



Appeal Decisions

Site visit made on 11 July 2023

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1ST AUGUST 2023

Appeal A Ref: APP/M1520/C/21/3289337

Appeal B Ref: APP/M1520/C/21/3289338

**Land adjacent to 445 London Road, South Benfleet, Benfleet, Essex
SS7 1AW**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended. The appeals are made by Mr Jason Willis (Appeal A) and Mrs Sarah Willis (Appeal B) against an enforcement notice issued by Castle Point Borough Council.
 - The notice was issued on 23 November 2021.
 - The breach of planning control as alleged in the notice is without planning permission, a material change of use of the land as (*sic*) a garden for purposes incidental to the enjoyment of a dwellinghouse.
 - The requirements of the notice are: (1) Cease using the land for residential purposes. (2) Remove the fence enclosing the unauthorised use of the land and any buildings erected on it. (3) Remove all materials arising from the dismantling of the fence and buildings from the land within the red edged plan.
 - The periods for compliance with the requirements are: (1) Four weeks. (2) Eight weeks. (3) Ten weeks.
 - The appeals are proceeding on the grounds set out in section 174(2) (b), (c) and (d) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177 (5) of the Act have lapsed.
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Decisions

1. It is directed that the enforcement notice is corrected by the insertion of 'to use' in the first line between 'land' and 'as' in paragraph 3. Subject to the correction the appeals are dismissed and the enforcement notice is upheld.

Preliminary Matters

2. There is a typing error in the allegation in the enforcement notice at paragraph 3, which omits reference to change 'to use' as a garden. The absence of those words does not make the allegation want for certainty. The appellants could have been in no doubt about exactly what the Council were referring to in the allegation. No injustice would be caused to the appellant or the Council by using the power available in the Act at s176 (1) to correct the notice to rectify the error.
3. Planning merits considerations are not before me, as there is no deemed planning application arising from an appeal on ground (a) and the relevant fee has not been paid. Whether the use alleged in the notice and/or any development that facilitates such use is in contravention of other legislation, including that in relation to land registered as a Village Green, is also not a matter before me in these appeals.

Ground (b) appeals

4. The ground of appeal is that the matter alleged in the notice has not occurred. It is for the appellants to show why their appeals on this ground should succeed, the relevant test of the evidence being on the balance of probability.
5. The appeal site consists of a rectangular strip of land. Within the site are a line of about six maturing trees. An extensive area of woodland, known as Coombe Wood, is to the north and east of the site. To the west are the grounds of a detached single storey dwelling. The dwelling fronts onto a main road. Within the grounds of the dwelling are timber outbuildings of varying size.
6. Solid timber fencing supported by concrete posts has been erected adjacent to the north, east and southern boundaries of the site. A solid timber pedestrian gate is set within the fencing. The fencing encloses the site from the woodland. There is limited physical separation however from the grounds of the dwelling. Bench seating and a table, a bird feeding table, some planters and a number of decorative ornamental items have been placed on the site, along with a couple of compost bins. An ornamental shrub has also been planted. Taken together, these features are indicative of a use for a purpose secondary or subordinate to the residential use of a dwelling. They are incidences characteristic of and normally associated with a residential garden. The appellants provided no substantive evidence to show otherwise.
7. The use of the site as a garden for purposes incidental to the enjoyment of the dwelling has therefore occurred as a matter of fact. The appellants have been unable to show otherwise. The ground (b) appeal fails.

Ground (c) appeals

8. The ground of appeal is that the matter alleged in the notice does not constitute a breach of planning control. It is also for the appellants to show why their appeals should succeed on this ground, applying the same evidential standard set out above.
9. Use as a garden for purposes incidental to the enjoyment of the dwelling is materially different in character to a use as woodland. As a result, there has been a material change of use of the site within the meaning of development in s55 of the Act, for which s57 states that planning permission is required. There is no grant of planning permission for the material change of use, either in the GPDO¹ or expressly, following submission of a planning application. Matters of ownership have little bearing on planning permission being required for the development of land. At s171A (1) (a), the Act defines a breach of planning control as carrying out development without the required planning permission.
10. An enforcement notice directed at a material change of use can require the removal of works which, as in the case of the timber fencing, are integral to and facilitate the unauthorised use. In any event, the Direction made in 2007 under Article 4 of the previous version of the GPDO covering Coombe Wood restricts the erection of fencing at the site unless express planning permission has been obtained.
11. Consequently, the appellants have been unable to show that the use as garden incidental to the dwelling does not constitute a breach of planning control. The ground (c) appeal also fails.

Ground (d) appeals

12. The ground of appeal is that it was too late to take enforcement action against the matter alleged in the notice. The requirement for the appellants to show

¹ The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

why their appeals should succeed on this ground and the standard of proof are the same as in the above grounds.

