

Bath & North East Somerset Council

Development Management

Enforcement Report



REFERENCE:

Enforcement file – 17/00268/UNAUTH

LAND TO WHICH THE ALLEGED BREACH OF PLANNING CONTROL RELATES

Land Rear Of 18-25

Queenwood Avenue

Fairfield Park

Bath

WARD

Walcot

MATTERS WHICH APPEAR TO BE BREACHES OF PLANNING CONTROL

Without planning permission the change of use of land from garden land (Sui Generis) to open and covered storage (B8).

SITE DESCRIPTION

The land is situated to the rear of Queenwood Avenue and Tynning Terrace, Fairfield Park, Bath, accessed along a track from Queenwood Avenue within a residential area. The site is surrounded by a number of private gardens. A number of small lean-to structures have been erected on the land and a large metal fence surrounds the land on four sides. The land is being used for open storage and a variety of materials and items are stored within the fence such as building materials and vehicles.

Historic aerial images and maps identify that the land has remained undeveloped for a significant period of time (from at least 1905) and was one of a number of large plots of land positioned to the rear of both Queenwood Avenue and Tynning Terrace. These plots of land were historically separated from the larger allotments to the north (now developed) and appear to align with the small rear gardens of Tynning Terrace. Whilst not divided along the same boundary lines as the small rear gardens, given the appearance and position of this land it was considered that its lawful land use was as garden land detached from a dwelling(s) which falls within a Sui generis use class.

BACKGROUND AND RELEVANT HISTORY

10th May 2017 – Complaint received regarding condition of land.

14th June 2017 – Enforcement visit to site. Land enclosed within green fence has assortment of items stored and two lean-to buildings within it (vehicle, building materials, fencing, equipment also visible).

18th July 2017 – Planning Contravention Notice issued.

10th August 2017 – Response received to Planning Contravention Notice.

25th September 2017 – Letter sent to Mr Gapper (owner) requesting that the land is cleared of all items within 42 days.

25th April 2018 – Enforcement Notice issued for the change of use of land from garden land (Sui Generis) to open and covered storage (B8). The requirements of the Enforcement Notice were:

- Stop using the land for open and covered storage.
- Permanently remove all items stored on the land from the land.
- Permanently remove the boundary fencing and gates from the land marked x on the attached plan.
- Demolish or dismantle the buildings marked as 'A' on the attached plan and remove all resultant materials from the land.

The compliance period was set at 6 months from the date the Enforcement Notice came into effect (25th May 2018).

15th May 2018 – Enforcement Notice appeal submitted on Ground (d) 'That at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice'.

14th December 2018 – Enforcement Notice appeal dismissed. The Inspector stated in his decision notice that "I conclude on the balance of probabilities that the material change of use took place less than 10 years prior to the issue of the enforcement notice. Accordingly the appeal on ground (d) fails."

17th December 2018 – Letter sent to Mr Gapper advising of appeal outcome and that the Enforcement Notice needed to be fully complied with by 14th June 2019 (six months from the date of appeal decision).

4th July 2019 – Enforcement Officer visits site. Land not cleared of any items.

12th March 2020 – Letter to Mr Gapper requesting his attendance at the site for an accompanied visit for Enforcement Officer to assess condition of land. Land owner did not attend.

The site does not benefit from any historic or extant planning permissions.

PERSONAL CIRCUMSTANCES

The Council is unaware of the personal circumstances of the current landowner.

DECISION MAKING FRAMEWORK

The Development Plan comprises the Bath and North East Somerset Core Strategy adopted July 2014 and the Placemaking Plan adopted July 2017. Of particular relevance are Policies:

Core Strategy:

DW1 District Wide Spatial Strategy
B1 Bath Spatial Strategy
B4 The World Heritage Site and its Setting
CP6 Environmental Quality

Placemaking Plan:

NE2 Conserving And Enhancing The Landscape And Landscape Character
D1 General Urban Design Principles
D2 Local Character & Distinctiveness
D3 Urban Fabric
D6 Amenity

The National Planning Policy Framework ("NPPF") and National Planning Practice Guidance ("NPPG") are material considerations.

