

Appeal Decision

Site visit made on 28 November 2022

by Debbie Moore BSc (HONS), MCD, PGDip, MRTPI, IHBC

an Inspector appointed by the Secretary of State

Decision date: 20 December 2022

Appeal Ref: APP/C3430/C/22/3295538

Land at the rear of 8 Baggeridge Close, Gospel End, Staffordshire DY3 4AJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr D Bytheway against an enforcement notice issued by South Staffordshire District Council.
- The enforcement notice was issued on 18 February 2022.
- The breach of planning control as alleged in the notice is without planning permission, the making of a material change of use of the Land and associated unauthorised development and engineering works to facilitate that change of use including, but not limited to the installation of a garden pond, the laying of a hardstanding base and siting of a shipping container, the erection of fencing and the raising of the land levels to level off the Land to facilitate that change of use for use as domestic residential garden land by the owners/occupiers of 8 Baggeridge Close.
- The requirements of the notice are:
 - i. Permanently cease the use of the Land for domestic garden use;
 - ii. Remove the garden pond, (outlined in blue on Plan 2), removing from the Land any lining and materials used to form the pond, including all stone, stone blocks and materials surrounding it and infill with soil to the ground levels that existed before the unauthorised use commenced;
 - iii. Permanently remove from the Land the shipping container and hardstanding base located on the Land outlined in green on Plan 2;
 - iv. Permanently remove from the Land the metal fencing within the area outlined in yellow on Plan 2;
 - v. Remove from the Land all turf laid to facilitate the material change of use;
 - vi. Lower and restore the Land to the original levels that were existing before the unauthorised engineering operations commenced as set out in the topological survey reference DML12A at Appendix 1, annexed to this Notice so as to ensure the Land is returned to its original condition prior to the [un] authorised [sic] development;
 - vii. Remove all additional imported material used to raise the ground level from the Land. (The topological survey reference DML998A showing the land levels on 10 December 2021 is included at Appendix 2 for reference);
 - viii. To ensure a reduction in the overly domesticated and urban appearance of the Land and restore the character of its rural appearance, to replant replacement trees with a broad mix of species chosen from the list at Appendix 3, in the area outlined in yellow and shown on Plan 3 attached to this notice. The trees should be planted in accordance with the provisions detailed at Appendix 3.
- The period for compliance with the requirements is i) one month; ii), iii) and iv) three months; v), vi) and vii) six months; viii) within the first planting season following compliance with v), vi) and vii).
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (d) and (f) of the 1990 Act as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a correction and variations in the terms set out below in the Formal Decision.

Preliminary Matters

1. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as 'legal' grounds of appeal is the balance of probabilities. There is no ground (a) appeal and associated deemed planning application. Therefore, I have not considered matters such as the effect of the development on the Green Belt, the character and appearance of the area and protected species in terms of whether or not planning permission should be granted. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.
2. The first requirement is to cease the use of the Land for domestic garden use whereas the breach describes domestic residential garden. The requirements should flow from the allegation and, consequently, I will use my powers of correction under Section 176(1) of the 1990 Act to include the word 'residential' in requirement 1. I am satisfied that I can make this minor correction without injustice since the terms and effect of the enforcement notice would be unaffected.
3. The appellant says the land is landlocked and it would not be possible to remove the alleged imported material or the storage container. I understand that the previous use of the land to the east for access would no longer be available. However, the practicalities of compliance are not grounds for quashing the notice. The Council may choose to extend the compliance period using the powers under Section 173A(1)(b) of the 1990 Act if the anticipated difficulties are encountered.

Applications for costs

4. Applications for costs were made by (1) Mr D Bytheway against South Staffordshire District Council and (2) South Staffordshire District Council against Mr D Bytheway. These applications are the subject of separate Decisions.

The ground (b) appeal

5. The ground (b) appeal is that the matters alleged in the enforcement notice, that is the material change of use of the land to use as domestic residential garden, have not occurred as a matter of fact.
6. The appeal site is a rectangular area of land to the rear of the properties along a cul-de-sac known as Baggeridge Close. The plan attached to the notice includes the whole of the land within the appellant's ownership. However, the alleged works are confined to the western part of the land, which lies to the rear of Nos 6 to 9 Baggeridge Close.
7. The appellant explains that the land was acquired in 2014, at which time it was very overgrown and contained abandoned items. In December 2020, planning permission was granted for a replacement dwelling on land at the head of the cul-de-sac (No 10 Baggeridge Close, Ref 20/00905/FUL). Due to logistical difficulties during the construction of the new dwelling, the appellant allowed the developer to use the appeal site for the storage of plant and materials. After the works finished, the appellant says the land was levelled off and replacement grass was laid by the developer in order to remedy the damage

caused by their machinery. Prior to this, trees had been removed and a fence which ran from north to south had been replaced.

