



Appeal Decisions

Hearing Held on 10 January 2023

Site visits made on 10 January 2023

by R Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 February 2023

Appeal A: APP/D4635/C/21/3289922

Land at 23 Glen Court, Wolverhampton WV3 9JW

- 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 Charles Ward against an enforcement notice issued by Wolverhampton City Council.
- The enforcement notice was issued on 29 November 2021.
- The breach of planning control as alleged in the notice is Without planning permission, the making of a material change of use of a communal landscaped open space and the erection of boundary treatments to enclose the land as private rear garden.
- The requirements of the notice are 1. Remove the fencing to the rear of your property which has been erected over the communal open space and runs adjacent to Compton Road (shown in blue on Plan 2); 2. Remove from the land any materials arising from 1 either to a lawful place of disposal or if they are to be sold on as fencing from the land; 3. Return to and maintain the land in its predevelopment condition as communal open space.
- The period for compliance with the requirements is 2 months.
- The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal succeeds in part and the notice is corrected to delete the relevant allegation and requirements, but otherwise the appeal fails, and the enforcement notice as corrected and varied is upheld, as set out below in the formal decision.

Appeal B: APP/D4635/C/21/3289936

Land at 25 Glen Court, Wolverhampton WV3 9JW

- 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 Jagmeet Khalsa against an enforcement notice issued by Wolverhampton City Council.
- The enforcement notice was issued on 29 November 2021.
- The breach of planning control as alleged in the notice is Without planning permission, the making of a material change of use of a communal landscaped open space and the erection of boundary treatments to enclose the land as private rear garden.
- The requirements of the notice are 1. Remove the fencing to the rear of your property which has been erected over the communal open space and runs adjacent to Compton Road (shown in blue on Plan 2); 2. Remove from the land any materials arising from 1 either to a lawful place of disposal or if they are to be sold on as fencing from the land; 3. Return to and maintain the land in its predevelopment condition as communal open space.
- The period for compliance with the requirements is 2 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal succeeds in part and the notice is corrected to delete the relevant allegation and requirements, but otherwise the appeal fails, and the enforcement notice as corrected and varied is upheld, as set out below in the formal decision.

Appeal C: APP/D4635/C/21/3289850

Appeal D: APP/D4635/C/21/3294761

Land at 21 Glen Court, Wolverhampton WV3 9JW

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Gwyn James against an enforcement notice issued by Wolverhampton City Council.
- The enforcement notices were issued on 29 November 2021 (Appeal C) and 10 February 2022 (Appeal D).
- The breach of planning control as alleged in the notices is Without planning permission, the making of a material change of use of a communal landscaped open space and the erection of boundary treatments to enclose the land as private rear garden.
- The requirements of the notices are 1. Remove the fencing to the rear of your property which has been erected over the communal open space and runs adjacent to Compton Road (shown in blue on Plan 2); 2. Remove from the land any materials arising from 1 either to a lawful place of disposal or if they are to be sold on as fencing from the land; 3. Return to and maintain the land in its predevelopment condition as communal open space.
- The period for compliance with the requirements is 2 months.
- The appeals are proceeding on the grounds set out in section 174(2) (c), (d) and (f) of the Town and Country Planning Act 1990 as amended. In addition Appeal C is proceeding on ground (e).

Summary of Decisions: The appeals succeed in part and the notices are corrected to delete the relevant allegation and requirements, but otherwise the appeals fail, and the enforcement notices as corrected and varied are upheld, as set out below in the formal decision.

Appeal E: APP/D4635/C/21/3287966

Land at 3 Glen Court, Wolverhampton WV3 9JW

- 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 Gordon Clarke against an enforcement notice issued by Wolverhampton City Council.
- The enforcement notice was issued on 29 November 2021.
- The breach of planning control as alleged in the notice is Without planning permission, the making of a material change of use of a communal landscaped open space and the erection of boundary treatments to enclose the land as private rear garden.
- The requirements of the notice are 1. Remove the fencing to the rear of your property which has been erected over the communal open space and runs adjacent to Compton Road (shown in blue on Plan 2); 2. Remove from the land any materials arising from 1 either to a lawful place of disposal or if they are to be sold on as fencing from the land; 3. Return to and maintain the land in its predevelopment condition as communal open space.
- The period for compliance with the requirements is 2 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal succeeds in part and the notice is corrected to delete the relevant allegation and requirements, but otherwise the appeal fails, and the enforcement notice as corrected and varied is upheld, as set out below in the formal decision.

