



Appeal Decisions

Site visit made on 7 November 2024

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 December 2024

Appeal A Ref: APP/X1165/C/24/3340755

Appeal B Ref: APP/X1165/C/24/3340756

80 Windsor Road, Torquay TQ1 1SU

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended) (the Act). The appeals are made by Mr Jack Henderson (Appeal A) and Mrs Laura Henderson (Appeal B) against an enforcement notice issued by Torbay Council. The notice was issued on 2 February 2024.
- The breach of planning control as alleged in the notice is: Without planning permission, the demolition of a boundary wall and associated gate piers along the south-western boundary of the site as depicted in the attached photograph labelled "Photograph 1", to create a means of access onto a classified highway, in the approximate location identified by a blue line on the attached plan titled "Map 2".
- The requirements of the notice are described as:
"You must reinstate the former wall and associated gate piers along the south-western boundary of the Land, in the approximate location identified by a blue on the attached plan titled "Map 2". The wall and associated gate piers must be re-instated in accordance with the attached photograph labelled "Photograph 1" and in accordance with the requirements in sub-paragraphs (i) and (ii) below
 - (i) The new wall and associated gate piers shall be rendered to match the existing wall at the neighbouring property 78 Windsor Road, and as depicted in the attached photograph labelled "Photograph 1";
 - (ii) The new pier caps shall be designed to match the existing pier caps at the neighbouring property 78 Windsor Road and as depicted in the attached photograph labelled "Photograph 1".
- The period for compliance with the requirements is: 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 (as amended).

Appeal A Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Appeal B Decision

2. The appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The copy of the notice submitted with the appellant's appeal documents and that submitted with the questionnaire by the Council did not include 'Photograph 1'. I therefore requested confirmation that I had the correct notice or whether the original notice had not included it. The Council confirmed that the photograph had been included and that is not disputed.
4. The appellants are arguing that they have not created a means of access. This is therefore suggesting that what has occurred is not as alleged on the notice which would involve an appeal under ground (b). Whilst not explicitly pleaded,

I will deal with the appeal on the basis that ground (b) is also relevant to consider although I will deal with it when considering ground (c).

The Appeals on grounds (b) and (c)

5. To succeed on ground (b), the onus is upon the appellant to demonstrate that the breach as stated has not occurred. The appeal against the notice on ground (c) is that what is alleged does not constitute a breach of planning control and again, the onus is upon the appellant to prove their case on the balance of probabilities. The planning merits of what is alleged are not of relevance to either ground of appeal.

Reasons

6. The appeal site is an end of terrace dwelling. The terrace of dwellings are each set back at a similar level as the adjoining footway and road. They each have short front gardens and the immediate adjoining neighbouring house has a rendered front wall with pedestrian gate with capped gate piers which defines the front boundary with the footway. From the submitted evidence as well as 'Photograph 1', as attached to the notice, I can see that there was previously a similar rendered wall along the front of the appeal site. That wall, including the pedestrian gate piers, has been demolished.
7. By reason of s57 of the Act, planning permission is required for the carrying out of development of land. In turn, s55(1) of the Act states that development "means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land". Furthermore, building operations are confirmed at s55(1A) to include "demolition of buildings". Section 171A(1) of the Act includes within the definition of a breach of planning control, at subparagraph (a), the carrying out of development without the required planning permission. The Town and Country Planning (Demolition – Description of Buildings) Direction 2021 at 3(1)(b) states that the demolition of the whole or any part of any gate, fence, wall or other means of enclosure should not be taken as "development".
8. The notice alleges that the works have been undertaken "to create a means of access". However, the creation of a means of access will only require planning permission if it involves an act of operational development within the meaning of s55(1) of the Act. In themselves, the removal of the wall and gateway including the piers would not require planning permission given that is excluded from the definition of development by the 2021 direction. However, it is necessary to look at the works as a whole and determine whether or not as a matter of fact and degree, the demolition could, along with any other works, be characterised as the formation of a means of access to a highway.
9. Section 336 of the Act includes within the definition of "engineering works" as including "the formation or laying out of means of access to highways". However, that in itself does not mean that creating all means of access to highways will have to be considered as "engineering works". There will need to have been something that has taken place which involves the "formation" or "laying out" of the access as a matter of fact and degree.
10. The Council has referred to the regrading of the land between the dwelling and the pavement. At my site visit, I saw that the land in the front garden, which

would have been behind the wall, is approximately level with the surface of the footway. The site has not been hard-surfaced although was covered in part by artificial turf as well as some dark coloured membrane. The present condition of the site would appear to be a work in progress.

