



Appeal Decision

Site visit made on 3 October 2023

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 November 2023

Appeal Ref: APP/C3105/C/22/3306113

Land Rear of the Post Office on Merton Road, adjoining 2 Chapel Drive, Ambrosden, OX25 2RS

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Gabriele Di Genova against an enforcement notice issued by Cherwell District Council.
- The enforcement notice, numbered 20/00236/ENF, was issued on 2 August 2022.
- The breach of planning control as alleged in the notice is failure to comply with a condition imposed on planning permission ref 01/00694/OUT granted on 30 August 2001.
- The development to which the permission relates is the erection of a detached dwelling and construction of parking area for use of post office customers (as amended by Layout Plan received 19.6.01).
- The condition in question is no 8 which states that: *Notwithstanding the details shown on the site plan/car parking plan submitted, a plan showing car parking and turning provision for both the house and the shop shall be submitted to and approved in writing by the Local Planning Authority prior to the commencement of development and shall be retained unobstructed except for the parking and manoeuvring of vehicles at all times thereafter. Reason - in the interest of highway safety.*
- The notice alleges that the condition has not been complied with because the parking spaces located on Land A have become permanently obstructed.
- The requirements of the notice are to:
 1. Cease the use of Land A as part of the garden of 2 Chapel Drive;
 2. Remove the close boarded fencing in the approximate position marked in blue on the attached plan from the Land;
 3. Remove any play equipment or domestic paraphernalia from Land A to allow it to be used for car parking and manoeuvring of vehicles at all times;
 4. Reinstate Land A to its condition before the breach took place to allow Land A to be used for car parking and manoeuvring of vehicles at all times.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the ground set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.

Decision

1. It is directed that the enforcement notice is corrected by the deletion of the words '2 Chapel Drive' from requirement 1 and the substitution with 'Austin House'.
2. Subject to the correction, the appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The appellant has sought to bring it to my attention that the Council initially issued an enforcement notice with the same date and reference, but with a covering letter that erroneously referred to a breach comprising the siting of a

mobile home for residential accommodation. That error was addressed the following day with a covering letter reflecting the breach in the banner heading above. The appellant has confirmed that the appeal is made against the second notice issued, and that is what I have determined.

4. Requirement 1 of the enforcement notice is to '*Cease the use of Land A as part of the garden of 2 Chapel Drive*'. The Council highlight that should instead refer to Austin House¹. The appellant has also confirmed that Land A has been utilised by Austin House, rather than No 2, and that the appeal is made on that basis. I am therefore able to correct the enforcement notice accordingly, under the powers transferred to me by s176(1)(a) of the 1990 Act, without injustice to any party.
5. The appellant explains that a certificate of lawful use or development (LDC) is sought to confirm that the use of the site for purposes incidental to the enjoyment of Austin House is lawful under the provisions of s191 of the 1990 Act. However, even if that were shown to be so, the use of my discretionary powers to issue a LDC is beyond the scope of a ground (d) appeal concerned with whether the breach of Condition 8 is immune from enforcement action through the passage of time.
6. The appellant and neighbours have made representation on matters including highway safety, parking, the respective benefits of how the land may be used and the effects on the operation of the Post Office shop. However, I am unable to consider such matters, insofar as they relate to the planning merits, because the appellant has not made an application for planning permission through a ground (a) appeal, which requires payment of a fee.
7. I note the submissions made regarding the appellant's alleged actions, but those are not matters for this appeal. Moreover, for an appeal solely made on ground (d), it is not within my gift to consider how a compromise may be reached over how the land may be apportioned, as requested by a neighbouring occupier.

Background

8. Outline planning permission was granted in August 2001² for the erection of a detached dwelling and the construction of a parking area for the use of Post Office customers on land between the rear of the Post Office on Merton Road and No 2.
9. Condition 8 of that planning permission states:
Notwithstanding the details shown on the site plan/car parking plan submitted, a plan showing car parking and turning provision for both the house and the shop shall be submitted to and approved in writing by the Local Planning Authority prior to the commencement of development and shall be retained unobstructed except for the parking and manoeuvring of vehicles at all times thereafter.
10. In May 2002 the Council approved the reserved matters application³, including site plan 208/8. That shows the siting of the dwelling known as Austin House

¹ No 2 Chapel Drive is the neighbouring property to Austin House

² Ref: 01/00694/OUT

³ Ref: 02/00681/REM

fronting onto Chapel Drive and its side boundary running alongside land to the rear of the Post Office. Beyond the rear of the dwelling the side boundary is shown to cut in at an angle thereby narrowing the width of the rear garden, before straightening out again to rear of the site.