8. The appellant maintains that the appeal site has not been used as a domestic residential garden and, as such, a change of use has not taken place. However, it is accepted that the land is used by the appellant in connection with his ownership. There is no dispute that the site has been levelled and replacement grass has been laid, nor that fencing has been erected, a pond has been enlarged and a shipping container has been sited on a gravel base. Play equipment has also been present. The level surface, the turf, the pond and the play equipment are evidence that the site has been used for residential purposes. There is no detail of how the shipping container is used, aside from a comment that it was sited temporarily. However, it remained at the time of my site visit. Given its location relatively close to the house, it is more likely to be used for domestic storage than for agricultural purposes as indicated.
9. An additional ground (b) appeal has been made, that the laying of the hardstanding base associated with the shipping container has not occurred, although it is accepted that the container is sited on a bed of gravel. I saw that the crushed stone has become compacted and, in addition, there is a concrete ramp in front of the doors. This can reasonably be described as hardstanding.
10. Therefore, on the basis of the appellant's own evidence, I find that the matters alleged have occurred as a matter of fact and the ground (b) appeal must fail. Whether or not the matters alleged amount to a material change of use, for which planning permission would be required, is considered below as part of the ground (c) appeal.

The ground (c) appeal

11. The ground (c) appeal is that the matters alleged do not constitute a breach of planning control. The concept of a material change of use is not defined in statute, but the basic approach is that, for a material change of use to have occurred, there must be some significant difference in the character of activities from what has gone on previously, as a matter of fact and degree. The Courts have held that any off-site effects may be highly relevant to whether there has been a material change of use. Similarly, the planning consequences of the change may be relevant. A change which leads to an 'improvement' in respect of planning merits can amount to a material change of use just as much as one that causes harm.
12. The Council has provided a series of dated photographs showing the condition of the land in April, September and December 2021¹. The part that had been subject to the works was flat and laid with turf that had been mown and maintained. It had been cleared of trees and any vegetation and contained a pond, with large stone blocks at one side and a fountain, plus a storage container, in the positions shown on Plan 2. The turf extended from the rear of the appellant's garden, that lies directly behind No 8, and there was no separating boundary treatment. At some point, there was a child's goal post(s) and play equipment on the land but these have since been removed. The land had the appearance of an extended garden with a lawn, an ornamental pond and a storage container. It is also apparent from the Council's photographs,

¹ Appendix 7, 11, 15, 24 and 25 of Council's statement.

- aerial images and from what I saw on site that a significant amount of earth had been moved around the site, using machinery, to create the flat surface.
13. It is possible to ascertain the appearance of the site prior to the works by comparing it with the remainder of the land which has not been altered, and considering aerial photographs supplied by both parties. The land within the appellant's ownership to the east of the dividing fence is uneven and boggy, with a pronounced downward slope to the east. It remains heavily overgrown with trees and shrubbery. The appeal site had been grazed and appears to have been less overgrown and was divided into paddocks by a belt of trees. Nonetheless, it is apparent that there is a significant difference in the appearance of the land as a result of the works.
 14. I appreciate that the appearance has changed since the Council's photographs were taken. The lawn has been left unmown, a fence has been erected at the rear of the appellant's garden, the pond has bedded in a little and its fountain has been removed. Nonetheless, the land remains level, which in itself is a pronounced change given its former uneven nature and the prevailing slope of the land on the remainder of the site and Baggeridge Close itself. Moreover, the land has been cleared of shrubbery and trees and the pond has an over-engineered appearance. As a result, the land to the rear of Nos 6 to 9 is more similar in character and appearance to domestic residential garden. This has led to a significant difference in the character of activities to what took place previously, which would amount to a material change of use.
 15. I understand that the appellant may not be using the land actively on a day-to-day basis for residential purposes. Given its size, it is unlikely to be used as intensively as a modest-sized rear garden. However, its character is residential and there is evidence that it has been used as such. This change in character and appearance has planning consequences because the appeal site is within the Green Belt. The works represent encroachment into the countryside, which would be contrary to Green Belt purposes as set out in the National Planning Policy Framework and policies with the development plan².
 16. I appreciate that several neighbours have written in support of the works, commenting that the visual appearance of the land has improved in their opinions. As explained above, the off-site effects and planning consequences that I have identified strongly reinforce the finding that a material change of use has taken place.
 17. I conclude on this issue that, as a matter of fact and degree, the works to the land have resulted in such a change to its character and consequent use, that it amounts to a material change of use to domestic residential garden. This constitutes development for which planning permission would be required. In the absence of any such permission, the matters alleged constitute a breach of planning control and the appeal on ground (c) must fail.
 18. The appellant had also made a series of points concerning the matters which the Council lists as facilitating the breach of planning control. This includes the pond, the storage container, the turf, tree removal and the erection of the green mesh fence. The appellant's arguments concerning these matters focus on whether or not the Council is justified in seeking the removal or

² South Staffordshire Core Strategy (December 2012) Policy GB1 – Development in the Green Belt.

replacement of these items, which are more appropriately considered under the ground (f) appeal below.