Preliminary Matters

1. The appeal sites involve land associated with a terraced block of dwellings. Each case involves the enclosure of what was previously open land situated between the respective dwellings and the highway along Compton Road West.
2. The Hearing procedure related only to Appeal A in relation to 23 Glen Court. All of the other appeals cited are proceeding by way of written representations.
3. With regard to Appeal A, at the Hearing the appellant confirmed that he no longer wished to pursue the appeal on ground (e), and accordingly that this ground of appeal was withdrawn.
4. At the Hearing I acknowledged that concern had been expressed regarding the motivation and expediency for the Council taking enforcement action. However I confirmed that such concerns were outside my jurisdiction and that I needed to focus on the substance of the various grounds of appeal.
5. With regard to Appeal B, the appellant states that some residents have not been served with a copy of the notice. I have treated this as a 'hidden' ground (e) appeal and deal with it accordingly below.
6. With regard to Appeals C and D, during the site visits I was unable to gain access to 21 Glen Court. However I am satisfied that I was able to view the land in question sufficiently from the adjoining property at No 23 and also from Compton Road West.
7. There are no appeals made on ground (a), that planning permission should be granted for the development alleged. Therefore for the avoidance of doubt the question of the planning merits of any of the works undertaken, including potential security benefits, have not had any influence on my decisions.
8. The notices are served by the Council following two unsuccessful attempts to enforce, with the notices in those cases having been found invalid by respective Inspectors¹. For the avoidance of doubt, a finding of invalidity does not mean, as has been suggested by some of the appellants, that the fencing subject to the present notices was deemed to be permitted. Nor does it suggest that the Council has behaved unreasonably and should be liable for an award of costs. The basis of the invalidity findings was that the notices did not specify with sufficient clarity what was required to be done to remedy the breach of planning control. The invalid notices were issued by the Council in August 2019 and August 2020 respectively.
9. S171B(4)(b) of the Act allows for 'taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach'. It is the Council's case that the notices subject to the present appeals benefit from this so-called 'further bite' provision. I am in no doubt that the concern of the present notices continues to be with the matter of the change of use of land and the erection of boundary treatments, as was identified in the previous invalid notices. Accordingly the present notices fall within the 'further bite' powers available to Councils under s171B(4)(b) of the Act.

¹ Appeal Refs APP/D4635/C/19/3236928; APP/D4635/C/20/3261282 & APP/D4635/C/20/3261330

10. The appellant in relation to Appeal D is critical of an inconsistent approach by the Council in that enforcement notices have not been served against owners who have planted hedges. However the act of planting, in itself, does not come within the definition of operational development, as defined in s55 of the Act, and as such is exempt from planning control.
11. The enforcement notices each target both the alleged material change of use of the land as well as separately the operational development comprising the erection of fencing enclosing that land. My decisions therefore address both types of development.

Appeals B and C on ground (e)

12. This ground of appeal is that copies of the enforcement notice were not served as required by s172 of the Act. This requires the notice to be served on the owner and the occupier of the land to which it relates and on any other person having a material interest in that land. The onus is on the appellant to demonstrate their case on the balance of probability.
13. The appellant in relation to Appeal B states that not all residents have been served with a copy of the notice. It is not made clear which residents are considered to have been overlooked in this regard, and there is no suggestion that the notice has not been served on all persons with an interest in the land at 25 Glen Court.
14. With regard to Appeal C, the appellant's case is that No 21 is owned in equal shares by the appellant and a relative, who was not specifically served with a copy of the notice. The Council indicates that it served a copy of the notice jointly on both parties at what appears to be their former address. Whilst the appellant claims that only one notice was served, which was passed to him, I am not provided with evidence to rebut the point that the notice was also intended for the attention of his relative. Accordingly the appellant has failed to demonstrate on the balance of probability that the notice was not served as required by the Act. The ground (e) appeals therefore fail.

Appeal A on ground (b)

15. The appeal is that the matters alleged to constitute the breach of planning control have not occurred as a matter of fact. The alleged breach of planning control is the material change of use of land to private rear garden and the erection of boundary treatment to enclose that land.
16. The appellant does not dispute that the land subject to the notice is in use as a private garden and that it has been enclosed by fencing. I have no reason take a different view. Accordingly the appeal on ground (b) must fail.

