



Appeal Decisions

Site visit made on 25 April 2023

by S A Hanson BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3 July 2023

Appeal A Ref: APP/J0405/C/22/3303111

14 Wingate Walk, Aylesbury, Buckinghamshire HP20 1LN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Ms Carmen Batory against an enforcement notice issued by Buckinghamshire Council - North Area (Aylesbury).
 - The notice was issued on 28 June 2022.
 - The breach of planning control as alleged in the notice is Without planning permission, the material change of use of the land to residential facilitated through the erection of close-board fencing, a gate, a wooden pergola, wooden decking and the laying of hard standing.
 - The requirements of the notice are to: 1. Permanently cease the unauthorised residential use of the Land. 2. Permanently remove (demolish) the closeboard fencing, gate, wooden pergola, decking and hardstanding from the Land and ensure all materials used in construction are removed from the Land. 3. Reinstate the Land to its appearance immediately prior to unauthorised development which consisted of open grassland and back-fill, using soil, any hole created by the removal of the fence and gate posts and cement from the Land.
 - The appeal is proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.
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Appeal B Ref: APP/J0405/W/22/3301472

14 Wingate Walk, Aylesbury, Buckinghamshire HP20 1LN

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Ms Carmen Batory against the decision of Buckinghamshire Council - North Area (Aylesbury).
 - The application Ref 22/01338/APP, dated 8 April 2022, was refused by notice dated 30 May 2022.
 - The development proposed is described as the (retrospective) erection of close board fences to the boundaries in association with No. 14 Wingate Walk, Aylesbury HP20 1LN
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Decisions

Appeal A

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

Appeal B

2. The appeal is dismissed.

Preliminary Matters

3. From the submissions it seemed to me that there was a hidden appeal on ground (d). I wrote to the parties and invited comments. Their responses have been considered in my decision.
4. My attention has been brought to land at 28 Wingate Walk where the change of use from open space to residential garden was accepted through a Certificate of Lawfulness granted in 2008. While the appellant considers this to add weight to their case, the circumstances are different to the appeal before me. The certificate was issued for No. 28 because the time for taking enforcement action had expired and thus the use was considered lawful through time.

Background

5. The parcel of land which is the subject of the appeal is roughly triangular in shape and sits to the side, extending beyond the front and rear of the dwellinghouse, 14 Wingate Walk (No. 14). It extends sideways to the adjacent public footway, beyond which is a large area of public open space. The property is an end of terrace two-storey dwellinghouse set in a residential estate built in the 1960s.

Appeal A – Ground (b) and Ground (c)

6. There is significant overlap in the arguments on grounds (b) and (c). Consequently, it seems that the sensible way to approach these grounds is to tackle them together. The planning merits of the use are not relevant, and they are not an issue for me to consider in the context of an appeal under grounds (b) and (c). I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case. It is not necessary for an enforcement notice expressly to identify the former land use, and here there is no dispute between the parties that the land is in a residential use. Nevertheless, the reasons for issuing the notice inform the reader that its former function was considered to be open space.
7. An appeal on ground (b) is that the alleged breach, which is the material change of use of the land to residential, facilitated through the erection of close-board fencing, a gate, a wooden pergola, wooden decking and the laying of hard standing, has not occurred. The appeal on ground (c) is a claim that those matters, if they did occur, do not constitute a breach of planning control. In pursuing an appeal on these legal grounds, the onus firmly rests with the appellant to show, on the balance of probabilities, that the matters alleged had not occurred and if they did, that they did not constitute a breach of planning control.
8. The gist of the appellant's case is that there has not been a material change of use of the appeal site. This is because planning permission was granted for the residential use of the whole site in 1958¹ and 1960² and so there has been no breach in terms of a change of use of the land. There are also no conditions attached to these permissions that require open spaces to be retained as such. The appellant further considers that the plans demonstrate that the estate layout and individual residential plots were demarcated by the footpaths and

¹ Outline planning permission ref: AB/252/59 granted by notice dated 14 August 1959

² Reserved matters planning permission ref: AB/179/61 granted by notice dated 21 June 1961

that these determined the residential boundaries. This, they say, is supported by the Council's own 'quick map search for Aylesbury Vale area' which uses the same colour to represent residential and 'open space', thereby confirming the view that these areas are in the same use.