The ground (d) appeal

19. The ground (d) appeal concerns the storage container, however, the container is associated with the change of use. Hence, in order to succeed on ground (d), the appellant must show on the balance of probabilities, that the matters alleged in the enforcement notice have occurred for a continuous period of 10 years or more, prior to the issue of the notice, such that it is too late for the Council to take enforcement action.
20. The appellant maintains that the storage container has been present for a "sufficient" number of years but there is no supporting evidence. The onus of proof lies with the appellant and the appeal on ground (d) fails, therefore. I have considered the additional argument, implicit in the appellant's statement, that the removal of the container would be excessive to remedy the breach as part of the ground (f) appeal.

The ground (f) appeal

21. The Section 173(4) of the 1990 Act sets out the two purposes of an enforcement notice – (a) to remedy the breach of planning control that has occurred and (b) to remedy any injury caused by the breach. The steps set out in the notice require the unauthorised use to cease and the removal of matters that facilitate that use. Its purpose is to remedy the breach of planning control. What must be considered under the ground (f) appeal is whether the steps required exceed what is necessary to achieve that purpose.
22. The Courts have established that an enforcement notice directed at a material change of use may require the removal of works integral to, and solely for, the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or they would be permitted development or immune from enforcement, so that the land is restored to its condition before the change of use took place³. The appellant refers to an appeal decision⁴ in which the Inspector was considering an allegation of operational development that included "domestic paraphernalia". The Inspector corrected the notice to remove reference to any items that were not operational development within the meaning of Section 55(1) of the 1990 Act. It does not follow, as the appellant asserts, that only matters that constitute development can be the subjects of requirements in an enforcement notice directed at a change of use. Caselaw has established otherwise, as explained.
23. In this appeal, the allegation sets out the breach as a material change of use and lists the matters that were considered to facilitate the breach. This includes the pond, the shipping container, fencing and raising of land levels.
24. The appellant explains that the pond is an enlargement of a smaller pre-existing feature, and stone/low level planting has been added. However, the resulting pond has an over-engineered appearance due to its regular size, plastic liner, the domestic planting, the surrounding large stone blocks and the sloping lawn. It is an ornamental feature typical of large gardens, as opposed to a natural pond of the type that occurs within the countryside. Consequently,

³ *Murfitt v SSE* [1980] JPL 598, *Somak Travel v SSE* [1987] JPL 630.

⁴ Ref APP/F1610/C/13/2199101 dated 27 December 2013.

the pond has served to facilitate the change of use to domestic residential garden. I accept that, in time, the pond may have wildlife value but this is not relevant to this ground of appeal. The appellant suggests that the pond could be altered through the removal of some of the planting. However, this would not address the problem that the pond facilitates the unauthorised change of use. Its removal as required by the notice is justified, therefore.

25. The appellant suggests that the shipping container is not used in connection with the unauthorised change of use. However, it is not explained what its purpose is. It can be accessed relatively easily from the appellant's house and it is likely to be used for domestic storage. In the absence of evidence to the contrary, I consider that it facilitates the unauthorised use and its removal, along with the hardstanding base, is appropriate. A change in cladding would not address the fundamental issue that it facilitates the unauthorised use.
26. The appellant argues that the green mesh fencing in the location shown on Plan 2, comprises permitted development by virtue of the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO) Schedule 2, Part 2, Class A. This concerns the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. The fence was erected shortly before the other works took place. It separates and divides the appeal site from the unaltered part of the land. I note that it replaced a previous fence, but this may not have been necessary had the land remained in its former state. I am satisfied that the fence facilitates the unauthorised change of use.
27. The appellant claims that any changes in levels were minor and the Council has not provided any evidence of previous land levels, making the notice impossible to comply with. I saw from my site visit that there are significant differences in land levels between the levelled area and the immediately surrounding land. It is apparent from this, and the Council's photographs and aerial images, that significant earthworks have taken place to level the land. This has resulted in a change in character to the land, as explained above. It facilitates the unauthorised change of use and, in order to remedy the breach, the previous levels should be restored. It would not be sufficient to allow the land to 'rewild' as is suggested since it would remain uncharacteristically level.
28. The appellant also says that the Council has not provided a clear instruction of what needs to be done to lower and restore the levels. Again, this is not correct. The Council has commissioned a topographical survey, (Ref DML998A), which showed the land levels on 10 December 2021. In addition, a further survey has been attached to the notice, (Ref DML12A), which is an attempt to show the previous land levels. There is a supporting statement with additional survey drawings, including cross sections⁵. This has been produced by an appropriately qualified person and is based on reasonable assumptions.
29. However, the scope of the notice is limited by s173(4)(a) and (b) and so the recipient cannot be required to undertake works that would go beyond remedying the breach. No matter how the works are specified, the most that they can achieve is restoration of the land to its previous condition. There is no scope for a notice to require any improvements to the land. Requirement vi) is relatively specific and has been drafted as such to avoid any ambiguity. However, it would be sufficient to simply require the land to be restored to its

