



Appeal Decisions

Inquiry held on 11, 12, 13 and 20 January 2023

Site visit made on 13 January 2023

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 14 February 2023

Appeal A Ref: APP/M2372/C/22/3304083

Appeal B Ref: APP/M2372/C/22/3304084

Land and Buildings on the South side of Livesey Branch Road, Blackburn, BB2 5FB

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr James Boylan against an enforcement notice issued by Blackburn with Darwen Borough Council.
 - The notice, numbered , was issued on 24 June 2022.
 - The breach of planning control as alleged in the notice is: Failure to comply with the requirements of Condition 3 attached to the grant of full planning permission on the 22nd November 2001 – Ref.10/01/0516 – Set out as follows:
 - Trees and shrubs shall be planted on site in accordance with the Landscaping scheme hereby approved during the first available planting season after the commencement of the development. Trees and shrubs dying or becoming diseased, removed, or being seriously damaged within five years of planting shall be replaced by trees and shrubs of similar size and species to those originally required to be planted during the first available planting season after the loss of the trees and/or shrubs. Landscaped areas shall be maintained in a neat and healthy condition to the satisfaction of the Local Planning Authority;
 - Without planning permission the material change of use of land from Public Open Space, as approved and detailed within drawing number referenced 00/37/PO1 pertinent to planning approval 10/01/0516, granted permission by the Local Authority on the 22/11/2001 to that of 'private enclosed land' AND
 - Without planning permission the erection of a fence and gate / means of enclosure, adjacent to a highway at a height of 1.94 metres.
 - The requirements of the notice are : (i) Maintain, in a neat and healthy condition, the landscaped area/POS as detailed on Drawing number 00/37/PO1 pertinent to planning approval 10/01/2001, granted approval on the 22/11/2001, to the satisfaction of the Local Planning Authority. (ii) Remove the gate and fence/means of enclosure in its entirety , or reduce to a height no greater than 1m, in accordance with the limitations of The Town and Country Planning (General Permitted Development)(England) Order 2015 (As amended), Schedule 2, Part 2, Class A- Gates, fences, walls etc. (iii) Allow unrestricted access by members of the public over the access road, detailed and described within the aforementioned drawings as 'Access road through to the adjacent public open space, into the area of POS.
 - The period for compliance with the requirements is 2 months.
 - Appeal A and Appeal B is proceeding on the grounds set out in section 174(2) (b), (c) and (d) of the Town and Country Planning Act 1990 as amended. Appeal A is also proceeding on the ground set out in section 174(2) (a) and 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 and varied by:

The deletion of the first four paragraphs of section 3 of the notice in their entirety so that it begins with the paragraph numbered 3.2;

The deletion of requirement 5(i) in its entirety;

The deletion of requirement 5(iii) in its entirety and substitution with the words 'Cease the material change of use of the Land and allow unrestricted access by members of the public into the area of public open space.';

The deletion of the title of Plan 1 and substitution with 'Plan 1. Land and Buildings on South Side of Livesey Branch Road, Blackburn.'; and

The deletion of the title of the Site Plan and substitution with 'Site Plan. Land and Buildings on South Side of Livesey Branch Road, Blackburn.'

2. Subject to the corrections and variations, the appeals are dismissed and the enforcement notice is upheld.

Preliminary Matters

The Notice

3. Section 176(1) of the 1990 Act permits the correcting or varying of an enforcement notice where the change would not cause injustice to the appellant or LPA. So long as the notice is not a nullity by reason of hopeless ambiguity and uncertainty it can be corrected to be put on a proper footing.
4. I therefore direct that the following typological amendments and which will not cause injustice to the notice be made to put it in order:
 - a) Correct the title of Plan 1 so that it refers to 'Land and Buildings on South Side of Livesey Branch Road, Blackburn.'
 - b) Correct the title of the Site Plan so that it refers to 'Land and Buildings on South Side of Livesey Branch Road, Blackburn.'
 - c) Correct the reference of the planning permission in requirement 5(1) TO 10/01/0516'
5. I am also satisfied that Requirement 5(iii) can be amended to remove the wording 'detailed and described within the aforementioned approved drawings as 'Access road through to adjacent public open space' without causing injustice (and the parties agree).
6. The wording of Requirement 5(i) is more problematic. It reads: 'Maintain, in a neat and healthy condition, the landscaped area/POS as detailed on Drawing number 00/37/PO1 pertinent to planning approval 10/01/2001¹, granted approval on the 22/11/2001, to the satisfaction of the Local Planning Authority.' The parties readily accept that the requirement that the site be maintained 'to the satisfaction of the Local Planning Authority' is not sufficiently certain so as to enable the appellants to understand what they are required to

¹ Corrected to "planning approval 10/01/0516" as set out above.

