



Appeal Decision

Site visit made on 23 January 2024

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 April 2024

Appeal Ref: APP/A2280/C/22/3294407

Land at Merryboys House, Merryboys Road, Cliffe Woods, Rochester, Kent

- 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 Mr J S Gill against an enforcement notice issued by Medway Council.
 - The enforcement notice was issued on 1 February 2022.
 - The breach of planning control as alleged in the notice is: Without the benefit of planning permission, the erection of boundary treatment more than two metres in height consisting of telegraph poles, bamboo fencing and camouflage mesh, and the erection of three detached buildings on the Land.
 - The requirements of the notice are to:
 - 1) Remove the boundary treatment, shown in the approximate position marked A to B on plan 2, including all materials and resultant debris, from the Land;
 - 2) Demolish the two detached buildings, and the connecting canopy located between the two buildings, shown in the approximate position identified as C and D on plan 2;
 - 3) Demolish the detached building shown in the approximate position identified as E on plan 2.
 - 4) Remove all resultant debris created from undertaking requirements 2 and 3 above, from the Land.
 - The period for compliance with requirement 1) is within two calendar months from the date when the notice takes effect, and the compliance period for requirements 2) and 3) is within three and four calendar months respectively from the date when the notice takes effect.
 - The appeal is proceeding on the ground set out in section 174(2) (a), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fee has been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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Formal Decision

1. The appeal is allowed insofar as it relates to buildings C, D and E on plan 2, and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act, as amended, for the erection of three detached buildings on the land at Merryboys House, Merryboys Road, Cliffe Woods, Rochester, Kent, subject to the following condition:
 - 1) Within two months from the date of this decision the platform/walkway linking Buildings C and D hereby permitted, along with their balconies and external staircases, shall be demolished in its entirety, and all materials resulting from the demolition shall be removed;
 - 2) Within two months from the date of this decision, evidence shall be submitted to the Council demonstrating, to its satisfaction, that the

platform/walkway, balconies and external staircase have been demolished and all materials resulting from the demolition have been removed from the land.

2. Otherwise the appeal is dismissed, the application deemed to have been made under s177(5) of the 1990 Act as amended relating to the boundary treatment shown in the approximate position marked A to B on plan 2 is refused, and the enforcement notice is upheld, but subject to the following correction:

Requirement (i) is deleted and reworded to instead read "Dismantle the boundary treatment installed over the existing garden fencing in the approximate position marked A to B on plan 2 and, arising from this, remove from the land all materials and resultant debris.

Procedural Matter

3. Following my site visit, and the observations made, both parties were consulted as to whether, in the event of the ground (a) appeal succeeding, they would be agreeable to a condition requiring for the removal of the balcony walkway and link between Buildings C and D.
4. Both parties indicated their agreement to such, and I have taken this into account in reaching my decision.

Matters concerning the enforcement notice

5. The notice's requirement (i) directs quite reasonably that the boundary treatment is removed. However, it makes no distinction between the actual garden fencing and the subsequent alterations made thereto. Accordingly, I shall correct the wording in this regard.

Background

6. The wider site is in mixed use for residential and equine related purposes.
7. In November 2018, following a site visit by a Council official, it was found that boundary treatment, as described in the banner heading above and to a height in excess of 4m, had been erected close to the common boundary with a new housing development beyond. This was followed in 2019 by the erection of two large, detached buildings on the said field. Set in from the boundary, the buildings sit on a concrete base.
8. The two single-storey height timber-clad buildings (referred to in the enforcement notice as 'C' and 'D') are used, respectively, as an animal feed store and a chicken house and horse shelter; the latter in connection with the wider site's equine use.
9. Subsequently, in July 2021, Council officials noted that a third building ('E') had been constructed close to the site's entrance from Merryboys Road, where the field tapers out. Set back from the highway, it is understood that the building is a converted and altered shipping container, and is used as a hay store for the benefit of the horses kept at the site.
10. This building also required the benefit of planning permission for its lawful retention. Again, none was sought.

11. Thereafter, the Council saw it expedient to issue an enforcement notice requiring for the three buildings' removal along with the boundary treatment created.

The appeal on ground (d)

12. An appeal on ground (d) is that, at the date the enforcement notice was issued, it was too late for the Council to take formal action as the development which constituted the breach of control had already acquired immunity from such in planning terms.
13. The onus is on the appellant to prove his case, with the burden of proof being on the balance of probabilities. Precision and unambiguity is the key. Accordingly, my decision has to be based on evidential fact and, where applicable, case law.
14. The appellant is claiming immunity regarding Buildings C, D and E.
15. The enforcement notice was issued on 1 February 2022 and relates to operational development carried out on the land. In the circumstances, to demonstrate immunity from enforcement action, the appellant must show that the said buildings have been in situ at least four years before the date of the enforcement notice was served.
16. The material date is therefore 1 February 2018.
17. In support of his case the appellant has provided two aerial photographs; one from July 2014 and a subsequent image from May 2018. However, the 2014 photograph is badly blurred and, although the appellant is of the view that it shows a building close to the location of Building C, it is not possible to discern as such. The appellant goes on to say that the aerial photograph of May 2018 shows Buildings C and E are both in situ, yet the images are poor and ill-defined, and are in no way precise and unambiguous.
18. There is no evidence adduced in terms of Building D's claimed immunity.
19. The appellant cannot realistically be solely reliant on these poor aerial photographic images and, on the basis of the appellant's evidence, I am not convinced that any of the said three buildings were in place by February 2018.
20. My concerns are reinforced by photographs taken by a Council official on 22 April 2021 – the date is included within the shot – which would indicate that Building E, over three years after the 'material date', had yet to be built. This is confirmed by photographs subsequently taken by a Council official on 21 April 2022 which clearly show Building E in situ.
21. From these findings I must, therefore conclude that Building E was erected during the period between April 2021 and April 2022, and immunity from planning control has not been demonstrated.
22. As such, the appeal on ground (d) does not succeed.

