



Appeal Decision

Site visit made on 8 February 2023

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 March 2023

Appeal Ref: APP/K0425/C/21/3287541

Land at 2 Woodbine Cottages, Downley Road, Naphill, Buckinghamshire HP14 4RH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). The appeal is made by Mr R Stone against an enforcement notice issued by Buckinghamshire Council.
 - The notice was issued on 7 October 2021.
 - The breach of planning control as alleged in the notice is without planning permission:
 - a material change of use of Land to residential garden;
 - the erection of fencing and gates and;
 - the creation of a gravel hardstand.
 - The requirements of the notice are to:
 1. Cease the use of the Land (outlined in black on the attached plan) for residential purposes;
 2. Dismantle and remove all gates, fencing and enclosures from the Land;
 3. Rip up and remove all hardsurfaces, included but not limited to gravel driveway, from the Land.
 - The period for compliance with the requirements is: 6 months.
 - The appeal is proceeding on the ground[s] 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 deleting “the erection of fencing and gates” and “the creation of a gravel hardstand” from the alleged breach of planning control at section 3. 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

2. The allegation as set out in section 3 of the notice, includes reference within the second and third bullet points, to operational development in the form of fencing, gates and the creation of a gravel hardstand. The reasons for issuing the notice refer only to the breach of planning control having occurred within the last 10 years. This relates to the time limit for taking enforcement action with respect to a material change of use as provided for by s171B(3) of the Act. There is no reference to a 4 year period with regard to s171B(1) which would apply to operational development such as fencing, gates and the creation of a gravel hardstand. Furthermore, the reasons only refer to the alleged harm caused by the material change of use.

3. The appellant has confirmed their understanding that the notice “unequivocally” is directed at a change of use of the land. That is also consistent with the Council’s ‘Enforcement Notice Report’ which described the breach of planning control as “without planning permission, the change of use of land to residential garden” and the Council’s case on ground (c).
4. The Council’s case regarding ground (c) about these matters is not that they constitute breaches of planning control in and of themselves but that they are intrinsic parts of the alleged material change of use. As such, they do not need to be specified within the breach of planning control and it does not appear to have been the Council’s intention to include them as separate developments and serves no purposes to include them. The appellant’s argument that some elements of the operational developments did not require planning permission can be considered within the appeal under ground (f). The notice can be changed using my broad powers of correction under the provisions of s176(1)(a) of the Act without causing injustice to the Council or the appellant.

The Appeal on ground (c)

5. The appeal on this ground is that what is alleged does not constitute a breach of planning control. The onus is upon the appellant to demonstrate their case. There are 2 strands to the appellant’s stated case on this ground.
6. The first is that the enclosure of the land with a fence falls within ‘permitted development’ rights under the provisions of Article 3 the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (GPDO). Even if the fencing were considered to be permitted development, which is not disputed by the Council, that would not authorise the use of the land for residential purposes. The appellant does not suggest that the gravel hardstanding did not require planning permission or that if the fence is permitted development, it would authorise the change of use of the land as well. On this basis this ground of appeal must fail. It is more appropriate to consider the significance of the operational development being permitted development under ground (f), that the steps required by the notice exceed what is necessary to achieve the notice, should it be necessary to go that far.
7. The second strand of the appellant’s case relates to whether the Council were estopped from taking enforcement action or whether the appellant had a legitimate expectation that enforcement action would not be taken. Neither of these matters engage with whether the material change of use of the land as alleged on the notice constituted a breach of planning control as defined in the Act. In fact, there is no dispute that within the meaning of the Act the material change of use as alleged required planning permission and by not having planning permission is a breach of planning control. As such, the appeal on this ground cannot succeed in these respects either within the terms of s174(c). The appellants arguments are more relevant to whether the notice was properly and lawfully authorised. I will however deal with it here given that the parties have done so.
8. These claims relate an email dated 9 July 2021, before the notice was issued on 7 October 2021 in which an officer of the Council stated (and this is not disputed by the parties) “The works you have done to the front are acceptable and I am not taking any action over this.” The appellant’s argument has however evolved and they agree within counsel’s advice in support of the

appeal, that due to the '*Reprotech*' case¹ amongst others, where a planning officer's opinion could not be taken as a binding representation that planning permission was not required. This is on the basis that a formal application could have been made under the provisions of s191 or s192 (Lawful Development Certificates).