9. The Council has provided a copy of the outline planning permission and estate layout plan and a copy of the reserved matters planning permission. While the plan is not annotated, the layout shows garden areas to properties clearly delineated. The garden space to the rear of No 14 is bound in a similar fashion to its neighbours in the terrace and within the estate as a whole. There are areas of land along corner plots which sit outside of the lines that define the boundaries to individual properties within which formal private space is provided. Such land, set aside as open space within post war housing estates forming strips of land between the edges of residential gardens and the footways forming part of the highway, is not uncommon and is generally referred to as 'amenity land'.
10. Prior to the erection of the fence in its current position, the land up to the pavement was open to the front and side of No 14. To the rear, the fence projected back from the corner of the house where the side met the rear elevation. The open area was laid to grass with ornamental trees/shrubs. The aerial images, up to and including the image dated 5 July 2018, show the fence line demarcating the boundary to No. 14 was on the same alignment as that shown on the original plan.
11. No. 14, having been originally owned by the Council, was sold to the appellants predecessors in title in 1995. The plan shows that the sale of the land included both the property and the appeal site. The conveyance at the time, limited the use of the land to that of a single dwellinghouse and restricted the erection of new buildings or other structures without the written consent of the Council. This, however, does not withdraw permitted development rights on land and even if the land is included within the ownership of the homeowner, it does not necessarily follow that the lawful use of the land is residential or domestic and these individually or combined do not function to determine the actual use of the land in planning terms.
12. The present situation encloses this former open space behind the fence which has been erected along the edge of the footpath from the front boundary to the boundary with the neighbouring property, No. 16, which sits to the rear of No 14. The appeal site which was once open is now enclosed and incorporated into the appellant's private garden.
13. From the evidence provided, and particularly on viewing the layout of the land surrounding the site, I find it more likely than not that the appeal site, falling outside that original fence line, will have originally formed part of the 'amenity land' of the estate. The before and after uses are materially different.
14. Given this concession, namely that the land use has changed to the residential use alleged in the notice, I find that, on the balance of probabilities, the matter constituting the breach of planning control alleged in the notice has occurred and that change is material. Consequently, the appeal on ground (b) and ground (c) cannot succeed.

Appeal A – Ground (d)

15. Section 171B(3) provides that where there has been a breach of planning control consisting of a material change of use, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. Following on from my findings set out above, and from the evidence presented, it is necessary to establish whether the development is immune from enforcement action through the passage of time.
16. There is no dispute that the land is presently in a residential use. The Council's case is that the material change of use of the land occurred when the new fence was erected and that this, along with the other elements of alleged development, facilitated the change of use. Notwithstanding my findings above, the appellant considers that the residential use of the land began in association with the original build in the 1960s, or if not then, in 1995 when the land was purchased from the Council. If correct, that would mean the enforcement notice was issued when it was too late to take enforcement action.
17. Images captured in May 2014 show that the appeal site is an open area to the side of No. 14 with ornamental trees/shrubs and mown grass. A wooden fence, with a pedestrian gate, encloses the rear garden extending from the corner of the rear elevation of the house to the end the garden where the boundary is shared with No. 16. Even after the sale of the land in 1995, although possibly maintained by the appellant and/or previous owner, its primary purpose appears to have remained as a contributor to the spatial characteristics of the area as amenity land rather than as a private residential garden. There is nothing to differentiate it from other areas of open space and there is little evidence to show that the land was being used for purposes ancillary or incidental to the enjoyment of the dwellinghouse as such.
18. From the images provided, there appeared to be no change in the appearance of the land until some point in 2018 when the current fence was erected in its new position. Since then, a pergola and decking have been constructed and hard standing laid. Based on the evidence before me, as a matter of fact and degree, I therefore conclude that the land has only been in the residential use alleged by the notice since the erection of the present fence. As the aerial imagery shows the fence not to have been in existence in 2021, it follows that the use of the land as residential has not existed for more than 10 years beginning with the date of the breach. Furthermore, as the use of the appeal site is not considered to be lawful, the rights given under The Town and Country Planning (General Permitted Development) Order 2015 (as amended) do not apply if the development upon which they rely is unlawful. The appeal on ground (d) therefore fails.