- do to comply with the notice and should be deleted from the notice. I agree with the parties and this wording can be removed without causing injustice.
7. The parties were also in agreement that the requirement to maintain the land in a 'neat and healthy condition' was reasonably certain, particularly as it was the appellants' case that they had maintained it until 2010. They contend that this wording could be understood with its common meaning in plain English (and that any magistrates dealing with a prosecution for breach of that condition would understand its meaning and what steps should have been taken.)
 8. However, there is dispute between the parties as to what 'neat and healthy' means in this context and the appellant accepts that the assessment of what is 'neat and healthy' is highly subjective. I do not therefore find that this requirement meets the test set out in caselaw², i.e. that the recipient of the notice "is entitled to ...find out from within the four corners of the document what he is required to do". The parties argue that this requirement (and the source wording from the original condition) mean very different things in relation to the appeal site. I am not clear as to what level of maintenance was intended when the condition was imposed.
 9. The appellant argues that the notice can be varied so that Requirement 5(i) is redrafted to require "Maintenance of the POS by mowing three times between April and October each year". However, this wording would not mirror the alleged breach of planning control, i.e. the breach of Condition 3 and the alleged failure to maintain the site in a neat and healthy condition. Whilst such a variation of the requirement could be considered to be an underenforcement, the issue is in fact of a more central importance. The requirement to maintain the land in a neat and healthy condition is so fundamentally vague and uncertain that anyone reading the notice cannot understand what would be required in order to comply. The arguments put to me by the parties about what the condition sought to require highlights the subjective judgement involved in interpreting its meaning.
 10. There is no dispute before me regarding the remainder of Condition 3 and the parties accept that, whilst the condition was not formally discharged, the trees and shrubs were planted in accordance with the Landscape Scheme and that there is no evidence to suggest that any that needed to be replaced within the first 5 years were not so done in accordance with it. The problem with the condition only arises when considering the final sentence which does not meet the statutory and policy tests and should be removed.
 11. The notice is a hybrid notice in that it refers to 3 separate but related alleged breaches of planning control; i) a breach of condition; ii) a material change of use and iii) operational development. The uncertainty within Requirement 5(i) does not therefore render the whole of the notice a nullity because it, and the first unnumbered paragraphs of Section 3 (i.e. those before 3.2) relating to the alleged breach of condition, can be deleted without affecting the rest of the notice. These paragraphs and Requirement 5(i) should therefore also be removed from the notice in their entirety.

² Miller Mead v MHLG [1963] 1 All ER 459

Condition precedent

12. The parties both accepted when asked that permission reference 10/01/0516 ("the 2001 Permission") had been implemented. There was a brief discussion regarding whether Condition 4 had been discharged prior to the commencement of development and the Council's case was that it had not. This is not directly relevant to this appeal because whilst Condition 4 did prohibit the commencement of development until the requirement relating to the landscape and maintenance and management scheme for the open space was submitted and approved, it was not a true condition precedent as it did not go to the heart of the permission.

Grounds (b) and (d)

13. An appeal on ground (b) is on the basis that the matters stated in the notice as constituting a breach of planning control have not occurred. This ground of appeal is brought in relation to the material change of use of the land. The allegation as set out in section 3.2 is: "Without planning permission the material change of use of land from Public Open Space, as approved and detailed within drawing number referenced 00/37/PO1 pertinent to planning approval 10/01/0516, granted permission by the Local Authority on the 22/11/2001 to that of 'private enclosed land'. The parties accept that as 'private enclosed land' is not in itself a planning use this description should be corrected to describe the use as 'private open space', and I agree that this can be done without causing injustice.
14. The question before me under ground (b) therefore is whether, as a matter of fact, there has been a change of use of the appeal land from public open space to private open space.
15. The appeal land was granted permission as public open space as part of the wider permission reference 10/01/0516 for residential development ('the 2001 Permission'). The 2001 Permission was implemented and the appeal land was laid out in accordance with this permission, albeit there is a dispute between the parties as to whether it was completely finished. The appellants' case is that it was never used as public open space as the access arrangements were not finalised and the site remained locked following completion of the works on the houses. The Council argues that it was used by members of the public, predominantly but not only residents of Kingsley Close, from around at least 2006/2007 until Spring 2022 when the new gates and fences were erected.
16. An appeal on ground (d) is that, at the date that the notice was issued, no enforcement action could be taken in respect of any breach of planning control constituted by the matters stated in the notice. In this case, the appellants argue that the site has not been used as public open space for a period of over 10 years prior to the issue of the notice and that any use has been as private amenity space by the residents.