9. With respect to legitimate expectation, the appellant at least in part relies upon the *Save Britain's Heritage* case² (the *Save* case). That case related to the administrative decision by the Secretary of State to not call in a planning application for determination. The case was far more complex than the present one but the main element relied upon is the recital of the legal concepts. It is claimed that of relevance here is: firstly, that where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts; and secondly, a legitimate expectation can be generated by a practice, even where there has been no promise or assurance that a particular procedure will be followed.
10. Cutting to the chase in the present far simpler case, unlike the '*Save*' case which involved a ministerial promise made in Parliament, the dispute here relates to an email from an enforcement officer. There is no suggestion by the appellant that this officer had any powers or authority to make decision that could obviously bind that authority. My reading of the extract of the email is that it provides an opinion of an officer that some of the works, those "to the front" are acceptable and that the officer was "not taking any action over this". What the email does not say is also significant. The email extract provided does not say for instance indicate that the officer was referring to any or all of the land to which the notice is directed. There is land to the front of the dwelling that I saw which has been covered with gravel which extends up to the land shown on the notice plan. However, the land subject to the enforcement notice as clarified by the outlined area on the plan that accompanied it, is primarily to the side of the house albeit that smaller proportions extend forward of the line of the front elevation and another extends to the rear line of the dwelling. The email extract is imprecise in identifying what land is being referred to. From those words alone it would be naïve to consider that the officer was referring to the whole area that the notice describes.
11. Even by the logic of the legal submissions, I do not consider that the email extract provided to me gave an express promise that the Council would not take enforcement action against the breach that has now been alleged or that it did not require planning permission. I do not accept that it could be reasonably interpreted as applying to the development as a whole and the terms of what are provided are too imprecise for any reasonable interpretation to find that it overcame the need for planning permission or for the appellant to have expected that. The appellant also, subsequent to the email, applied for planning permission (Council ref 21/07100/FUL) to retain the development, according to the decision notice on 13 July 2021, 4 days after the email. Whilst the doctrine of legitimate expectation as set out in the legal submissions does not rely upon either the promise having been relied upon or that the appellant

¹ R v E Sussex CC ex parte *Reprotech* (Pebsham) Ltd [2002] UKHL 8

² R (*Save Britain's Heritage*) v Secretary of State for Communities and Local Government and others [2018] EWCA Civ 2137

has suffered detrimentally as a consequence, it is an indication that they also were under no false illusion about whether planning permission was required or not and went to the trouble and expense of making an application.

12. The correspondence from the Council did not override the need for planning permission and the breach of planning control has occurred. The appeal on ground (c) fails.

Ground (a)

Main Issues

13. The appeal site is in the Green Belt. The National Planning Policy Framework (the Framework) sets out advice for development affecting the Green Belt. It states that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. It does however also provide lists of development that should not be regarded as inappropriate. Paragraph 150 gives a closed list of development that would not be inappropriate and at sub-paragraph 150(e), refers to "material changes in the use of land." The specific uses stated within that sub-paragraph, given the qualification "such as" are in my view examples of uses of land that would not be inappropriate providing that they preserve the openness of the Green Belt.
14. Policy DM42 of the Wycombe District Local Plan, adopted August 2019 (LP) states that development in the Green Belt is inappropriate unless, amongst other things, it is development classified by the Framework as not inappropriate and then subject to a number of further criteria [as set out in paragraph b) i. to v.]. It also confirms a similar approach as the Framework whereby inappropriate development will be refused unless there are very special circumstances.
15. The first main issue is therefore whether the development is inappropriate development within the Green Belt having regard to the framework and relevant policies within the LP including the effect of the proposal on the openness of the Green Belt. The second is, if the development is inappropriate development, whether any harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations, so as to amount to the very special circumstances required to justify the proposal.

Reasons – inappropriateness including openness

16. The land that is subject to the notice is a strip of former field which the appellant states in the grounds of appeal as being 5m wide although the appeal statement refers to 6m. Whichever is correct, I could see the extent of the land from the track leading to the site and the footpath leading off of the end of Downley Road. The land, as defined on the enforcement notice plan, is a rectangular parcel of land to the south of the dwelling which extends forward and to the rear of the house, adjoining the pre-existing garden. This has been enclosed by fencing and some gates within the site and the gravel surfacing is an extension of the gravel surface more aligned with the front of the house. This land is on the side of the house which adjoins undeveloped fields rather than the row of cottages on the northern side.
17. There is no dispute about the manner in which the change of use has been described, as a use of land to residential garden. The appellant refers to their own definition of openness meaning free from 'development'. It is however

important to remember that 'development' is defined in s55 of the Act and includes the making of any material change in the use of land. Paragraph 150 of the Framework makes it clear that such development needs to preserve openness in order to qualify as not being inappropriate in the Green Belt.