LEGAL FRAMEWORK

- Town and Country Planning Act 1990 (as amended)
- Development Management Procedure Order, 2015 (as amended)
- The Human Rights Act 1998
- The Equality Act 2010

SUPPLEMENTARY PLANNING GUIDANCE

- Bath & North East Somerset Local Enforcement Plan, 2013

REASON FOR ISSUE OF ENFORCEMENT NOTICE

- a) It appears that the breach of planning control has occurred within the last ten years.

- b) The change of use of the land from garden land (*Sui generis*) to open and covered storage (B8) fails to contribute positively to the surrounding area and therefore is considered to harm local character and distinctiveness. The unauthorised use has resulted in the storage of items which are visually alien within the previously extensive open space which provided the context for the existing residential properties. The erection of buildings and boundary fence detract from the open character and nature of the remaining land. The unauthorised development is therefore contrary to Policy D2 and D3 of the Bath and North East Somerset Placemaking Plan 2017.

FURTHER ENFORCEMENT OPTIONS CONSIDERED

The continued use of the land for open and covered storage is a breach of planning control and constitutes non-compliance with an enforcement notice. Consideration has been given to the following options in this instance:

Enforcement Notice

The enforcement notice that was issued on 25th April 2018 is in effect. This notice was appealed but dismissed and the Inspector upheld the enforcement notice. The unauthorised use has continued along to date. The notice remains in effect; there is no requirement to serve an additional enforcement notice.

Stop Notice

Section 183 of the Town and Country Planning Act 1990 states that “*where the local planning authority consider it expedient that any relevant activity should cease before the expiry of the period for compliance with an enforcement notice, they may, when they serve the copy of the enforcement notice or afterwards, serve a notice (in this Act referred to as a “stop notice”) prohibiting the carrying out of that activity on the land to which the enforcement notice relates, or any part of that land specified in the stop notice*”.

In this section and sections 184 and 186 “relevant activity” means any activity specified in the enforcement notice as an activity which the local planning authority

require to cease and any activity carried out as part of that activity or associated with that activity.

Section (3) identifies that a stop notice may not be served where the enforcement notice has taken effect.

In this instance, the enforcement notice is already in effect and therefore a Stop Notice cannot be used.

Prosecution

The offence

Non-compliance with the requirements of an enforcement notice by the owner of land to which the notice relates is an offence under Section 179(1) of the Town and Country Planning Act 1990 and as such the Council can prosecute owners of land for being in breach of an enforcement notice. It is also an offence under Section 179(4) for a person who has control of or an interest in the land to carry out activities which are required to cease by the notice. Consequently the Council can prosecute any person who is operating from the site, and who has control over it, for their breaches of the enforcement notice.

The Full Code Test

Prosecutions should only commence whereby the case has passed both stages of the Full Code Test as set out within the Code for Crown Prosecutors. The first stage is the Evidential Test, which requires that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. The second stage is the Public Interest Stage, which requires that where the Evidential Test is passed prosecutors must go on to consider whether a prosecution is required in the public interest.

In most cases, prosecutors should only consider whether a prosecution is in the public interest after considering whether there is sufficient evidence to prosecute. There are cases where it is clear prior to reviewing all the evidence that the public interest does not require a prosecution. In these instances, prosecutors can decide that the case should not proceed further.

The Evidential Test

Prior to commencing prosecution proceedings, the Council would need to be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against a suspect. The test is whether the prosecutor concludes, following an objective assessment of the evidence, that a court is more likely than not to determine that it is beyond reasonable doubt that the suspect committed the offence.

In this instance, the Council has numerous photographic evidence and officer notes from inspections of the land which identify that the land continues to be used for open storage and covered.

With regard to the evidential test it is considered that there is sufficient evidence available to the Council which indicates that the enforcement notice has not been complied with and the land remains in use for open and covered storage. Further evidence could be from further visits to the land to assess its use.

The Public Interest Test

The Code for Crown Prosecutors identifies that where there is sufficient evidence to justify a prosecution or to offer an out-of-court disposal, prosecutors must go on to consider whether a prosecution is required in the public interest.

A prosecution will not automatically take place if the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. In reaching its decision, the Council has considered the questions set out in the Code for Crown Prosecutors at paragraph 4.14. The most relevant of those in these circumstances are discussed below.

