



Appeal Decision

Site visit made on 30 July 2018

by Elizabeth Jones BSc (Hons) MTCP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 September 2018

Appeal Ref: APP/F2415/C/17/3188404

Land to the rear of 6 and 8 Cordonnier Close, Broughton Astley LE9 6HR

- 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 Brian Hardy against an enforcement notice issued by Harborough District Council.
- The enforcement notice, numbered EN588, was issued on 10 October 2017.
- The breach of planning control as alleged in the notice is without planning permission the material change of use of the Land from open space to an extended residential garden serving both 6 and 8 Cordonnier Close, Broughton, Astley LE9 6HR.
- The requirements of the notice are:
 - (a) Cease the use of the Land as an extended residential garden.
 - (b) Remove the close board fence from the Land in its entirety.
 - (c) Restore the Land to its previous condition before the planning breach set out in this notice took place.
- The period for compliance with the requirements is:
 - 5(a) and 5(b) within one month from the date this notice takes effect.
 - 5(c) within three months from the date this notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (f) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld.

Procedural Matters

1. At the site visit it was agreed by both main parties that a plan submitted by the appellant in his appeal submissions titled "Plan showing the correct boundary of the land" dated June 2017 more accurately identifies the site boundary as it does not include the grass verge. It is a minor adjustment which reduces the area attacked by the notice and thus no injustice to either party would arise by substituting it.
2. The revised National Planning Policy Framework (the Framework) came into force on 24 July 2018. Both parties were consulted and given the opportunity to comment. No comments were received.

Appeal on ground (c)

3. The appeal on ground (c) is that the matters alleged in the enforcement notice do not constitute a breach of planning control. The question is whether the use as alleged amounts to a material change of use of the land so as to involve development requiring planning permission. The onus of proof is on the appellant and the standard of proof is on the balance of probabilities.

4. The subject of the enforcement notice comprises an area of land at the end of a residential cul-de-sac beyond the rear gardens of Nos 6 and 8 Cordonnier Close. The Council has submitted that this land was formerly open space used by the public which has now been fenced off and incorporated into the rear gardens of these two properties.
5. The appellant has provided documentary evidence¹ and contends that prior to purchasing the land the appeal site was private land owned by Jelson Limited and not public open space.
6. The appeal site lies within a housing development which was granted planning permission in 1986². The approved site layout plan³ shows this land as 'public open space'. The undisputed evidence from local residents shows that for many years it has been left open and laid to grass with some shrub planting, and, up until being enclosed by fencing in 2017, was used by local residents for recreational purposes. Although not formerly adopted by the Council the land was owned and maintained as open space by Jelson Limited⁴ and is listed under the Jelson Sites in the Open Spaces Strategy 2016-2021⁵.
7. The land was subsequently bought in 2017 by the appellant and his neighbour. I have had regard to the various documents submitted by the appellant; however, a change in ownership of the land does not automatically change the existing use. For there to be a material change of use there needs to be some significant difference in the character of the activities from those previously. The fencing of this land to be used as residential garden by the appellant and his neighbour, as a matter of fact and degree, has prevented its use by members of the public and has resulted in a material change in the open character of the land so as to result in a material change of use for which planning permission is required.
8. No planning permission has been given and there has been a breach of planning control as alleged. The appeal on ground (c) therefore fails.

Appeal on ground (a)

Main Issue

9. This ground of appeal is that planning permission should be granted for what is alleged in the notice. In this case the main issue is whether the development is acceptable in terms of open space provision.

Reasons

10. Policy CS11 of the Harborough District Local Development Framework Core Strategy 2006-2018 (CS) seeks the highest standards of design to create attractive places for people to live, work and visit. Policy CS16 of the CS helps to deliver the Council's Strategic Objectives which include to secure provision of accessible community services, open spaces and infrastructure.
11. The revised Framework in its glossary defines open space as "All open space of public value, including not just land, but also areas of water (such as rivers,

¹ Appendices D2 –D6 & M1-M4 of the Appellant's Statement

² 96/0851/3R

³ Appendix 4 of the Council's Statement of Case

⁴ Letter from Jelson Limited dated 11 September 2017 and Council's email dated 26 June 2018.

⁵ Appendix H of the Council's Final Comments

canals, lakes and reservoirs) which offer important opportunities for sport and recreation and can act as a visual amenity". It states that existing open space should not be built on unless certain criteria are met and planning policies should aim to provide the social, recreational and cultural facilities and services the community needs by planning positively for the provision and use of community facilities such as open space.

12. It is clear from the third party representations that the appeal site was a valuable open space to the local community. I have been provided with no evidence to show that this open space was surplus to requirements, would be replaced by an equivalent or better provision in terms of quantity and quality or that the change of use has resulted in alternative sports and recreational provision as required by the Framework. Moreover, whilst boundary fences are a common feature in the surrounding area, the fence surrounding the appeal site encloses this once open area of land resulting in harm to visual amenity and materially altering its open character.
13. I therefore conclude that the development results in an unacceptable loss of open space. Thus, it is contrary to Policies CS11 and CS16 of the CS and the revised Framework which states that access to a network of high quality open spaces is important for health and well-being of communities.

Other matters

14. I have also had regard to the points raised regarding the visibility from adjoining driveways. The Council has not raised highway safety as a concern and, from what I saw at my site visit I have no reason to find otherwise.
15. I note the appellant's comments regarding the issuing of the enforcement notice and communication with the Council. Dissatisfaction with the Council's procedural policies should appropriately be made in the first instance through the authority's own complaints procedure.

Conclusion

16. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal on ground (a) should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Appeal on ground (f)

17. The ground of appeal is that the steps required by the notice to be taken or the activities required by the notices to cease, exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in Section 173(4) of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). Since the notice requires the unauthorised use of the Land as an extended residential garden to cease and the removal of the close boarded fence, the purpose of the notice is clearly to remedy the breach.
18. The appellant suggests either reducing the height of the fence to 1 metre in line with permitted development, or removing the fence and replacing it with a 1m high fence set back from the highway. The appellant has submitted a number of photographs showing examples of boundary treatment in the surrounding area with regard to the character and appearance of the fence. In

addition, the appellant comments on the materials used in construction of the fence, highway visibility and other open spaces in the area. I have considered these matters under ground (a) above. Moreover, for the reasons given above, there is no fallback position in relation to s173(4) in terms of the deemed planning permission.

19. Case law establishes that it is not excessive to require the removal of all items introduced to facilitate the unauthorised use as part of the requirements of the notice and to require the land to be restored to its condition before the breach took place. Leaving the fence on the land would not achieve the purpose of the notice.
20. For the reasons given, I conclude that no lesser steps would remedy the breach of planning control that has occurred. The appeal on ground (f) therefore fails.

Formal Decision

21. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended.

Elizabeth Jones

INSPECTOR