Evidence regarding the land

17. In this case the appellants need to prove, on the balance of probabilities, that the site was not used as public open space, or that if it was it subsequently changed to private amenity space and was used as such for a continuous 10 year time period prior to the date of the notice.

18. It should be acknowledged that the relevant planning history of this site dates back to 2002 and that the period of alleged use of the site stretches over nearly 20 years. It is not therefore unusual that there are some contradictions in the recollections of witnesses or that original documents were not retained, particularly as some of the issues now in contention as part of this appeal would not have seemed significant at the time. The number of photographs of actual use of the site is also not unusual in the circumstances, and must be taken into consideration alongside other evidence. I accept that the photographs including those from Google Maps, and similarly the site visits including flyovers, simply represent a snapshot from time and date taken and it is therefore necessary to consider when these snapshots are supported or contradicted by other evidence.
19. The appellants state that if the photographic evidence is examined in detail it "only shows (generously) 20 occasions of the site being used". They say that the quality of the use by the residents of the six houses that back onto the land was not such as to qualify as use by the public generally, and that public open space can only be classed as such where there is actual use by the public.
20. Their case is that the Jubilee party which took place was with the owners' permission, and that the evidence regarding the use for a private birthday party and for the pitching of tents is commensurate with use as a private amenity space. They say that evidence provided of the residents and their children using the site is also use as private amenity space and that this is supported by the various encroachments onto the site (i.e. garden extensions, planting and access gates), a lock and sign put on the gate by a resident and fact that their planning witness was approached and asked what he was doing by a resident when he visited the site. In addition, the appellants gave sworn evidence regarding site inspections (passing by on foot or flying over in a helicopter) where very little or no use was seen (other than football posts on site and one overnight stay by a canal barge who was asked to move on).
21. As well as the photographic evidence submitted by the Council, sworn evidence was provided by two residents and a local parish councillor regarding their knowledge and use of the appeal site following the implementation of the 2001 Permission. Both residents gave evidence of it being used frequently by residents and members of the public, particularly children during the summer holidays. The councillor does not live on Kingsley Close but gave evidence of seeing the appeal site used when passing by on the tow path opposite and also using it himself several times a year to link up to a longer walking route.
22. The three witnesses said they accessed the site via the low fence next to the gate, and on seeing the photo showing the geese and unfenced gap next to the gate (exhibited as AB64), both of the residents remembered that it had not always been fully fenced and that they had originally gone on the site through that gap. The photograph was dated May 2007 and it is generally accepted that the gap was fenced by around 2009 at the latest. It does not undermine the credibility of the residents that they had not remembered the exact access configuration at various times until seeing the photograph, particularly as this would not have been an important detail to them at that time.
23. The areas of evidence most in dispute between the parties are not directly relevant when considering the use of the appeal land. There is in fact little in the way of direct conflict between the evidence given by the witnesses

regarding the actual use. The appellants' evidence regarding site inspections were only of sporadic and intermittent points in time and for short periods and could be easily consistent with the use described on behalf of the Council.