11. The photographs from 'Google Streetview' presented within the Council's statement show that between the gate piers, there had been a kerb-stone marking the edge between the footway and the pedestrian access (figure 3). Behind that kerb-stone, a drain inspection-cover can be seen with further hard-surfacing behind that. It is also possible to see through the pedestrian gate and at that time, there appears to be edging alongside the pathway which delineates the soft-landscaped garden behind that, which is consistent with what can be seen from the estate agent's photograph (figure 4). The 'Streetview' image from 2022 (figure 5) shows that the kerb is still in place at that time although the lawn and landscaping have been removed. The appellants have not disputed what is shown in these photographs, the dates or the interpretation of the Council. The Council suggest that the accumulated soil on the garden has probably resulted from regrading of the site and that seems logical.
12. The artificial turf and coloured membrane shield what is below and there are patches of grass which also make it difficult to see what the precise surfacing currently consists of. Notwithstanding these matters, it is clear that the site has been levelled and various works have been undertaken in the area behind where the wall used to be. The onus is upon the appellant to demonstrate their case and if the Council's interpretation in their appeal submissions were not correct, they have had the opportunity to clarify matters. It does appear that there has been the removal of stone or concrete kerbs and the scraping back of soil which has now been removed from site. These matters would have required some pre-planning by someone with at least some technical knowledge. This has involved the "formation" or "laying out" of an access albeit one that may not be in its final state.
13. Whilst the use of the access may not conform with the requirements of highway legislation, that does not mean that what currently exists is not an access. A cross-over has not been created and passing across the footway may well fall-foul of other restrictions but that in itself does not change the character of what has been undertaken. I am not told how such other restrictions are enforced in the Council area and whether that would prevent any driving of vehicles into the site. The appellants also refer to the access across the pavement having occurred "for a very short time" but that it was ceased. The Council has provided a photograph within their appeal statement (figure 7) which they say was taken on 22 November 2023, which shows muddy tyre tracks from the road, across the footway and leading onto the front garden. The aerial 'Google' image from 18 April 2023 (figure 8) does also show clearly a vehicle parked parallel with the footway on the appeal site.
14. The background to the issuing of the notice is also that, again in the appellants' terms, is "entangled in the application" made for a vehicular access. The 2 planning applications made at this site by the appellant have been described as "removal of the front boundary wall to create a means of access to the highway, for off-road parking" (Ref P/2020/0299) and for the formation of a "new driveway and vehicular access" (Ref P2021/0646).

15. Considering all of the matters in the round, as a matter of fact and degree and looking objectively at all of the circumstances, a means of access has been created. I therefore consider that what is alleged in the notice has occurred and the appeal on ground (b) fails.
16. Development requiring planning permission has occurred. Schedule 2, Part 2, Class B of the Town and Country Planning (General Permitted Development) Order 2015 (as amended), permits the formation, laying out and construction of a means of access to a highway, but only where it is not a trunk or classified road. The fact that the site is not within a Conservation Area does not affect this determination one way or the other. There is no dispute that Windsor Road is a classified road and so what is alleged is not permitted development.
17. The appeal on ground (c) also therefore fails.

The Appeal on ground (f)

18. The appeal on this ground is that the steps required exceed what is necessary to achieve the purpose of the notice and those purposes are set out in s173(4) of the Act.
19. The very detailed steps set out in section 5 of the notice are very clearly and carefully seeking to reinstate the wall with gate piers as were removed. This is done by reference to a photograph of what previously existed including detailed dimensions which are not disputed by the appellants as being an accurate reflection of what had previously existed. As such, because the purpose of the notice is to reinstate what was removed, that would remedy the breach of planning control by "restoring the land to its condition before the breach took place" with s174(4)(a).
20. The appellants do not argue that the requirements of the notice go any further than replacing what has been removed and the evidence does not suggest to me that the notice has gone any further. As such, the appeal on this ground cannot succeed.
21. I have already considered within the discussion on the other grounds, the significance or otherwise of the lack of a dropped kerb. The suggestion that an alternative obstruction to the use of the area for parking could be required would not remedy the breach alleged on this notice.
22. The appeal on ground (f) fails.

Conclusion

23. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

Andy Harwood

INSPECTOR