13. At s171B (3), the Act provides that where there has been a breach of planning control consisting of a material change of use of land (other than to use as a single dwelling), no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. Any ten-year period is relevant, not just that immediately preceding the date of the notice. At s191 (2)(a), the Act provides that an unauthorised material change of use would be lawful if no enforcement action can be taken because the time for taking such action has expired.
14. The basis of the appellants' claim is that the site had been used as a garden for purposes incidental to the enjoyment of the dwelling for a period in excess of ten years before the notice was issued. I am given to understand that the appellants have been resident at the dwelling for around six years and are unable to provide first-hand knowledge of the use of the site for any longer period. They have therefore relied on copies of two photographs purportedly taken in the 1960s and 1970s, accompanied by recent comparison images. Both photographs were taken from the grounds of the dwelling looking towards the north-east part of the site. The photographs show the site as largely covered by maturing trees and there seems to be no means of enclosure physically separating it from the woodland. There are few obvious incidences of residential use on the site similar to those currently in situ, nor any indication of a means of enclosure following the alignment of the recently erected timber fencing. There is little in the photographs to indicate that an outbuilding was present on part of the site or that activity inconsistent with a woodland was taking place at the time. Consequently, neither photograph clearly shows the site in use as part of the garden of the dwelling. In any event, the photographs alone would not demonstrate a continuing use of the site as part of the garden of the dwelling for a period of in excess of ten years. The appellants provided little by way of other supporting evidence.
15. To counter the appellants' claim, the Council supplied a number of documents, including copies of the Land Registry Title Plan for the dwelling and the plan attached to the Article 4 Direction. Copies of the block plans which had accompanied applications made during 2017 for extensions to the dwelling and in 2018 for alterations to the vehicular access arrangements were also supplied. None of these plans showed the site as included within the boundaries of and forming part of the land associated with the dwelling. There is little to suggest that these plans do not provide an accurate contemporaneous record of the boundaries of the land associated with the dwelling at the time they were prepared. It is not unreasonable to expect that any use of the site as garden incidental to the dwelling would have been reflected on the 2017 and 2018 plans, which were prepared on behalf of the appellants, had such a use been occurring at or around those dates.
16. Furthermore, the Council and an interested party supplied copies of plans that had accompanied applications made during the 2000s for registration of Coombe Wood as a Village Green, pursuant to the relevant legislation thereto. Those plans show the site as forming part of Coombe Wood, not the grounds of the dwelling. Since one of these plans, dated 17 June 2003, is likely to have been prepared following a detailed survey, it is highly probable that this accurately depicts the boundaries of the dwelling and the extent of the woodland as at that date.
17. In addition, first-hand evidence of the use of the site from 2002 to 2015 was supplied in an account from the former occupiers of the dwelling during that period. They recalled that the boundaries of the dwelling were rectangular during that time, with no deviation in shape. They also recalled that a chain

link fence had run along the eastern boundary from the front in a straight line, down to the bottom of the garden, reflecting the boundaries shown on contemporaneous documents referred to above. The former occupiers went on to state that the eastern boundary *'...has altered as indicated by the three fence panels that extend into the forest and then down to the end of the garden to the northern boundary...* Although the former occupiers' account is not sworn, it is signed and it is sufficiently clear, precise and unambiguous. In the absence of contrary or conflicting evidence, I afford this account significant weight. The account reinforces the likelihood of the boundaries of the dwelling shown on contemporaneous documentation as having been accurate. It also makes it more probable that the use of the site as a garden incidental to the dwelling commenced at some stage after the former occupiers moved out, therefore having been continuous for a period of less than ten years prior to the date of the notice.

18. Finally, the Council also supplied copies of photographic images, including from Google Street view dated 2009 and 2012 and from a property sales website, the latter purportedly dating from June 2014. There is nothing which would indicate that the dates attributed to these images are not accurate. They depict parts of the grounds of the dwelling closer to the main road, looking in a north-east direction towards the site. Included in the images are some of the supporting posts of the chain link fence running along part of the eastern boundary, described by the witnesses in their account. Beyond the chain link fence and within the woodland is a substantial mature tree. The more recent image also shows an outbuilding immediately adjacent to the chain link fence. During my visit, I saw that the tree referred to above is one of those situated on part of the site, within the area now enclosed by timber fencing, whilst the outbuilding is a considerable distance away from that fencing. The evidence in these images therefore adds to the likelihood that the eastern boundary of the dwelling has been moved outwards into the woodland to annex the site to a use as residential garden at some time after the latest image was taken.
19. Drawing the above matters together, the appellants' claim is not accompanied by sufficiently clear, precise and unambiguous supporting evidence. Moreover, the available evidence including contemporaneous documents, dated photographs and the former occupiers' account all indicates that the use of the site as garden incidental to the dwelling has not been continuous for a period of more than ten years prior to the date of the notice, casting doubt on the appellants' claim.
20. Therefore, the appellants have been unable to show that it was too late to take enforcement action in relation to the material change of use of the site to a use as garden incidental to the dwelling. The ground (d) appeals do not succeed.

Conclusions

21. For the reasons given above I consider that the appeals should not succeed.

Stephen Hawkins

INSPECTOR