The appeals on ground (c)

17. The appeals are that those matters (if they occurred) do not constitute a breach of planning control. The burden of proof rests with the appellant, with the standard of proof being the balance of probability.

Material Change of Use

18. In terms of the alleged material change of use, the disputed areas of land are situated in the space between the terraced dwellings and the highway footpath

running adjacent to Compton Road West. The land comprises amenity space which has been enclosed to varying degrees by timber fencing. The fencing has encroached over, and therefore severed the route of, a former private footway, which is set back from, but runs parallel with, the highway footpath on Compton Road West.

19. That all of the land between the dwellings and the highway is in private ownership is not disputed. However, the crux of the dispute between the Council and the appellants is the extent to which the lawful use of this space can be regarded as private garden land and the extent to which it can be regarded as being in separate use as incidental 'communal' landscaped open space.
20. The appellants' case is that the alleged material change of use to private garden land has not occurred, as the land subject to the notices has always been part of the private gardens of the respective properties. In this regard there has not therefore been a breach of planning control.
21. The Council's case, as set out at the Hearing, is that the private rear gardens of the appeal properties previously ended at the rear of the private footway. It says that Historic Google Street view imagery from 2009 shows the boundary with the footway to be substantially fenced, therefore leaving the footway and amenity land between it and the highway as a visually open landscaped feature. The Council says that the continuity and 'communal' nature of the footway, which it says was used by the public (even if not a lawful public route), served to reinforce the character of the land as incidental open space. It contends that the extension of fencing up to or very close to the highway, in relation to the appeal properties, has facilitated the material change of use to an extension of residential garden land there with attendant domestic activities.
22. It is important to have regard to the concept of the planning unit, as it is the planning unit against which the question of a material change of use would need to be judged. The planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and/or occupied for different and unrelated purposes; the concept of physical and functional separation is key.
23. Whilst there is evidence of a strongly established fence line at the back of the private footway, the parties accepted at the Hearing that this feature was not original. At the time the dwellings were constructed, likely to have been in the 1960s, it appears that the land between the rear of the terrace and Compton Road West would have been open and free from any form of built enclosures. It is also not controversial between the parties that historically residents have used hedges to help define and compartmentalise plot areas. Indeed it was evident from my visit that some of the plots, where fencing has not been extended back, appear to rely on dense hedge boundaries in this way. It seems to me that the historic absence of built enclosures around any of the land associated with the dwellings does not equate to there having been an absence of gardens then.
24. I concur with the Council that the enclosure of land would be likely to increase security making it more amenable for private domestic use, for example in terms of relaxation, children's play and the drying of laundry. Equally however

it seems to me that the original absence of man-made enclosures did not mean that garden land did not exist, rather that the design concept for the development was based on an absence of strong physical division between individual private plots. From the historic photo imagery, reinforced by my visits, it was apparent that where the land is not enclosed by fencing mature shrubs and trees predominate with some evidence of grass behind boundary hedges.

25. The Council refers, by way of analogy, to examples of landscaping strips and corners on certain housing estates forming areas of incidental amenity open space that are distinct from gardens. I do not dispute this, and it seems to me that the inclusion of a number of trees in the vicinity within an historic Tree Preservation Order² only serves to underline this wider amenity value.
26. However it is possible for open plan front gardens on more modern estates, to be protected from fence enclosures so that they provide a wider amenity function. Notwithstanding, this does not mean that such areas, which are frequently planted and maintained by and for the enjoyment of residents, no longer constitute gardens incidental to the enjoyment of those dwellings, rather than incidental amenity open space instead; even though they may not facilitate the aforementioned domestic activities associated with more private space. I consider the appeal sites to be akin to this situation, their close physical relationship, orientation and common ownership with the respective private properties, despite the intervening footway, meaning they are to be regarded as garden land, with wider amenity benefits.
27. This is a subtle distinction but nevertheless significant in this case. I am not persuaded that any use historically by the public of what appears from all the evidence before me to have been a private footway, together with the steps leading down from this to the respective dwellings, serves to dilute my finding that the lawful use of the land is that of private gardens, functionally linked to the respective dwellings, rather than a single planning unit of communal open space.
28. Whilst I have some sympathy with the Council's stance, on the balance of probability I find that a material change of use of land has not occurred. The ground (c) appeals therefore succeed in respect of the material change of use of land. I shall allow the appeals insofar as they relate to the material change of use of land and in doing so shall delete from the notice references to it from the allegation and the requirements. However it is necessary for me to go on to consider whether the erection of the fencing in itself would have required planning permission.

