



Appeal Decision

Site visit made on 5 May 2021

by **B.S.Rogers BA(Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 14 June 2021

Appeal Ref: APP/B3030/C/21/3268786

Land to the rear of 15 Hickman Grove, Collingham, NG23 7QU

- 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 Simon Chapman against an enforcement notice issued by Newark & Sherwood District Council.
 - The enforcement notice was issued on 14 January 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of open countryside land to residential use (C3), with facilitating operational development including, but not limited to, the erection of a terraced steps and platform/decking, and the regrading of the land, as shown in Figures 1 and 2.
 - The requirements of the notice are A. Dismantle and remove the terraced steps and platform and all above-ground visible component parts (railings, decking, timber boarding and pillars/legs) – indicated on Figure 1 and Figure 2 – from the Land; B. return the Land to its condition before the development took place; and C. cease using the land for residential purposes, including the removal of all planting of a domestic nature, in order to achieve a visual finish similar to that of the neighbouring bank to the north and south of the Land.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (d), (f) & (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be corrected by:-
 - i. replacing the breach of planning control with "Without planning permission, the erection of a platform/decking for domestic use and the regrading of the land, as shown in Figures 1 and 2."; and
 - ii. replacing "ten" with "four" in the first reason for issuing the notice.

Subject to these corrections, the appeal is allowed and the enforcement notice is quashed.

Background

2. No.15 Hickman Grove forms part of a recent housing development, built pursuant to the grant of planning permission in July 2014 (ref: 14/00720/FULM). Along with a number of other dwellings on the western edge of this development, no.15 has a rear garden which extends westward at a similar level to the house itself. The land then falls away, in the form of a very steep embankment, to a watercourse known as The Fleet. I understand that the

ownership of the embankment is divided to accord with the width of each property backing onto it.

3. The appeal site is that part of the steep embankment which extends in line with no.15. Here, the appellant has constructed an extremely large, wooden deck structure virtually the full width of, and at a similar height to, his garden. The deck extends over most of depth of the embankment and is very significantly higher than ground level at its western extremity.

The enforcement notice

4. The allegation in the notice is of a material change of use to residential use, indicating that the erection of the decking etc. facilitates that use. The Council appears to rely on the principles established in *Murfitt*¹ for its approach of requiring the removal of operational development, which has been in place for more than 4 years prior to the issue of the notice, to restore the land to its condition before the breach took place. In *Murfitt*, it was held that an enforcement notice may require that such works carried out to facilitate the material change of use are removed.
5. There are two limbs to 'development', the carrying out of building, engineering, mining or other operations in, on, over or under land and the making of any material change in the use of any buildings or other land. I note that, in S.336(1) of The Act "use", in relation to land, does not include the use of land for the carrying out of any building or other operations on it. It was held by Lord Denning in *Parkes*² that operational development 'comprises activities which result in some physical alteration to the land, which has some degree of permanence to the land itself, whereas ... 'use' comprises activities which are done in, alongside or on the land but do not interfere with the actual physical characteristics of the land.'
6. Waller LJ sought to clarify this difference in *Murfitt* in opining that a breach subject to the 'four year rule' is one where "something is done that, on the whole, would be obvious – that, on the whole, would be permanent by the mere fact that it is done and, therefore something that should be dealt with within a period of four years." He contrasted this with the case before him in which the works were for an ancillary purpose, which would leave the land in a useless condition for any purpose, and so the land should be restored to the condition it was before the unauthorised development took place.
7. In the present case, the development carried out appears to me to primarily comprise building operations which have resulted in a very noticeable and permanent physical alteration to the land. To my mind, the development is not incidental to a material change of use – it is a large and very visible operational development in its own right, designed for domestic use. It appears to me to be the type of development alluded to by Waller LJ and one which should be challenged within four years. For this reason, I shall correct the allegation in the notice to reflect its status as operational development and to refer to the relevant four year period.
8. I have considered whether this correction would give rise to any injustice to any party and have concluded that would not be the case. The parties have

¹ *Murfitt v SSE and E.Cambridgeshire DC* [1980] 40 P&CR 254

² *Parkes v SSE* [1979] 1 All ER 21172

addressed this matter fully in their cases and have been given an opportunity to comment on the proposed correction.

The appeal on ground (b)

9. The purpose of ground (b) is to submit that those matters alleged in the notice have not occurred. In the allegation as originally drafted, the land in question is being put to a residential use and the 'facilitating' operational development has taken place. In any event, I have corrected the allegation to refer only to the operational development. The appeal on ground (b) fails.

The Appeal on ground (d)

10. Having regard to my correction of the allegation in the notice, the onus is on the appellant to demonstrate that the development was substantially completed more than 4 years prior to the issue of the notice on 14 January 2021.
11. The appellant has submitted photographs showing the decking substantially complete and in use on 25 March 2016. Photographs of the appellant's children using the decking in 2016 and again in 2020 show a clear age change, consistent with the quoted dates. Miss Wilson of 11 Hickman Grove attests to the fact that the decking has been in position since March 2016 and Mrs Fawcett of 16 Hickman Grove confirms in her letter of 4 May 2021 that the structure has been in place for more than 5 years. The Council has not disputed any of this evidence, nor provided any alternative evidence on this matter such as to cast doubt on the appellant's version of events.
12. Accordingly, I am satisfied, on the balance of probability, that the development in question was substantially completed more than 4 years prior to the issue of the notice and that no enforcement action could be taken. The appeal on ground (d) succeeds and I shall quash the notice.

The Appeal on grounds (f) and (g)

13. Having come to my conclusion on ground (d), there is no need to go on to consider grounds (f) and (g).

Other matters

14. The Council has drawn my attention to an appeal decision of October 2020 concerning the neighbouring dwelling, no.3 Pitomy Drive (Ref: APP/B3030/W/20/3254592), arguing for a consistent approach to decision making. In that case, an appeal against the Council's refusal to grant planning permission for 'the change of use of land to extend the residential curtilage, erection of timber decking and partial replacement of boundary fence with picket handrail' was dismissed.
15. However, there is a crucial difference between an appeal under S.78 of the Act and one under S.174. In the former case, the question as to whether the development should have been described as a material change of use or operational development was not put before the Inspector. He was simply charged with considering the planning merits of the proposed development.
16. I may well have come to a similar conclusion on the planning merits in the present case had there been a ground (a) appeal and a deemed application before me. However, such considerations were not before me. I am only able

to consider the grounds of appeal that were submitted by the appellant, as they apply to a development that was demonstrably carried out more than four years prior to the issue of the enforcement notice.

B.S. Rogers

Inspector