development, thereby compounding the harm I have described.
21. Although not borne out by the photographs, I acknowledge that the appellant undertook the work in good faith on the basis that the pre-existing wall was leaning and in risk of collapse. However, it is not explained why the wall couldn't have been repaired and made safe. The circumstances do not justify replacing the wall with a fence, in a different location, and, in doing so, enclosing amenity land.
22. For the reasons explained, the alleged development does not safeguard or improve the environment and accordingly does not make effective use of the land. I appreciate that colonising the space increases the private amenity space at the property, but any marginal gain from that strip is clearly outweighed by the harm described. I appreciate that CS Policy CS21 seeks to ensure appropriate levels of private amenity space, but it has not been shown that the property is deficient in that regard without the strip of amenity land.
23. The appellant refers to neighbouring support, but no evidence is provided to that effect.

Conclusions on the Ground (a) Appeal

24. For the reasons given above, I conclude that the ground (a) appeal should not succeed. I shall refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

The Appeal on Ground (f)

25. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. In this case, the alleged breach of planning control is, essentially, the material change of use of part of the land from amenity land to residential garden and the erection of a close boarded timber fence. The requirements of the notice are, in short, to cease the use of the amenity land as residential garden, remove the fence, re-instate the boundary, restore the amenity land to its previous condition and remove all associated materials. The purpose of the enforcement notice must therefore be to remedy the breach, rather than to remedy any injury to amenity caused by the breach.
26. The appellant states under ground (f) that he is willing to reduce the height of the fencing to 1.8m to alleviate any visual impact concerns. However, I have considered the same under ground (a) and have found that doing so would not overcome the harm described.
27. The appellant further argues that reducing the fence to 1 metre would be classed as permitted development under Class A of Part 2 of Schedule 2 of the GPDO¹. However, doing so would not remedy the breach of planning control. That is because the GPDO does not grant retrospective permission and the material change of use of the land to residential garden would remain.
28. The requirements of the notice are not excessive to remedy the breach. Nevertheless, requirement (ii) should be corrected so that it explicitly tallies with the alleged breach, for the avoidance of doubt. Moreover, requirement (iii) should be corrected to refer to the previous alignment, again for the avoidance of doubt. Reference should also be made to residential garden, rather than curtilage, for the reasons explained under ground (c). The corrections do not expand the requirements of the notice or result in injustice to any party.
29. The appeal on ground (f) fails.

Richard S Jones

INSPECTOR

¹ The Town and Country Planning (General Permitted Development) (England) Order 2015