The appeal on ground (a) and the deemed planning application (DPA)

Main Issues

23. These are the effect of the development on the character and appearance of the surrounding area, and also the effect on the living conditions of neighbouring occupiers.

Reasons

Character and appearance

24. Buildings C and D are detached in terms of their footprints but are linked by way of an external platform. Used for rural related purposes, both have raised timber balconies edged with balustrading the height of which aligns with their eaves. The balconies are linked via a platform between which has allowed for a continuous walkway across their frontages facing the field. The open fronted area between the buildings is use for storage.
25. The balcony is reached via an external wooden staircase rising from an external wooden staircase that ascends from points to the sides of both building.
26. The timber clad buildings – former containers – have taken on a rural character, and are largely of identical design. However, with the balconies, link platform and external staircases the visual impression given is of an intensive form of development out of character with the rather fragmented built pattern on the wider site, and is also at odds with the general pattern of residential development beyond the site's western boundary behind.
27. Building E is set back from the footway, it is of an articulated design, built with appropriate external materials. Due to its positioning and single-storey height, it provides a certain threshold to the site, and I do not consider its appearance to be out of character with the surrounding area.
28. The boundary treatment, also enforced against, is out of character due to its excessive height. With reference to photographs supplied by the Council, when installed it comprised a series of delineated mesh sections positioned above the standard 2m high garden fence of those residential properties in Berry Wood Close, more than doubling the height of the garden enclosure. The individual stanchions which divide the sections rose to an even greater height, and it gives the appearance that the rear gardens sit behind a sports ground.
29. It would appear that the form and height of the boundary enclosure sections have since been modified and reduced in height, but I must take account of its appearance at the time that the enforcement notice was issued.
30. In light of this I consider that Buildings C and D, due to their physical linkage and associated features, along with the boundary enclosure's height and appearance, conflict with the aims and requirements of policy BNE1 of the Medway Local Plan (LP)

Living conditions

31. Based on the above I have two particular concerns; the effect on the outlook of the residential occupiers of Berry Wood Close beyond whose rear gardens face directly towards the common boundary with the appeal site, and also the potential for overlooking of these rear gardens from persons climbing the

external staircases to Buildings C and D. Although the heightened boundary enclosure would have guarded against this, its reduction in height would have implications for privacy in this regard.

32. Accordingly, I find that the above developments have implications for the living conditions of neighbouring residential occupiers, contrary to the requirements of LP policy BNE2. Building E has no such impact.

Conclusions and Conditions

33. In the circumstances I am satisfied that, subject to a condition being imposed which requires for the removal of the walkway platform, balconies and external staircases, planning permission should be granted for the retention of Buildings C and D, by way of the DPA.
34. A further condition will require that evidential proof be presented to the Council to confirm that these works have been carried out.
35. In the above connection I have considered imposing a comprehensive, retrospectively worded condition which would require, in the event that the requisite works were not undertaken, that both Buildings C and D be demolished. However, as the works were agreed between the parties, and the Council holds remedial powers to enforce compliance with the conditions, I am satisfied that the imposition of simply worded and less draconian conditions are sufficient in the circumstances.
36. Planning permission should be granted to allow for the retention of Building E.
37. Given that the buildings are being used in connection with the wider site's equine use, and also for agricultural purposes, I see no reason to condition their use. If, however, their use was to materially change at some future point then, similarly, the Council holds powers to address any such irregularity as it sees fit.
38. Accordingly, for the above reasons, and having had regard to all matters raised, I conclude that the appeal should succeed in part only, and I will grant planning permission for the retention of Buildings C, D and E, but otherwise I will uphold the notice and refuse to grant planning permission for the boundary treatment installed and enforced against, as marked A to B on Plan 2.
39. The requirements of the upheld notice will cease to have effect so far as inconsistent with the permission which I will grant by virtue of s180 of the 1990 Act, as amended.

The appeal on ground (f)

40. An appeal on ground (f) is that that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control which may be constituted by those matters.
41. Given my findings on the DPA it is only necessary that I assess this ground in relation to the unauthorised boundary treatment installed.
42. The starting point in a such an appeal is identifying the purpose of the enforcement notice which, in this particular instance, is to remedy the breach of planning control. The next step is to consider whether there is any obvious alternative or lesser step which would achieve the purposes of the

enforcement notice with less cost and disruption. The requirements of the notice should therefore be proportionate in that sense.

43. In this particular instance I consider that the requirement to remove the additional boundary treatment installed is both reasonable and necessary in the circumstances. A proposed height increase would thereby require the benefit of planning permission with drawings produced to justify any such proposal.

44. Accordingly, the appeal on ground (f) does not succeed.

Timothy C King

INSPECTOR