18. There is no clear plan for how the extended garden will be used with the appellant referring to it as either being left open as grassland, mown or unmown, planted with fruit trees (but not ornamental trees) or simply left as a wildflower strip. However, notwithstanding the way in which the present occupiers use the land and its current appearance, domestic activities would still take place which would contrast with the previous non-domestic use of a field. The contrast is stark when seen alongside the extensive open field directly next to the appeal site of which the unauthorised garden was previously a part. Residential gardens can normally be used for any purpose which is part of that use or ancillary to it. Gardens are generally therefore used for a range of activities many of which involve the placement of items such as tables, chairs, equipment used for children to play or for gardening. Part of the land is hardsurfaced with gravel for the use of vehicles to park and turn. Each of these activities and in particular the physical manifestations of objects including vehicles being positioned on it, emphasise and are in contrast with the openness of the adjoining land. Even if some of those activities result in only ephemeral or occasional changes, at those times, the openness of the site would be adversely affected.
19. The operational developments related to the material change of use also have some impacts. The enclosure of the land with the fencing has resulted in further man-made structures raised up by 1.5m according to the appellant above the surface around the perimeter of the land. This fencing for the most part is built with sturdy timber posts and rails along with stout 5 bar gates. This forms a robust enclosure around and within the extended garden. Notwithstanding the other grounds of appeal, the fencing along the line of land ownership and inside it has reduced the openness of the land and caused the encroachment of development beyond the extent of the previous extent of the garden. The construction of the hardstanding is also a form of operational development which is within a previously undeveloped field. Whilst the main impact of it upon openness is its use related to the space taken up with vehicles that will use its surface, it has also resulted in additional encroachment of development into the open countryside.
20. Whilst I can consider imposing a planning condition to prevent the erection of structures, including those that would otherwise constitute being permitted development under the provisions of the GPDO, other effects of the use as I describe above would have harmful impacts upon openness. It would be unreasonable to in effect nullify the benefit of any planning permission by preventing normal domestic activities on the land to such an extent that could conceivably prevent any effects upon openness. Furthermore, even the most temporary or ephemeral activities will cause some harm in that respect to the Green Belt and through encroachment. The Framework makes it very clear that substantial weight should be given to any harm to the Green Belt and makes no allowance for temporary harm.
21. In relation to the first main issue, development is inappropriate development in the Green Belt as defined within LP Policy DM42 as well as the Framework. The extended garden, driveway and parking area has also resulted in an

encroachment of development into the countryside contrary to one of the 5 purposes of the Green Belt set out in the Framework.

Other considerations

22. I have not been provided with any evidence of what the previous boundary structures were before the material change of use took place. Even if fencing similar to what exists now around the extended garden is positioned closer to the house and around the previous extent of garden, that would have less impact upon openness and would not encroach into the surrounding field. As such, that has no weight as a fallback consideration.
23. It is also suggested that if the notice were complied with and the fencing were removed, that it could be re-erected to delineate the land ownership or for some other lawful purpose. No specific evidence is provided to indicate the likelihood of those example scenarios or why there would be a particular justification for simply demarcating the ownership boundary in the same manner as currently exists. The appellant refers to the planting of a hawthorn hedge inside the fence and it seems plausible that this could very well achieve a similar purpose. Without a clear, more than simply a theoretical explanation of why there would be a need to fence off the land in this way whilst not using the plot as a domestic garden, I give this very limited weight.
24. As an Area of Outstanding Natural Beauty (AONB), the Chilterns has the highest status of protection where the Framework confirms great weight should be given to conservation and enhancement of landscape and scenic beauty. The Council has not alleged that the development has caused any harm in terms of the character and appearance of the AONB and I agree that its natural beauty will be conserved given the limited visual impact on the rural area. This is however this is a neutral factor that neither weighs in favour nor against the proposal.
25. The appeal site is located at the end of Downley Road which is an informal track along the front of this and neighbouring dwellings and which peters out close to the appeal site. Other paths leading from it do not appear to be appropriate for vehicles. There is no space to turn at this point at the end of the track. The gate from the track into the appeal site is not within the area to which the notice relates and there is a substantial area inside where parking and turning could take place without affecting the extended area. A shed is close to the front boundary and also appears to be outside of the extended area which may reduce what parking and turning space is available although I am not provided within any detailed surveys of the land or indications of how parking and turning has been improved to any significant extent.
26. The nature of the track leading to the site requires driving with caution and I had to reverse very carefully back from close to the front of the site into a more appropriate place to park. There were a number of pedestrians using the various tracks and paths at that time but I could see them and my driving was cautious as a result. It would be more convenient for drivers of vehicles to be able to turn at the end of the track but the space is private land demarcated with a robust gate and so the site is not available other than to those with a right to enter the appeal site itself. As such, whilst there may be some benefits with respect to minimising vehicles and pedestrian conflict, this would only benefit the appellants and their visitors rather than the general broader car using public. These are limited benefits which therefore have limited weight.