Operational Development

29. There is no dispute between the parties that the erection of the fences, subject to the notices, constitute an act of development in the context of Section 55 of the Act. I therefore turn to the question of whether the fences would have amounted to 'permitted development'. Article 3, Schedule 2, Part 2, Class A of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) states that the erection, construction,

² Wolverhampton (Avenue Road) Tree Preservation Order, 1960

- maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure constitutes permitted development, subject to various conditions.
30. Paragraph A.1. of Class A goes on to indicate that, with the exception of specific circumstances relating to schools, development is not permitted by Class A if the structure in question is erected or constructed adjacent to a highway used by vehicular traffic and would exceed a height of 1 metre above ground level. In any other case the height of the structure should not exceed 2 metres above ground level, in order to be permitted development.
31. The parties do not dispute that the fences erected in this case exceed 1 metre in height but do not exceed 2 metres in height. The ground (c) appeals therefore turn on whether the fences subject to the notices should be regarded as being 'adjacent' to a highway used by vehicular traffic.
32. Case law has established that a fence does not need to be abutting a highway in order to be adjacent to it. The common dictionary definition of 'adjacent' refers to meaning close or near to something. A fact and degree assessment will therefore be necessary in each case, to determine whether a fence should be regarded as adjacent to a highway.
33. With regard to Nos 21, 23 and 25 Glen Court it was evident that the rear boundary fencing was either abutting or at least very close to the Compton Road West highway footpath. The rear boundary fencing at No 3 Glen Court is set further back from the highway boundary, to allow for some intervening planting. However, from my visit the rear garden fence nevertheless still appears close to the highway boundary, my view being reinforced by the presence of a boundary gate which is clearly intended to enable connectivity between the two. In each case the rear boundary fencing subject to the respective notices is therefore adjacent to a highway used by vehicular traffic.
34. With regard to each property, it appears that not all of the 'side' panel fencing, subject to the notices, could be regarded as adjacent to the highway, due to their degree of set back within the site and separation from the highway. However I have no reason to doubt that these panels were erected as an integral part of the whole development and therefore also constitute part of the breach of planning control. Having regard to the above considerations the appeals on ground (c) fail in relation to the erection of boundary treatments.
35. Nevertheless I shall go on to consider the extent to which the requirements to remove side panel fencing would be excessive, in the context of the ground (f) appeals. It may be that the erection of some of the side panel fencing, in isolation, would be acceptable on the basis that it is permitted development. Alternatively it may be arguable that boundary fencing should be granted planning permission, although this is a matter that would need to be resolved between the parties in future.

Appeals A, C and D on ground (d)

36. The ground of appeal is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control. S171B(1) of the Act provides that no enforcement action may be taken in respect of any unauthorised operational development after the end of the

period of four years beginning with the date on which the operations were 'substantially completed'.

37. In order to succeed on this ground, in accordance with Section 171B(1) of the Act, it would normally be necessary for the appellants to show, on the balance of probability, that the alleged fences were substantially completed by 29 November 2017 (or in the case of Appeal D by 10 February 2018).
38. However I have concluded that the notices issued in this case benefit from the provisions of S171B(4)(b) of the Act. This allows for 'taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach'.
39. The first of the notices relating to the Council's purported enforcement action, which was the subject of the previous appeals as referred to above, was issued on 30 August 2019. This date is during the four-year period ending with the issue date of the enforcement notices subject to the present appeals (29 November 2021 and 10 February 2022). Consequently in order to succeed on this ground the appellants would need to show, on the balance of probability, that the alleged fences were substantially completed by 30 August 2015.
40. It is undisputed by the parties that the fences were completed on 17 August 2017. Accordingly the Council was not out of time to initiate enforcement action. The ground (d) appeals therefore fail.

