



Appeal Decision

Site visit made on 4 October 2023

by Chris Preston BA(Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 November 2023

Appeal Ref: APP/M3645/C/22/3303297

Pennethorne House, Swissland Hill, Dormans Park, East Grinstead RH19 2NH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mrs Kim Norman against an enforcement notice issued by Tandridge District Council.
 - The enforcement notice, numbered ENF/2019/117, was issued on 28 June 2022.
 - The breach of planning control as alleged in the notice is: Without planning permission, an engineering operation comprising the raising of the garden area to the rear of the house and the erection of retaining walls and steps in this area.
 - The requirements of the notice are:
 - i) Alter the rear garden; including terraced area, retaining walls and steps; to be in accordance with drawing reference number 1232/02 Rev A which was approved under the conditional planning permission reference 2013/307. A copy of drawing reference number 1232/02 Rev A is attached to this Notice;
 - ii) No machinery or storage of materials arising from the works is permitted within the defined ancient woodland boundary; and
 - iii) Remove from the land all building materials, soil and other material arising from compliance with requirement (i) above.
 - The period for compliance with the requirements is six months from the date the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The enforcement notice is quashed.

Procedural Matters Pertaining to the Enforcement Notice

2. Prior to assessing the specific grounds of appeal I have a duty to examine any defects within the notice itself and put the notice in order, providing doing so would not cause injustice.
3. The requirement at section 5(i) of the notice is to alter the rear garden to make it conform to drawing reference 1232/02 Revision A which the Council intended to attach to the notice. However, a different plan was in fact attached to the notice which showed how the garden area was laid out following the construction of the dwelling at the site, as opposed to how it was shown on drawing No. 1232/02 Revision A¹. The appellant maintains that this causes confusion as to precisely which drawing the notice requires compliance with.

¹ Topographical survey reference SMT-1821A

4. However, I think that confusion is over-stated. The wording of section 5(i) is very clear as to which plan should be followed and the fact that an alternative plan was attached was an obvious administrative error in my view. Accordingly, there would be no injustice if I were to correct the notice to substitute the correct plan for that currently attached.
5. Notwithstanding that I have reservations about the requirement to conform to drawing reference 1232/02 Revision A for other reasons. The planning history for the site shows that permission was first granted for a new dwelling in 2013 under reference 2012/550. Following that approval, a second planning permission was granted in June 2013 under reference 2013/307 for 'Demolition of existing garage, erection of a detached dwelling, 1 detached double garage and 1 detached double garage and store'. Drawing reference 1232/02 Revision A is listed under the approved drawings within the decision notice relating to that scheme.
6. Following that approval another application was made under s73 of the Town and Country Planning Act 1990 (the Act) described as 'variation of condition 2 of permission 2013/307 for the 'demolition of existing garage, erection of a detached dwelling, 1 detached double garage and 1 detached double garage and store'. That application, reference 2014/279, made a number of minor changes to the proposed layout of the property, the position of the garage, the fenestration and the inclusion of a privacy screen. It was approved in April 2014.
7. Although commonly referred to as being for the 'variation of a condition' an application under s73 is actually an application for planning permission without compliance with conditions previously attached. The effect of an approval is the grant of a new planning permission that exists independently of the previous permission. The previous permission remains extant and it is up to the individual which permission to implement. Having viewed the property and noted the position of the garage, the fenestration and the inclusion of the privacy screen, it would seem likely that the 2014 permission, was the scheme that was implemented at the site. Consequently, permission granted under 2013/307 will have lapsed due to the passage of time and the fact that it was not implemented.
8. The plans listed as being approved under application 2014/279 do not include drawing reference 1232/02 Revision A. Consequently, in seeking to remedy the breach of planning control by requiring the garden to comply with that plan, the Council has not referred to the approved scheme, as implemented, but a different scheme that was seemingly not implemented. That alone raises questions about whether the drawing should be referred to within the notice.
9. Moreover, the drawing itself lacks clarity and is very difficult to interpret with regard to the proposed levels of the rear garden. What it appears to show is the original contours of the site with the proposed development overlain but it does not make clear how those contours were proposed to be altered as a result of the approved scheme. For example, the pre-existing contours are shown cutting through the proposed dwelling and garage which would clearly be impractical accounting for the need to provide a level base upon which to build.