Appeal B

Main Issue

19. This is the effect of the development on the character and appearance of the area.

Reasons

20. The fence which is the subject of the appeal has been erected to the side of No. 14 running from the pavement to the front of the house to the end of the rear garden. It measures approximately 1.8m in height where it forms the

boundary to the rear garden and side of the house, and approximately 1m where it is sited forward of the house. The fence is set on the edge of the public footpath which forms part of the pedestrian network through the estate. Beyond the footpath is an area set aside for parking and an area of public open space for recreation.

21. The appeal site is in an established residential area characterised by rows of houses of similar design and appearance in a formal grid pattern layout. The distinctive feature of the surrounding area is its open plan character, with residential properties set back from the road, predominantly with lawns and parking areas to the front. Where there are boundaries between properties and roadsides, these are generally of a low level, consisting of both hard and soft landscaping. Areas of grassed amenity land are also identifiable, adding to the open feel of the estate and providing relief amongst the built form.
22. While high fences are visible in the area, they are not features which dominate the space or reduce its openness. However, the existing fence is a high solid structure which provides a hard boundary with the footpath. Previously open views along the open frontages of the adjoining terrace from the end of Wingate Walk are disrupted by its siting. While there was previously a high boundary fence enclosing the rear garden of No. 14, this was set back and in line with the frontages of the terrace row incorporating Nos. 16 to 26, maintaining the building line, a strong feature within the estate. Extending the fence line outwards introduces an alien feature in amongst an area that was characterised by soft landscaping and low level or open frontages. The appearance of the development is visually insensitive and contextually inappropriate.
23. Furthermore, the fence has enclosed land that was previously open and would have formed part of the original layout of the estate in the form of amenity land. Such spaces are an important feature and were designed into estates to allow some relief from the built environment and from privately enclosed spaces.
24. The development as a whole fails to integrate into the existing pattern of development or enhance the overall character of the locality. The fence is a visually dominant and an incongruous feature and by incorporating what was amenity land, the development jars with the predominantly open nature of the estate. In this respect, the development is harmful to the character and appearance of the surrounding area.
25. My attention has been drawn to examples of similar developments and indeed during my visit, I did experience some properties where areas had been enclosed by a high-level fence. While the fence at No. 28 gained lawfulness through a certificate of lawfulness as explained in my preliminary matters, I am not aware of the planning status of others. Nevertheless, while I give the planning status of these little weight, the examples are few and far between and the estate principally retains its design concept of space and openness. Furthermore, I do not consider that the existence of fences in other areas justifies the harm identified in these circumstances.
26. Overall, I find that the fence has resulted in an insensitive and oppressive form of development which is visually harmful to and erodes the open plan character and appearance of its surroundings. This is particularly so because of its location next to a large area of open space and its corner position which render

it visually prominent, commanding longer views from the open space and from neighbouring properties. In this respect, the development fails to demonstrate high quality design which complements the characteristics of the site and its surroundings, and this is contrary to Policy BE2 of the Vale of Aylesbury Local Plan and guidance within the National Planning Policy Framework which champions good design sympathetic to local character.

Other Matters

27. I acknowledge that open land within estates can be victim to unsociable behaviour and a case has been made in respect of personal circumstances. However, the information presented does not carry sufficient weight to outweigh the harm I have identified or the conflict with the development plan policies and national guidance.

Conclusion

28. For the reasons given, I conclude that the appeal should be dismissed. The development is contrary to the development plan as a whole and there are no other material considerations, including the provisions of the Framework, which outweigh this finding.

S A Hanson

INSPECTOR