11. Three parking spaces and a turning area are shown for Post Office customers adjacent to where the rear garden narrows (spaces 1-3). Two spaces are shown immediately alongside the rear of the Post Office building (spaces 4 and 5), with a gap to allow access to the three parking spaces and turning area beyond. A further two spaces are shown to the side of the Post Office, on the corner of Chapel Drive and Merton Road (spaces 6 and 7).
12. The merits of that scheme are not for me to consider for an appeal made on ground (d) only.
13. The enforcement notice refers to Land A and B. Land B is the whole of the appeal site, encompassing Austin House and its garden, as well as the land to the rear of the Post Office. Land A essentially encompasses the area shown on the approved site plan for parking spaces 1-3, as well as part of the turning area.
14. The enforcement notice alleges that Condition 8 has not been complied with because the parking spaces located on Land A have become permanently obstructed.

Appeal on Ground (d)

15. An appeal on ground (d) is that, on the date that the enforcement notice was issued, it was too late for the Council to take enforcement action.
16. The burden of proof lies with the appellant to make his case on the balance of probabilities. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, that is enough. Evidence should not be rejected simply because it is uncorroborated.
17. There are two parts to Condition 8. Firstly, it requires a plan showing car parking and turning provision for both the house and the shop to be submitted to and approved in writing prior to commencement of development.
18. It is common ground that the details necessary to discharge that aspect of Condition 8 were approved by the Council as part of the approval of the aforementioned reserved matters application in May 2002, and are shown on site plan 208/8. Consequently, that part of the condition was complied with and there was no breach.
19. The second part of Condition 8 states '*and shall be retained unobstructed except for the parking and manoeuvring of vehicles at all times thereafter*'. That is a continuing requirement condition.
20. To succeed on ground (d), the appellant must demonstrate that a breach of that part of Condition 8, consisting of the obstruction of Land A, occurred 10 or more years before the date of the enforcement notice and then continued without material interruption for a period of at least ten years thereafter, so as to meet the immunity period from enforcement action under s171B(3) of the 1990 Act. The material date is therefore 2 August 2012.

21. However, the appellant argues that the approved details were never implemented and that the land has never been utilised in accordance with Condition 8 and that the breach has been ongoing since Austin House was first built around 2005. It is also argued that the land has been utilised in a manner which is incidental to the residential use of Austin House since at least March 2010.
22. Condition 8 does not specifically require the approved details to be implemented, so not doing so would not give rise to a breach of that condition. Nevertheless, Condition 3 of the reserved matters approval requires '*That, before the development is first occupied, the parking spaces to serve both the new dwelling and the existing shop and hairdressers shall be constructed, surfaced, laid and marked out, drained and completed in accordance with specification details to be submitted to and approved in writing by the Local Planning Authority prior to the commencement of the development*'.
23. The appellant refers to the absence of any approved details to dictate how those parking spaces should be constructed, surfaced and laid out and questions how the layout plan approved by Condition 8 can be complied with. However, most of those details are shown on approved site plan 208/8. As the plan annotates a crushed stone surface as existing (rather than tarmac), I would not expect the car parking spaces to be formally marked out. On that basis, the dashed markings on the plan are likely to be indicative.
24. Six statutory declarations (SDs) have been submitted in support of the appeal from the occupants of three different neighbouring properties. All six neighbours state that they never saw anyone park on Land A. That is contradicted by the person who has run the Post Office since 2011, who states that the annexed area was used by himself and staff, as well as customers, to allow the area next to the shop to be utilised for further customer parking.
25. However, it does not necessarily make any difference whether cars have been parked on Land A for the purposes of Condition 8 as its continuing requirement is that the parking and turning provision is retained unobstructed. Indeed, matters relating to curtilage and whether there has been a material change of use of Land A are irrelevant; the question is whether an obstruction has arisen.
26. Nevertheless, the term implementation can be used to refer to the beginning, carrying out or completion of development. Whether a planning permission has been implemented is a matter of fact and degree.
27. The Council has produced a Google Earth aerial photograph from 2004, which clearly shows Austin House and the kinked alignment of its side boundary, as per the approved site plan, adjacent to what appears to be an unobstructed expanse of hardstanding wrapping around the side and rear of the Post Office, which is very likely to have been its parking area.
28. The owner of the neighbouring property, who has lived in Chapel Drive since 2002, also states that after Austin House was completed in 2003/4 the land behind the Post Office provided parking provision for its staff and customers and for the hairdressers and flat. He states that the shape of the carpark as set out reflected the approved layout and that because of the gravel surfacing, demarcation of individual parking bays was not practical and did not last.