⁵ Datum Surveys 18 December 2021.

- condition before the development took place. The survey information may be used to assist the appellant in carrying out this remedial work. Similarly, it is not necessary to specify the removal of the turf, as per requirement v), since this would be achieved if the land were restored to previous condition.
30. There is also a requirement to remove all additional material used to raise the ground levels. Although the appellant maintains the levels were not altered, it is accepted that the ground was cut away at the western end and the excavated material was used elsewhere. It is also explained in sworn evidence⁶ that earth was stored on the appeal site resulting from excavation at the nearby development site. The developer who carried out the works at No 10 has stated in sworn evidence that a significant amount of earth had to be excavated from the adjoining plot in order to accommodate the new dwelling. This material was stored on the appeal site prior to being removed. Further sworn evidence from the contractor who carried out renovation and garden works to the appellant's house states that any materials/aggregates or soil which were temporarily imported onto the appeal site in connection with the works at No 8 were removed. There is reference to further removal and disposal evidence but this is not provided.
31. The Council maintains that a quantity of soil has been imported. It refers to contrary sworn evidence from neighbours⁷, who state that they saw large amounts of fresh soil being imported and deposited onto the land. Aerial images⁸ also show quantities of soil spread evenly about the appeal site. The Council also provides photographs which they say shows bricks and rubble within the deposited material⁹. Furthermore, it is argued that the topographical surveys and accompanying report provide evidence that fill material has been imported due to the respective cut and fill depths.
32. From all of the evidence before me, it is not possible to establish with any certainty how much material was deposited on the site during the development at Nos 8 and 10 and whether all of this was removed. However, I am satisfied that significant amounts of material were deposited and moved around the appeal site. There is a resulting difference in levels which cannot be described as minor. In any event, it is entirely appropriate for the Council to require the land to be restored to its previous condition to remedy the breach of planning control. It has provided a survey to guide the appellant to the end result it is seeking. It may well be the case, given the differences in levels that I observed, that material will have to be removed from the land to reinstate the previous levels.
33. The final requirement is to plant replacement trees. It is accepted that trees were removed from the area identified in the notice but argued that their removal was unconnected with the unauthorised use. I appreciate the reasons why the Council wishes to have replacement trees planted, however, the number, species and condition of the original trees is unknown. The Council has made its best estimate of what those species would have been but this is not certain. I consider that this would be an improvement to the land and the requirement is thus excessive.

⁶ Appellant's final comments.

⁷ Appendices 27-29 of the Council's statement.

⁸ Appendix 25 of the Council's statement.

⁹ Appendix 15 of the Council's statement.

34. I conclude that steps ii), iii) and iv) required by the notice do not exceed what is necessary to remedy the breach of planning control. The unauthorised use must cease and facilitating development must be removed. This is proportionate and necessary to prevent the use re-occurring. However, I also find that steps v), vi), vii) and viii) go further than is necessary. Nonetheless, it is important to ensure the land is restored to its condition prior to the development, and a requirement to that effect is appropriate. I shall vary the notice accordingly. There will be a consequential variation to the periods for compliance. The appeal on ground (f) succeeds to this limited extent.

Conclusion

35. For the reasons given above, I conclude that the appeal should partially succeed on ground (f) only. I shall uphold the enforcement notice with a correction and variations.

Formal Decision

36. It is directed that the enforcement notice is corrected by the insertion of the word 'residential' after domestic in requirement i) in paragraph 5 of the notice; and varied by:

(1) the deletion of requirements v), vi), vii) and viii) in paragraph 5 of the notice and their replacement with a new requirement v) Restore the land to the condition it was in prior to the unauthorised development; and

(2) the deletion of the related compliance periods in paragraphs 5c) and 5d) of the notice and their replacement with a compliance period 5c) of six months for step v) as varied.

37. Subject to the correction and variations, the appeal is dismissed and the enforcement notice is upheld.

Debbie Moore

Inspector