10. Similarly, in the rear garden what appears to be a retaining wall with steps is depicted but the contours cut through that retaining wall leaving confusion as to what height or level that wall would have and the extent to which land would be raised behind it. The wall cuts across the full width of the garden but no corresponding walls are shown along the boundaries of neighbouring dwellings leaving doubt as to how any land would be retained, given the change in level to those adjacent gardens.
11. Thus, when viewed in isolation I find it very difficult to understand what the plan actually depicts. I asked the agent for the appellant and the representative of the Council if they could explain what was shown on the accompanied site visit and what would be required to alter the garden as constructed into what was depicted on the plan. Both agreed the plan was difficult to interpret. If three professionals find it hard to interpret that is clearly an indication of a lack of clarity and precision.
12. That being the case it would be very difficult for anyone seeking to comply with the terms of the enforcement notice to ascertain exactly what needed to be done. It may be possible to refer to extraneous documents, including other plans linked to the drawing. However, having looked at other plans provided in relation to the relevant planning permission, it is difficult to marry up the sections shown on the elevational drawings and the garden layout and retaining structure shown on drawing 1232/02 Revision A. In my view the plans lack clarity as to precisely what was proposed in respect of proposed ground levels and the height of the retaining structure within the rear garden.
13. Given that lack of clarity I find the notice in its present form to be invalid because it doesn't clearly identify what the appellant must do to comply with its terms. It is incumbent upon me to consider whether it can be corrected without causing injustice to either party.
14. It seems clear that the aims of the notice are to remedy the breach of planning control under s173(4)(b) of the Act. In many cases it will be sufficient for a notice to specify a requirement to reinstate the land to the condition before the breach took place. Immediately before the breach took place the contours of the garden had been altered during the construction of the dwelling to the 'horse shoe' arrangement, as depicted on the plan that was incorrectly attached to the enforcement notice. That profile was subject to the landslip which led to the construction of the retaining structures that are subject to the present appeal.
15. However, it is not clear that arrangement benefitted from planning permission itself² and a requirement to return the land to that condition would not necessarily remedy the breach of control if that is what the Council is seeking to achieve. Returning the land to its condition before any development took place at all may be impractical if not impossible because land levels at the site have now been altered to accommodate the approved dwelling. In view of those matters I find that a requirement to return the land to its condition before the breach took place may not be sufficiently precise given the circumstances of the case. It is clear that some alteration was proposed to the level of the garden, the difficulty is defining precisely what that was.

² As explained in paragraph 19 of the previous appeal decision APP/M3645/D/21/3279441

16. The most obvious way that the requirements could be corrected to remedy the breach of planning control would be to require the land levels of the garden to comply with the approved plans in relation to the implemented planning permission (2014/279) or to require the levels to be altered such that they complied with the recently approved scheme under reference TA/2022/1239.
17. However, from the information and plans provided there may be similar uncertainties over precisely what was approved under the 2014 permission with regard to the proposed levels within the rear garden. I am concerned that altering the requirements to seek compliance with that permission may therefore cause injustice if I were to go down that route without the parties having the chance to comment on the details.
18. In terms of the recently approved scheme it is not clear whether the appellant would wish to make any arguments under grounds (a) or (f) in terms of the comparison between what has been approved and the scheme as presently exists. If I were to correct the notice to seek compliance with the approved details without giving the opportunity to advance any case in that regard there would be a clear opportunity for prejudice.
19. In view of the above, and having given the matter some thought, I cannot identify a way in which the requirements of the notice could be corrected to provide sufficient clarity without having the potential to cause prejudice to one or both parties. Accordingly, the most appropriate course of action is to quash the present notice. Whether the Council considers it expedient to serve another notice setting out alternative requirements would be a matter for it.
20. For the reasons given above I conclude that the enforcement notice does not specify with sufficient clarity the steps required for compliance. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the 1990 Act as amended since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances the appeal under the various grounds as set out in section 174(2) of the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered.

Chris Preston

INSPECTOR