



Appeal Decisions

Site visit made on 11 June 2019

by Paul Freer BA (Hons) LL.M PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 June 2019

Appeal Refs: APP/H4505/C/18/3211548 & 3211549 Land at 25 Sundridge Drive, Gateshead NE10 8JF

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Stephen Johnson and Mrs Eileen Johnson against an enforcement notice issued by Gateshead Council.
 - The enforcement notice was issued on 10 August 2018.
 - The breach of planning control as alleged in the notice is, without planning permission, the material change of use of part of the Land shown edged in blue on Plan 1 attached to the notice from public open space to private garden by incorporating into the curtilage of no 25 Sundridge Drive, Gateshead, NE10 8JF.
 - The requirements of the notice are:
 - (i) Permanently cease the use of part of the Land (shown edged in blue on Plan 1 attached to the notice) for private garden use.
 - (ii) Dismantle the timber fence enclosing the land (shown in the approximate position edged with a blue line and a broken black line on Plan 2 attached to the notice), ensuring that the posts and foundations are removed to at least 100 millimetres below the level of the ground.
 - (iii) Restore the land to its condition prior to the breach by filling in any post holes with topsoil to a minimum depth of 100 millimetres, levelling and evenly grading the surface of the ground to match the contours of the surrounding land.
 - The period for compliance with the requirements is 4 weeks.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (c) and (f) of the Town and Country Planning Act 1990 as amended.
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Summary Decisions: the appeals are dismissed and the enforcement is upheld

Procedural Matters

1. The appeals were initially made on ground (c) as set out in section 174(2) of the Town and Country Planning Act 1990 (the 1990 Act): namely that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control. Parts of the appellants' evidence, specifically that relating to the erection of the fencing around the land, is relevant to an appeal on ground (c) and I have considered that evidence in relation to that ground of appeal.
2. However, the appellants' primary case is that the land remains as open space available for use by the public and therefore is not used, as alleged in the notice, as a private garden. On my reading, that more properly constitutes an appeal on ground (b): namely that, in respect of any breach of planning control

that may be constituted by the matters stated in the notice, those matters have not occurred. I therefore propose to consider the appellant's arguments in that regard as an appeal made on ground (b). The Council has responded to the case made by the appellants, albeit in the context of an appeal under ground (c), and I am satisfied that no injustice would be caused by so doing.

3. As part of the statement that accompanied the appeal form, the appellants express the view that the steps required by the notice exceed what is necessary to remedy any breach of planning control. Although not expressly stated as being such, that is clearly an appeal on ground (f) as set out in section 174(2) the 1990 Act and I propose to treat it as such. In its statement, the Council has reiterated its view that the requirements of the notice are valid and reasonable. Accordingly, I am satisfied that I can consider the appellants' appeal on ground (f) without causing injustice.
4. A large part of the appellants' evidence refers to matters in support of the granting of planning permission for the use of the land as a private garden. These matters include, for example, the two appeal decisions relating to properties in Meadowbrook Drive and Montrose Drive in which such use was granted planning permission. I also note the map submitted by the appellants showing other areas of open space across the wider estate. That evidence, and other such matters referred to in the appellants' written statement, would be relevant to an appeal on ground (a) as set out in section 174(2) the 1990 Act: namely that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. However, because no appeal on ground (a) has been made and the requisite fee was not paid, I am not able to take these matters into account in reaching my decision¹.

The appeals on ground (b)

5. I noted during my site visit that the estate as whole is served by numerous parcels of public open space. These parcels of public open space are diverse in both size and shape. I noted that some of the larger spaces were used to provide informal recreational space: for example, on one linear area of open space, goal posts had been positioned and the land was clearly used for ball games. Other parcels of open space had less recreational value but nevertheless formed part of the character of the wider estate. In all cases that I observed, the spaces were neat and tidy, and it was evident that the grass had been cut relatively recently. The common denominator that united all these diverse spaces was the absence of any fencing or other physical barrier to prevent or restrict access to them by members of the public. From the perspective of a member of the public contemplating using those spaces, the absence of fencing or other physical barrier to access is a clear invitation to do so.
6. The appellants do not contend that the previous use of the land was not as public open space and, accordingly, I have taken the first aspect of the breach of planning control alleged (i.e. 'from public open space') to be undisputed. The appellants have, however, stressed that the land is currently open space and acknowledge both that it is available for use by the public and that they cannot make the land as enclosed into a private garden.

¹ See the letters from the Planning Inspectorate dated 16 October 2018 and 2 November 2018