27. The development is inappropriate development within the Green Belt as defined by the Framework. There is no other harm to weigh against the proposal but the only other considerations in favour of it individually and together lend very limited weight in favour of the proposal. In relation to the second main issue, the substantial weight I must give to the harm by reason of inappropriateness including openness of the Green Belt would not be clearly outweighed by these other considerations, so as to amount to the very special circumstances required to justify the proposal. This does not therefore comply with LP Policy DM42 or the Framework.

Conclusion on ground (a)

28. For the reasons set out above, having had regard to the development plan as a whole and all other material considerations, I conclude that the appeal on ground (a) should not succeed and consequently, the deemed planning application shall be refused.

The Appeal on ground (f)

29. The appeal on this ground is that the steps required exceed what is necessary to achieve the purpose of the notice. The requirements of the notice include the cessation of the use, thereby its purpose is to remedy the breach of planning control rather than the alternative of remedying injury to amenity.
30. The appellant considers that the gates, fencing and enclosures should remain as they are not part of the breach of planning control. They do not claim the same about the gravel hardstanding. For the reasons I have set out above, I agree as do the main parties, that none of the operational developments when looked at in themselves, are being enforced against as separately alleged breaches. It has however been established in settled case law, as referred to me, that in some circumstances a change of use enforcement notice can require the removal of what would normally be considered as lawful operational developments. The appellant relies upon the Bowring³ case. In that case, it was held that it would not be sufficient if the works are integral to or part and parcel of the unauthorised use if those works had been undertaken for a different and lawful use and could be used for that other use.
31. If the appellant only wanted to demarcate ownership of their newly acquired land, they could have potentially done so without requiring planning permission as fencing can be permitted under the terms of the GPDO. However, I am provided with no factual evidence to help me understand what happened and when. They vaguely refer to the site having been enclosed "recently" and that the land was "subsequently subsumed". There is no indication that the gap in time between the erection of enclosures and the change of use was significant. If fencing was erected recently the change of use occurred even more recently. As a matter of fact and degree, I consider that the erection of the fencing was probably undertaken to demarcate the land to enable the material change from the previous use of part of the field to residential garden.
32. The appellant also refers to a previous appeal case⁴ from 2012 that was older than the Planning Inspectorate document retention period and so I asked the appellant for a copy. That case also involved the material change of use of

³ Bowring v Secretary of State for Communities and Local Government [2013] EWHC 1115 (Admin) J.P.L. 1417

⁴ APP/H1515/C/12/2182946

land where fencing had been part of the allegation albeit not a breach in itself but “associated with the unlawful change of use...” similar to the present case.

33. In that case, the Inspector did not have an appeal under ground (f) but dealt with it in a similar way by deleting the requirement to “remove from the land all fencing associated with the unlawful change of use” as well as making a similar change to the allegation. There are similarities to what the appellant is asking me to do here. Having considered the evidence submitted in that case the Inspector felt that there was justification for the fencing to remain in order to define the appellant’s ownership. I do not have the evidence submitted although note that the appellant in that case took up occupation of the land in question prior to ownership, the Inspector refers to the erection of fences to define the boundaries as did their neighbours and by 2010 there was still a denial by the appellant that the land was being used as a garden. In the present case I have no evidence to set out a similar detailed chronology or narrative of what happened and when. However, as I set out above, the erection of fencing and the material change of use appear on the balance of probabilities to have happened in close succession and erection of fencing was part and parcel of that change of use.
34. I have assessed the planning merits of the fencing within the appeal under ground (a). In the present case, there may well be a chance that the fencing will be re-erected if the notice is complied with but the evidence does not indicate that this is anything other than a theoretical possibility.
35. Allowing the retention of the operational developments would not achieve the purpose of the notice to remedy the breach of planning control. There is no obvious alternative step as put to me short of full compliance that would do so. As a consequence, the appeal on ground (f) fails.

Conclusion

36. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Andy Harwood

INSPECTOR