



Appeal Decision

Site visit made on 13 June 2023

by Alexander Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 July 2023

Appeal Ref: APP/X2410/C/22/3307494

28 Curzon Avenue, Birstall, Leicestershire LE4 4AB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mrs Tamu Gill against an enforcement notice issued by Charnwood Borough Council.
- The notice was issued on 18 August 2022.
- The breach of planning control as alleged in the notice is raised land levels and construction of retaining structures in rear garden.
- The requirements of the notice are to:
 1. Remove from the land the wooden retaining wall structures and footpath and reduce the ground levels within the garden to their original height prior to the work being undertaken, as can be seen from the base of the tree trunks, and the ground level of the gravel boards on the boundary fencing and restore the land so it is gently sloping down to the rear (photographs are attached to indicate original ground levels.)
 2. Remove all resulting debris and waste from the site.
- The period for compliance with the requirements is: two months.
- The appeal is proceeding on the grounds set out in section 174(2)(a) and (c) 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.

Summary of Decision: The appeal is dismissed, the enforcement notice is upheld with a correction in the terms set out below in the Formal Decision and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matter

1. The appeal form indicates that an appeal is made on ground (b). However, the appellant confirmed via email dated 18 August 2022 that the appeal is to proceed on grounds (a) and (c) only. In light of this confirmation, and as there is no argument made that the matters alleged in the Enforcement Notice (the Notice) have not occurred, I have not considered a ground (b) appeal.

Hidden ground (d) appeal

2. In pursuing this appeal on ground (d), the onus is on the appellant to demonstrate on the balance of probabilities that at the time the Notice was served on 18 August 2022, it was too late to take enforcement action against the alleged breach of planning control. The relevant test of the evidence is 'on the balance of probability' (i.e. that it is more probable than not). If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.

3. The appellant raises the argument that not all of the works have been undertaken since 2019 and refer to correspondence with the Council in 2012 regarding the removal of soil from the bottom of the garden. Therefore, there is a ground (d) argument, which I shall consider.
4. Despite the appellant's above assertion, there is no indication of what works took place in 2012. The evidence in support of this is therefore imprecise and ambiguous. The Council refer to site visits carried out in November 2021 when works involving the raising of ground levels and the construction of retaining structures were underway.
5. Consequently, on the balance of probabilities, at the time the Notice was served on 18 August 2022, it was not too late to take enforcement action against the alleged breach of planning control alleged in the Notice.
6. The ground (d) appeal therefore fails.

The ground (c) appeal

7. The appeal on ground (c) is whether the matters alleged in the Notice do not constitute a breach of planning control. The burden of proof is upon the appellant.
8. The appellant argues that the works that have taken place is landscaping and does not amount to development as defined under s55 of the Town and Country Planning Act 1990 (the Act) or that the change of use is not a material one. The matters alleged in the Notice make no reference to a material change of use; they are clearly read as operational development.
9. In response to the first reason for issuing the Notice, the appellant contends that the 'new structure' is at a lower ground level than the ground was previously. They refer me to photographs, which they imply indicate as such. However, the photographs clearly show that the retaining structures rise above the previous ground levels.
10. The works that have taken place to raise the land levels and construct the retaining walls involved the use of heavy machinery, as evidenced in the photographs submitted by the Council. The appellant states this machinery was used only to prepare the ground for turfing. It is not clear what is meant by 'prepare' but based on the evidence before me and the observations I made during my site visit, this preparation would likely have included the raising of the ground levels. Whilst the retaining walls may well have been constructed without the need for machinery, they would have required a certain degree of pre-planning and technical skill.
11. There is a dispute between the parties as to how high the ground levels have been raised. The appellant disputes the Council's assertion that it has been raised by 1.2m at its highest point. Nevertheless, it is clear from the gradual reduction in height of the fence line with the neighbouring property, 26 Curzon Avenue, that the ground levels have been significantly raised towards the rear of the turfed area. Where the stepping down of the fence panels would have likely once followed the gradient of the garden, the levelling of the ground now results in clear views of the rear garden of No 26 when stood on the adjacent path towards the rear of the turfed area.