The appeals on ground (f)

41. The ground of appeal is that the steps required by the notice to be taken are excessive. I have determined above that the alleged material change of use did not occur. With regard to the alleged operational development the objective of the notices is to remove the fencing and therefore to remedy the breach of planning control.
42. The appellants' say that the requirements are excessive on the basis that it will expose the properties to increased security risk and also to disturbance from traffic noise. It is also suggested by the appellant, in respect of Appeal A, that hedging should replace the fencing in due course, with a structure set back to enhance security; and in relation to Appeal E that hedging is becoming established, blocking views of the fence from the road. However, these considerations and arguments are linked to the planning merits of the case which are not before me for consideration in the absence of appeals on ground (a). The appellant in respect of Appeals C and D sets out that the communal space could be restored by removing only the side fence panelling or by replacing it in part with gates, therefore obviating the need to remove all of the fencing. However this would not remedy the breach of planning control, namely the erection of unauthorised fencing.
43. Given that the purpose of the notices is to remedy the breach of planning control, in the absence of planning permission, this can be achieved by the removal of the unauthorised fencing. To require that does not, therefore, exceed what is necessary.

44. However I have recognised in the reasoning above that some of the side panel fencing could be sufficiently set back from the highway, such that if it was erected in isolation, it would be regarded as permitted development. It seems to me, in the circumstances of this case, that any fencing situated 2.5 metres or more than that away from the boundary with the Compton Road West highway footpath should not be regarded as forming a boundary between the property and the highway, and as such not adjacent to it. Therefore to require complete removal of the alleged fencing would be excessive, because the grant of planning permission under the GPDO represents a realistic fallback position. To this extent and because of the corrections warranted, as referred to above, the ground (f) appeals succeed.

Appeal A on ground (g)

45. The appeal on ground (g) is that the time given to comply with the notice is too short. The appellant does not specify a period which he considers would be reasonable for compliance. I am mindful of the importance of striking a balance between enforcement that is intended to be remedial rather than punitive, whilst maintaining public confidence in the planning system.
46. I am aware from the Council's representations that it may be possible to achieve a design solution that is acceptable to all parties; also that its views on what is acceptable may be influenced by my finding that a material change of use has not occurred. Whilst ground (g) has not been pleaded in relation to all of the appeals it seems to me that there would be justification to lengthen the time for compliance with the enforcement notices.
47. I consider that this would provide a reasonable opportunity for the appellants to make a planning application to the Council for an alternative scheme and for any necessary amendments to be made, should the applications prove successful. In this regard I consider that a six-month compliance period would be proportionate whilst also having regard to human rights considerations. The ground (g) appeal therefore succeeds to this limited extent.

Conclusions

48. For the reasons given above I conclude that the appeals should succeed in part only, and the notices are corrected to delete the relevant allegation and requirements for one part of the matter the subject of the notices, but otherwise I will uphold the notices with corrections and a variation.

Formal Decisions

49. It is directed that the enforcement notices be corrected as follows:

Deleting the alleged breach of planning control set out in Schedule 3, in its entirety, and substituting the following wording instead: "Without planning permission the erection of boundary treatments to enclose the private rear garden."; and

Deleting the wording in paragraph 1 of Schedule 5 in its entirety and substituting the following wording instead: "Remove the fencing, that exceeds 1 metre in height, to the rear of your property adjacent to Compton Road West (as shown in blue on Plan 2, but with the exception of any of that fencing that

is situated not less than 2.5 metres away from the Compton Road West highway footpath)”; and

Deleting paragraph 3 of Schedule 5 in its entirety.

50. It is directed that the enforcement notices be varied by deleting the words “2 months” in Schedule 6 and substituting the words “6 months” instead.
51. Subject to the above corrections, the appeals on ground (c) are allowed insofar as they relate to the change of use of land only at Nos. 3, 21, 23 and 25 Glen Court, Wolverhampton WV3 9JW.
52. The appeals are dismissed and the enforcement notices are upheld, as corrected and varied, insofar as they relate to the alleged erection of boundary treatments at Nos. 3, 21, 23 and 25 Glen Court, Wolverhampton WV3 9JW.

R Merrett

INSPECTOR

APPEARANCES IN RESPECT OF APPEAL A

FOR THE APPELLANT:

Charles Ward	Appellant
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FOR THE LOCAL PLANNING AUTHORITY:

Charlotte Morrison	Section Leader, Planning
Colin Noakes	Senior Town Planner