24. Much was considered regarding whether a wider element of the public used the appeal land rather than only the residents from the 6 houses that back onto the appeal land. The site is not very large as an area of open space, and its use by people over a wider area is therefore likely to reflect its size. For example a large public park will attract many more people from a wider locality than a small 'pocket park' provided as part of a new residential estate which whilst freely accessible to anyone will mainly be used by the nearby residents due to its limited size and amount of play equipment. Nevertheless, there was evidence before me that other residents from Kingsley Close (aside from the 6 houses that back onto the site), plus other who lived further afield (including the sworn evidence from the councillor) used the land. And in any event, the residents of the six adjoining houses are also members of the public.
25. The intention behind this use is not relevant in this case, the evidence from the Council is that people were able to access the site and did so; either via the gap, using the gate when it was unlocked or climbing the low fence. I fully accept the evidence from the Council's witnesses that they were told when purchasing their houses that the land would be public open space and were not then told anything to the contrary until fairly recently. They understood that the land was privately owned but not that it was not public open space as they had initially been informed, and as it had been laid out. Indeed, the appellant's witness accepted that residents had not been expressly informed that the land was not to be used as public open space but their case is that the locked gate and the signage stating it was private should have been sufficient to deter any use.
26. The historic evidence regarding the access arrangements, whether and when the gates were locked and what signage was on the gate during a particular time is unclear. The appellants' witness gave sworn evidence that the gate was locked in 2006 and their employee who undertook the maintenance until 2010 provided written evidence that it was always locked when he visited, and the farmer using the adjacent field has provided evidence by way of affidavit that the gate was always locked, at times with two keys. However, a resident gave sworn evidence that the gate was unlocked on many occasions, and indeed the photograph with the geese (exhibit AB64) shows that to be the case on at least that occasion. In any event, nothing turns on this discrepancy as access was possible and was achieved by using the fence as a stile. I accept that this means that if the gate were locked access would not be possible by all members of the public (e.g. those with a wheelchair or pram), but that in itself does not preclude a planning use as public open space.
27. I also find that the evidence regarding the locking of the gate and provision of a sign by a resident to dissuade the potential stationing of caravans on the land supports the case that it was used as public open space. Whilst the gate was locked by a resident (for an unknown time period but relatively short in the overall time period) it appears that there was a complaint from a member of the public to a local councillor and he was sufficiently concerned to require the lock and signage to be removed. This supports the view that the land was generally regarded as public open space and that people should not be dissuaded from using it as such.

28. The appellants provided evidence, which the residents accepted that there had been some elements of trespass onto the appeal site, namely the extension of the private gardens and the planting and removal of trees. Several gates had also been inserted into some of the gardens adjoining the land. However, these elements of trespass have been accepted and removed, and were de minimis in terms of the overall size of the appeal site and not evidence in themselves of a private amenity use of the site. In my experience, this type of trespass is not uncommon where housing adjoins open space and nor is the insertion of access gates.

29. *Conclusion on grounds (b) and (d)*

30. Based on the evidence set out above, I find that on the balance of probabilities the land was used as public open space from around the time that Dorbcrest left the appeal site. I do not find that there was evidence before me to show that there was a change of use to a private amenity use during this time. The new gates and fence erected in May 2022 prevent access by the public which caused a material change of use of the appeal site to use as private open space.

31. The appellants agreed that if the lawful use was found to be public open space, as alleged in the amended notice, Requirement 5(iii) should be corrected, without causing injustice, to require the cessation of the material change use. I agree that this correction can be made, and does not in fact widen the scope of Requirement 5(iii) which as originally drafted required unrestricted access by members of the public over the access road into the area of public open space. As a matter of plain English, the original wording clearly means access into the whole of the appeal land without needing any additional wording. A correction to the notice to require the cessation of the material change of use would not therefore cause injustice as it would not increase the scope of the requirement.

Ground (c), ground (a) and the deemed application for permission

32. The appellants submitted that if the lawful use as public open space were found and the notice upheld with regards to the alleged material change of use they would not be pursuing the ground of appeal in relation to the operational development of the gates and the fence. The appeals brought under ground (a) and ground (c) do not therefore fall to be considered

Zoë Frank

INSPECTOR

Appendix 1

List of those who have appealed

Reference	Case Reference	Appellant
Appeal A	APP/M2372/C/22/3304083	Mr James Boylan
Appeal B	APP/M2372/C/22/3304084	Mrs Gladys Boylan

APPEARANCES

FOR THE APPELLANT:

Anthony Gill of Counsel who called:

Kierstan Boylan, Dorbcrest Homes

Dympna Boylan, Dorbcrest Homes

Paul Sedgwick Dip TP MRTPI, Sedgwick Associates

FOR THE LOCAL PLANNING AUTHORITY:

Christian Hawley of Counsel who called:

Amanda Barnes

Darren Tuplin

Cllr Rick Moore, Livesey Parish Council

Richard Waters, Planning Enforcement Officer

Gavin Prescott MA, MRTPI, DMS, Planning Manager (Development Management),

DOCUMENTS

- 1 Opening statements from Appellants and Council
- 2 Documents submitted by appellant by email dated 6 January 2022
- 3 Rebuttal evidence of Amanda Barnes
- 4 Closing statements from Appellants and Council