12. Moreover, given the extent of the land that has been raised, it is likely that a significant amount of material would have been imported onto the site to carry out these works.
13. Overall, the extent of works that have been carried out amount to engineering operations that fall within the definition of development as set out in S55 of the Act. There is no evidence before me that the works benefit from planning permission granted expressly by way of the submission of a planning application or granted by the Town and Country Planning (General Permitted Development) (England) Order 2015.
14. Whilst I accept the appellant's contention that the works are landscaping works, landscaping and engineering works are not mutually exclusive. Depending on the circumstances, such as in this instance, landscaping works can involve engineering operations.
15. As the development does not benefit from planning permission, the matters alleged in the Notice constitute a breach of planning control. The ground (c) appeal therefore fails.

The ground (a) appeal

Preliminary Matter

16. The third reason for issuing the Notice pertains to the impact on trees protected by a Woodland Preservation Order. However, the Council confirm that the trees concerned are not covered by the Woodland Preservation Order and therefore withdraw the third reason for issuing this Notice and invite me to vary the Notice accordingly. Based on the evidence before me I find no reason to conclude otherwise. I do not consider that any injustice would be caused by making such a variation.

Main Issue

17. In light of the above, the main issue is the effect of the development on the living conditions of the occupants of neighbouring residential properties, with particular regard to privacy.

Reasons

18. As a result of the raising of ground levels, the paved pathway that runs alongside the boundary fence with No 26 allows unobstructed views of the rear garden of No 26, particularly towards the rear of the turfed area of the appeal site. The level of overlooking would be detrimental to the occupants of No 26, significantly detracting from the usability of their garden as a private space.
19. The appellant states that it is not possible to stand on the pathway part way down the garden as the ground has not yet been backfilled. However, whilst there were some parts of the retaining structures that had not been backfilled, I was able to clearly peer over the fence when stood on the pathway during my site visit.
20. With regard to 30 Curzon Avenue, the boundary fence between this property and the appeal property is higher than that on the boundary with No 26. Nevertheless, when stood at the rear end of the turfed area it is possible to have clear views of a large portion of the rear garden of No 30. The level of overlooking would be detrimental to the occupants of No 30, detracting from

the usability of their garden as a private space. Whilst this harm would not be as significant as that to the occupants of No 26 due to the higher boundary fence, it is nevertheless unacceptably harmful.

21. I note that views of the rear garden of Nos 26 and 30 are possible from the upper floor windows in the appeal property. However, such views are typical in a suburban setting such as this. Moreover, the windows are further away from the boundary fences and therefore the perception of being overlooked by someone standing in the window would not be as great compared to someone standing on the pathway or turfed area being clearly visible above the height of the fence.
22. I also noted during my site visit that there are elevated views of the rear gardens of Nos 26 and 30 from the raised patio to the rear of the appeal property. However, these views are largely obscured by trees planted on No 26's side of the boundary fence and the higher boundary fence of No 30 at this end of the fence.
23. I find therefore that the development significantly harms the living conditions of the occupants of the neighbouring residential properties, with regard to privacy. As such, it is contrary to Policy CS2 of the Charnwood Local Plan Core Strategy 2015 and Policies EV/1 and H/17 of the Charnwood Local Plan 2004, which, amongst other things, seek to ensure development safeguards the amenities of adjoining properties, with regard to privacy.

Other Matters

24. I note that the proposal does not have a harmful effect on the character and appearance of the area. However, this is generally expected of all development and therefore is a neutral matter that does not weigh in favour of, nor against, the appeal.

Conclusion on the Appeal A ground (a) appeal and the deemed planning application; and Appeal B

25. For the reasons given above, having considered the development plan as a whole and all material considerations, I conclude that planning permission should not be granted in response to the ground (a) appeal against the enforcement notice and the deemed application. Therefore, the ground (a) appeal fails.

Formal Decision

26. It is directed that the enforcement notice is corrected by the deletion of the third reason for issuing the Notice under paragraph 4 of the Notice.
27. Subject to the correction, 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.

Alexander Walker

INSPECTOR