29. Therefore, even if the soakaway annotated on the approved site plan was not provided, it is likely, as a matter of fact and degree, that the area of car parking shown on the approved site plan to the rear of the Post Office, was implemented by 2004, regardless of whether Condition 8 specifically required it to be so. It follows that the condition bit and that there was no breach at that time.
30. In any event, for a breach of Condition 8 to have occurred, it must be shown that the land was obstructed, not whether the car park was laid out as per the approved site plan or whether cars actually parked on the land.
31. In that regard, the aerial photograph from 2004 appears to show the parking area unobstructed. Although there is evidently a tree positioned within Land A, that could be that shown retained on the approved site plan, which doesn't obstruct the three parking spaces and turning area. The evidence does not therefore point to an ongoing breach of the condition since Austin House was first built, as suggested by the appellant.
32. The Council's site visit photographs from 2007 show cars parked to the rear of the post office at that time and no obstruction to that use (except potentially for some clutter to the rear of the Post Office building). Although little of Land A can be seen in the photograph, it is likely, because the angle of the parking, that one of the cars is either on or around parking space 3.
33. The aerial photograph from May 2009 also shows the same boundary to Austin House and an unobstructed parking area, save for a structure in the southern corner, which is likely to be the shed discussed below.
34. Moreover, the Council has provided an approved planning application site plan⁴, date stamped 1 September 2009, which annotates the general area of Land A as parking. The shape of that parking area and the boundary of Austin House reflect the approved site plan 208/8. As such, none of Land A is shown to form part of Austin House. Those observations can similarly be applied to the earlier block plan submitted by a neighbouring occupant (date stamped 1 March 2007) for an application for a flat above the Post Office.
35. The photograph from the Zoopla sale listing of 10 March 2010 shows that at that time the approved kinked residential boundary was still in place, with a shed situated immediately outside of the fenced boundary to Austin House on Land A. That arrangement is similarly shown in the Zoopla photograph from 10 June 2012.
36. It is not possible to see the main part of Land A in the Google Street View image from 2011. A raised earth embankment can be seen running along the western side boundary wall but that is consistent with the approved site plan showing landscaping along that part of the site. The photograph also shows cars parked to the side and rear of the Post Office.
37. The Council's site visit photographs purported to be from January 2015 show the shed, along with domestic items adjacent to it, including bikes, a ladder and footballs. No rainwater harvesting is evident, nor can any wheelie bins be seen. The remainder of Land A is largely unobstructed and cars are parked elsewhere on the site.

⁴ Ref: 09/01002/F for two new rooflights

38. The aerial image from April 2017 shows Land A continued to be unobstructed save for the shed. The image does not show any additional residential storage or paraphernalia on Land A and the kinked boundary to Austin House, reflecting the approved site plan, remained. The same observations can be applied to the aerial photograph from May 2018, and to the drone images provided by a neighbour, purported to be from 2018, other than perhaps a limited amount of material positioned alongside the shed.
39. The appellant's SD explains that after several viewings in 2019, he subsequently purchased Austin House in March 2020. He states that when he first viewed the property, Land A resembled a domestic garden and was evidently being used by the then owner/occupiers in connection with the house. He says he observed the area to be covered in an amalgam of clod, turf, sod and gravel with a garden shed sited upon it, and that there were no cars parked on it.
40. The appellant's SD goes on to explain that since acquiring the property he has continued to use Land A as domestic garden in association with his house, as it had been by the previous owners, specifically as a domestic garden/amenity area and for the storage of garden paraphernalia wheelie bins and for rainwater harvesting. He says that he also continued to use the shed for gardening/domestic storage purposes.
41. The appellant's photographs purported to be taken no later than 2019 (prior to purchase) show the approved kinked boundary still in place. The shed can also be seen outside the fenced boundary of Austin House along with various items, some of which are evidently domestic in nature. In general terms the land appears unkempt, and the trees and vegetation had evidently spread further into Land A. Obviously that colonisation would not have happened over night but there is little previous evidence of that extent of spread, particularly on or prior to the material date of 2 August 2012.
42. Another of the appellant's photographs purported to be taken no later than 2019 show the same boundary alignments, along with what appears to be a pile of materials adjacent to the shed. There are other items in and around Land A, including plant pots, lengths of timber, wheelie bins and table and chairs. The situation evident from the May 2020 Google Earth image does not appear to be materially different.
43. However, the photographs do not show Land A to resemble a domestic garden, as stated. Rather, they show a clear distinction between the well-kept domestic garden inside the fence line and the generally unkempt area of Land A outside of it.
44. Although the Council argue that it has not been shown that the shed, which was likely in place from as early as 2009 to 2020, was used in a manner incidental to the enjoyment of Austin House, the appellant has reproduced an extract from an email from the previous owners which confirms that they used the shed for domestic storage purposes. Moreover, five of the six SDs from the occupants of neighbouring properties attest to the siting of the shed by the previous occupier of Austin House.
45. I note the appellant's criticism of the Council's overlay plan, which shows the approved site plan on top of a Google Earth image from 2018. Nevertheless, it demonstrates that the shed would likely have occupied only part of Land A, and