7. The obvious corollary of the appellants position is that, in order for a member of the public to perceive the land as being public open space, the land must have the same physical attributes as the other areas of public open space on the estate in terms of the absence of any fencing or physical barriers that might deter or dissuade that person from using the open space. At the very least, given that the land is enclosed by fencing, there would need to be other indications (such as clear signage) that the land is available for public use. Otherwise, how might a member of the public recognise that the land is available for his or her use?
8. Nevertheless, at the time of my site visit, the gate that provides access to the fenced off land was locked with a small padlock attached to the latch on the rear of the gate. Consequently, and contrary to the stated position of the appellants, the locked gate is a clear and unequivocal statement to any member of the public intending to use the space that the land is private and that access to it is prohibited. In my view, the fact that the gate was locked is a firm indication that the land is used a private garden and that the breach of planning control alleged in the notice has occurred.
9. Moreover, even if the gate was not locked, in my view the enclosure of the land with fencing is sufficient in itself to distinguish the land from areas of open space on estate. The enclosed land is contiguous with the side of the main dwelling, with no physical separation of the land purportedly available as public open space from the land occupied privately as part the main house. I noted also that children's play equipment was lined up alongside the flank wall of the house. As a result, the land has very much the appearance of a side garden to the main house. There was no signage to indicate that the enclosed land is available for public use, or how a member of the public wanting to use the land might gain access to it. Again, from the perspective of a member of the public contemplating using that land, the fencing is a strong signal that the land is in some way different from the areas of open space to which they might have unrestricted access elsewhere on the estate and therefore should not be entered.
10. The Council has provided as part of its evidence copies of sales particulars from a local estate agent relating to the sale of the appeal property. The sales particulars, which appear to date from 2018, make clear reference to a garden situated to the side of the property and include a photograph of the land in question. It is apparent from these sales particulars that the land subject to the notice forms part of the residential property that is being offered for sale and specifically as a garden associated with and attached to it. Moreover, there is no disclaimer or other indication in the sales particulars to the effect that the land is available to members of the public to use as open space. It is usual in these circumstances for the sales particulars to be derived from instructions issued to the estate agent by the vendor. Consequently, to my mind, these sales particulars are a further indication that the land is used as, and is perceived by the appellants as being, part of their private garden.
11. Finally, I note that in March 2007 an appeal was dismissed for the change of use of the land from public open space to private garden following the purchase of land (APP/H4505/A/06/2028511). The appellant was Mr S Johnson, the same as the appellant for one of these appeals. I make no comment on the reasons why the appeal was dismissed, but I do note that the proposal then before the Inspector was use of the land as private garden. The intentions

behind the proposal at that time are therefore plainly stated and point to the underlying ambitions and intentions of the appellants for the use of the land both then and now. Taken together with the above sales particulars and the locked gate at the time of my site visit, this is yet another indication that the land is being used as a private garden.

12. I conclude that, on the balance of probability, the land previously used as public open space is now used as a private garden. I therefore conclude that the matters stated in the notice have occurred. Accordingly, the appeals on ground (b) fail.

The appeals on ground (c)

13. The appellants' primary position on this ground of appeal is that the land belongs to them and that ultimate control of the land is not vested in the Council. I have no reason to doubt that the appellants are the owners of the land but ownership does not dictate the use of land. The latter is controlled by the 1990 Act and associated legislation, and purchasing land does not automatically bring with it a change of use of that land. It follows that land owners, including the appellants in this case, are expected to use land in accordance with the 1990 Act and associated legislation. It further follows that, as a matter of planning principle, it is perfectly possible for land to be in private ownership but having a lawful planning use as public open space. In an appeal on ground (c), the onus is therefore on the appellants to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.
14. In this case, the Council are alleging a material change in use of the land from public open space to a private garden. The appellants contend that they were advised by the Council that, because they were not changing the use, the erection of fencing would not require planning permission. However, the exact wording of the Council's advice is important in this case.
15. A Council officer advised in an email dated 12 June 2009 that the land could be enclosed with fencing falling under Class A, Part 2 of the Town and Country Planning (General Permitted Development) (Amendment No 2)(England) Order 2008 (GPDO)². The clearly-stated caveat to that advice was that "*problems arise when a change of use of the land occurs*" (my emphasis). I will return to the question of the fencing below in relation to the appeal on ground (f) but the salient point here is that the erection of the fencing has resulted in a material change in the use of the land. Consequently, the erection of the fencing gave rise to the very problems flagged up by the Council in its advice and of which the appellants were made aware. It follows that the appellants cannot now rely on that advice in seeking to show that a breach of planning control has not occurred in this case.
16. I have found under the appeal on ground (b) that the use of the land a private garden has occurred. The appellants have provided no evidence to show that the change of use from open space to a private garden does not constitute a breach of planning control. Consequently, the appellants have not discharged the burden that is upon them and the appeals on ground (c) fail.

² Although the 2008 version of the GPDO has been subsequently superseded by the 2015 version, because the provisions within the 2015 version in relation to fencing are essentially unchanged, that is of no consequence in this case.

The appeals on ground (f)

17. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the Town and Country Planning Act 1990 sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place or (b) remedying any injury to amenity which has been caused by the breach. In this case, the requirements of notice are to cease the use of the land as a private garden and to dismantle the fence. The purpose of the notice must therefore be to remedy the breach of planning control that has occurred.
18. In the absence of an appeal on ground (a), the scope of an appeal on ground (f) is limited. However, the Courts have made it clear that I have a duty to consider whether there are any obvious alternatives which would overcome the planning difficulties with less cost or disruption to the appellant than complying fully with the notice. This leads me to consider whether removing the gate in its entirety, whilst leaving the remaining fencing in situ, would be a suitable lesser step. In my view, the mere presence of the fence distinguishes the land from areas of public open space elsewhere on the estate, and represents both a physical and psychological barrier to a member of the public who might be contemplating using that land. I therefore conclude that simply removing the gate would not overcome the planning difficulties in this case. Furthermore, simply removing the gate would not remedy of the breach of planning control that has occurred and would therefore not achieve the purpose of the notice.
19. I am mindful that in isolation the erection of fencing of the height in this case might constitute permitted development under Class A, Part 2, Schedule 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (2015 GPDO). Nevertheless, in this case, it is the erection of the fencing that has facilitated the material change of use to a private garden alleged in the notice. In these circumstances, it is settled case law that an enforcement notice can require the removal of the operational development that facilitates a material change of use, even though in other circumstances that operational development would constitute permitted development under the 2015 GPDO. I therefore consider that, in this case, the notice can require the removal of the fencing as being the operational development that facilitates the material change of use alleged in the notice.
20. Accordingly, for these reasons I conclude that the steps required by the notice are not excessive and that the appeals on ground (f) must fail.

Formal Decisions

21. The appeals are dismissed and the enforcement notice is upheld.

Paul Freer
INSPECTOR