



Appeal Decision

Site visit made on 28 March 2024

by Jessica Graham BA (Hons) PgDipL

an Inspector appointed by the Secretary of State

Decision date: 25 April 2024

Appeal Ref: APP/D0840/C/23/3318500

Glencree House, 2 Mennaye Road, Penzance, Cornwall, TR18 4NG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Fernihough Hay LLP against an enforcement notice issued by Cornwall Council.
 - The notice was issued on 6 February 2023.
 - The breach of planning control as alleged in the notice is: Without planning permission, undertaking the engineering operations to demolish rear boundary wall and create a parking area.
 - The requirements of the notice are to:
 - 1) Dig up and remove the hardstanding parking area to the rear of the property, shown in approximate position by a blue polygon on attached plan
 - 2) Rebuild the rear boundary granite stone wall to match the position, height and materials of the removed wall as shown in the attached photo
 - 3) Remove all materials arising from compliance with (1) – (2) above from the land and reinstate the land to the rear of the dwellinghouse to its former condition before the breach occurred.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (e) and (f) 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.
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Decision

1. The appeal is dismissed, the Enforcement Notice is upheld, and planning permission is refused on the application deemed to have been made under s.177(5) of the 1990 Act as amended.

The appeal on ground (e)

2. The ground of appeal is that copies of the Enforcement Notice were not served as required by s.172 of the 1990 Act.
3. S.172(2) of the 1990 Act requires a copy of the Notice to be served on (a) the owner and the occupier of the land to which it relates, and (b) any other person having an interest in the land which, in the opinion of the authority, is materially affected by the Notice. An "interest in the land" connotes a legal or equitable interest, such as a mortgage or the benefit of a covenant.¹
4. The Appellant has pointed out that the Notice was not served on the mortgage company Cambridge and Counties Bank Ltd, who have an interest in the land. In response, the Council has provided the print view of the register that it

¹ *Stevens v Bromley LBC* [1972]1 Ch.400

obtained from HM Land Registry in order to establish who had an interest in the land. The Charges Register identifies a charge in favour of Cambridge & Counties Bank Ltd. The Proprietorship Register identifies the Appellant as the owner, with Title Absolute, subject to a restriction preventing any disposition of the land without the written consent of Cambridge & Counties Bank Ltd.

5. The Council states that it "...would expect mortgagees to be included in the Proprietor section" and appears to have taken the view that because the mortgagee in this case was not, its interest would not be materially affected by the Notice. This is surprising, because mortgages (and other financial charges) registered against a property are listed in the Charges Register, not the Proprietorship Register. A mortgage lender would not ordinarily be identified in the Proprietorship Register, except in circumstances where it had taken possession of the property, or (as in this case) in the context of a restriction against disposal. Having established that there was a mortgagee with an interest in the land that was the subject of the Notice, the Council ought then to have made an assessment as to whether the Notice could materially affect that interest. As the Appellant rightly points out, an Enforcement Notice has the potential to affect the value of the land, which could in turn affect the interest of the mortgage lender.
6. However, s.176(5) of the 1990 Act provides that where a person required to be served with a copy of the Notice was not served, that fact can be disregarded if neither that person nor the Appellant has been substantially prejudiced. The circumstances of this current case are that the development attacked by the Notice has already been the subject of an application for retrospective planning permission.² The Appellant engaged a firm of Planning Consultants to appeal against the Council's refusal of that application³, and is represented by them in this current appeal.
7. In short, the professional representatives of the Appellant have already pursued every viable argument for retaining the development and/or quashing the Notice. The interests of the Appellant and the mortgagee are aligned, in that both would wish to maximise, or at least maintain, the value of the property; this is not a case where the party who was not served has been deprived of an opportunity to put a case that was specific to them (for example, a tenant of the property whose personal circumstances necessitated the provision of off-street parking).
8. In summary, I find that while a copy of the Notice ought, arguably, to have been served on the mortgage lender, the circumstances of this particular case are such that in my view neither the Appellant nor the mortgage lender have been substantially prejudiced by the Council's failure to do so. I therefore conclude that the appeal on ground (e) should fail.

The appeal on ground (a)

9. The ground of appeal is that planning permission should be granted for all, or part, of the development alleged by the Notice. The Appellant accepts, in the light of the 2022 Appeal Decision, that the boundary wall should be reinstated: the appeal on ground (a) is limited to the submission that planning permission should be granted for the retention of the hardstanding parking area. The

² Ref PA21/12675 dated 29 November 2021

³ Ref APP/D0840/W/22/3298175, dated 14 October 2022

Appellant's case on this ground, as I understand it, is that following the reinstatement of the wall there will be no public views of the hardstanding behind it, and so its retention would have no adverse visual impacts.