- primarily in an area which is shown for planting on the approved site plan. Consequently, its siting is unlikely to have materially obstructed the use of the land for car parking. (Even if it had resulted in a partial obstruction, that does not mean that there would have been a breach of condition for the remaining parts of Land A, or the wider parking area.)
46. Five of the neighbours further attest to Land A being used by the previous owner/occupier of Austin House for the storage of garden materials/tools, as well as the siting of the shed. The sixth refers to the previous owner's bins and containers on the land.
47. However, even from the 2019 photographs it is unclear whether the items on Land A, other than the shed and general materials in its vicinity, are associated with Austin House, or another property, or combination of both. Indeed, the table and chairs and two of the wheelie bins appear to be associated with the neighbouring residential flat.
48. Nevertheless, it is unlikely, given the extent and position of the various non-permanent items on much of Land A (other than the shed), that it was capable of being used for parking at that time. Therefore, based on the photographic evidence, sometime in 2019 marks the beginning of the breach of Condition 8 through a material obstruction of part of Land A.
49. The occupancy period for each of the neighbours who have submitted SDs is prior to the material date of 2 August 2012. As they have been sworn, they are capable of attracting significant weight. That is similarly so of the appellant's SD, although I am mindful that his direct knowledge of the site is only from 2019 onwards.
50. The written submissions to which no sanctions apply, in principle carry less weight than the SDs. Nevertheless, if there was other continuous storage use or obstruction of Land A beyond the shed, comparable to that shown in the 2019 photographs, it is reasonable to assume that would have been visible in the aerial photographs. However, over 2004, 2009, 2017 and 2018, that is not the case. Rather, the photographic evidence points to a more recent intermittent storage use beyond the shed, varying in extent, without formal or fixed obstruction, and of uncertain association.
51. Moreover, even if there had been an intermittent obstruction that didn't coincide with those photographs, it would not assist the appellant's case. That is because if the offending activity is ceased and the condition is complied with once more by removing the obstruction, the breach of planning control is deemed to have ended. The ten year clock will then restart if and when the condition is breached again, unless the interrupting compliance is de minimis as a matter of fact and degree.
52. The appellant acknowledges that it wasn't until July 2020 that he removed the shed and concrete base and replaced and reconfigured the garden fence and had the whole of Land A resurfaced with grass and assembled play equipment on it. The extent of that annexation goes significantly beyond the footprint of the pre-existing shed and the likely extent of any periodic adjacent storage.
53. More significantly, the fencing resulted in Land A being physically obstructed such that it is no longer possible to use it for parking and manoeuvring vehicles, in breach of Condition 8. However, as that breach of condition

occurred in 2020, it is not immune from enforcement action through the passage of time. Nor is the likely lesser breach in 2019 arising from indiscriminate storage.

54. I note that the appellant owns Land A and I sympathise that he may have been told during the sales process that it would be his to do with as he pleases. However, the fact remains that Land A is subject to Condition 8.
55. I therefore conclude that the appellant's evidence is not sufficiently precise and unambiguous to demonstrate, on the balance of probabilities, that a breach of Condition 8, consisting of the obstruction of Land A, occurred for a period of 10 or more years prior to the date of the enforcement notice. Accordingly, it was not too late for the Council to take enforcement action. The ground (d) appeal fails.

Richard S Jones

INSPECTOR