10. It is important to bear in mind, when considering the impact that development will have on the character and appearance of its surroundings, that lack of visibility does not equate to lack of harm. Put another way, harmful forms of development cannot be justified by the fact that they are not readily perceived from the public realm. Further, the Appeal Site lies within the Penzance Conservation Area, which means that I have a statutory duty⁴ to ensure that "special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."
11. I appreciate that the reinstatement of the granite boundary wall will screen public views of the hardstanding; indeed, part of this high wall's original purpose was to shelter from view some of the utilitarian and functional activities that would typically take place in the back yards of the substantial houses which front on to Mennaye Road. But as the Conservation Area Appraisal (adopted by the Council in 2010) notes, front and rear gardens within the Conservation Area form a vital part of its character and integrity, and their loss for the provision of parking is always detrimental to the streetscape. The Appraisal goes on to advise that the reinstatement of appropriate uses and boundary treatments should be encouraged.
12. The evidence of the Appellant is that the rear garden at the Appeal Site formerly contained some sheds, sited on areas of hardstanding, either side of a smaller area laid to grass. Notwithstanding the fact that it would have been largely screened from public view by the boundary wall, such an arrangement would have been entirely in keeping with the character of this well-established residential area, combining the provision of secure domestic storage with outdoor amenity space for the occupiers. In contrast, its replacement with concrete hardstanding, covering the entirety of the space available in the back yard in order to maximise the provision of off-street parking, does not accord with the historic character and use of back gardens in the Conservation Area. The ensuing harm to the Conservation Area, while "less than substantial" in the terms of the NPPF, must be afforded considerable importance and weight. No public benefits of the hardstanding, such as might be offset against that harm, have been identified.
13. I conclude that granting planning permission for the hardstanding would conflict with the aims of Policies 2, 12 and 24 of the Cornwall Local Plan 2010-2030, which together seek to ensure that development conserves and enhances the historic urban environment, and maintains the special character and appearance of the Conservation Area. I have found no other material considerations sufficient to outweigh that conflict. I shall therefore dismiss the appeal on ground (a), and refuse planning permission for the deemed application.

The appeal on ground (f)

14. The ground of appeal is that the steps required by the Notice exceed what is necessary to remedy the breach of planning control. The Appellant contends that since one of the requirements of the Notice is to return the land to its

⁴ S.72(1) of the 1990 Act

former condition, and in its former condition it contained areas of hardstanding, it is excessive to require the removal of hardstanding from the entirety of the area to the rear of the dwelling.

15. The Appellant has provided a copy of an aerial photograph dated 2017, and contends that this illustrates the extent of hardstanding present prior to the removal of the wall. The resolution of the image is poor, and I am not persuaded that it is possible to distinguish the hardstanding, grass and sheds in the areas outlined and labelled by the Appellant. In any event, what I saw at my site visit does not tally with the Appellant's claim that "only a small addition of hardstanding has been constructed as part of the works, in place of the grassed area." Rather, it appears that the works involved covering the entirety of the area to the rear of the dwelling with fresh concrete, to form a smooth and continuous surface: no signs of pre-existing areas of hardstanding remain visible. On that basis, it is not unreasonable or excessive for the Notice to require the removal of this new hardstanding in its entirety, in order to reverse the engineering operations which (together with the demolition of the wall) constituted the breach of planning control.
16. The Appellant points out that while the Notice states that the land should be reinstated to its former condition, it does not provide any detail as to what that condition was. But this is not unusual: the purpose of the Enforcement Notice is to remedy the breach of planning control that has taken place, and no recipient can be required to undertake works that would go beyond remedying that breach. Bearing in mind that the landowner should have the best knowledge of what the previous condition of the property was, it is sufficient, and indeed common practice, to require simply that the land be restored to its previous condition.
17. For similar reasons, I do not share the Appellant's concerns about the requirement to rebuild the demolished wall. The Appellant points out that the type of stone and mix of mortar are not detailed, but again, as the landowner responsible for the demolition of the original wall, the Appellant should have the best knowledge of what that former wall was like. I am satisfied that the requirement to "rebuild the rear boundary granite stone wall", together with the helpful provision of a photograph of the former wall to which the "position, height and materials" of the replacement wall are to be matched, is entirely reasonable and sufficiently precise.

Conclusion

18. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the Enforcement Notice and refuse to grant planning permission on the application deemed to have been made under s.177(5) of the 1990 Act as amended.

Jessica Graham

INSPECTOR