The Enforcement Notice remains in effect on the building and the lawful use of the land remains garden land. The use of the land for open and covered storage cannot become lawful.

Other Considerations

Whilst the Council may secure successful prosecution of a landowner for non-compliance with the requirements of an enforcement notice it will not however necessarily result in the notice being complied with and may require repeated prosecution attempts to resolve the breach. This is because under section 179 those found guilty of an offence are only liable to a fine. The court cannot in response to a finding of guilt order that the unauthorised use of the land cease.

Any penalty issued by the Courts could be nominal and a successful prosecution would not guarantee that the land would return to a garden use. Whilst prosecution in this instance could act as a deterrent for similar situations this is not sufficient justification alone.

Prosecutors should consider the costs of bringing a prosecution where relevant, especially where it could be regarded as excessive when weighted against any likely penalty. Prosecutors should not decide the public interest on the basis of this factor alone, but cost can be a relevant factor when making an overall assessment of the public interest.

In the Council's experience, bringing a prosecution is likely to have a substantial impact on the Council's ability to resource other priorities whilst carrying out the prosecution and to give rise to considerable costs. These costs must be weighed against the likely penalty of a fine that would not guarantee that the land would return to an agricultural use.

In addition to the above considerations, the land owner has shown no willingness to engage with the Council to resolve the breach of planning control and has failed to respond to various correspondences sent to them. It is considered that even if a successful prosecution was achieved that this would be unlikely to bring about compliance with the enforcement notice resulting in repeated prosecutions which would have resource implications for the Council.

For the reasons outlined above it is not considered that prosecution of the owner of the land for non-compliance with the enforcement notice would be within the public interest at this point in time though this remains an option that could be considered in the future.

Injunction

Section 187B of the Town and Country Planning Act 1990 allows local planning authorities (LPAs) to apply to the court for an injunction to restrain any breach of planning control (actual or apprehended) whether or not the LPA has exercised or are proposing to exercise any other powers and where it considers it necessary or expedient for the breach of planning control to be restrained by injunction.

In assessing whether it is necessary or expedient for the breach of planning control to be restrained by injunction, the LPA should examine considerations such as any urgency in restraining a breach or anticipated breach of planning control, health and safety, the planning history of the site and proportionality of such a course of action prior to determining whether an injunction is the most appropriate route to pursue.

It is considered that if an injunction was sought and then granted that the breach of planning control may be more likely to be remedied because of the nature of the injunction and the penalties associated with breaching an injunction. Obtaining an injunction to restrain the breach of planning control would support public confidence in the planning enforcement process and demonstrate the importance of complying with the criminal law. This is a strong reason in favour of seeking an injunction.

Case law (*South Bucks DC v Porter and another* [2003] UKHL 26) identifies that if conventional enforcement measures have failed over a prolonged period of time to remedy the breach then courts are more likely to agree to use its own more coercive powers and issue an injunction. The courts would be strongly disposed to grant an injunction where it appeared that a breach or apprehended breach would continue or occur unless and until effectively restrained by law and that nothing short of an injunction would provide effective restraint.

The enforcement notice should have been complied with by 14th June 2019, a period to date of approximately 12 months. The land owner has in this time made no attempts to comply with the notice.

Whilst the enforcement notice has not been complied with for a period of almost 12 months, there are no immediate health and safety issues arising from the continued unauthorised storage use that would warrant such immediate action as guaranteed by the gaining of an injunction. The nature of the breach of planning control does not

pose unacceptable risk to residential amenity of neighbouring properties and there are no highway safety concerns given the location of the site. As such it is not considered that an injunction would be the most effective way of dealing with non-compliance at this point in time.

Direct Action

Where the steps required by an enforcement notice are not taken within the period for compliance within the notice, Section 178 of the Town and Country Planning Act 1990 allows the LPA to enter the land and take the steps to complete the requirements as set out in the enforcement notice. In addition, the LPA may recover from the person who is then the owner of the land any expenses reasonably incurred by the LPA in doing so.

Paragraph 023 of section 17b of the NPPG states:

“These default powers should be used when other methods have failed to persuade the owner or occupier of land to carry out, to the local planning authority’s satisfaction, any steps required by an enforcement notice”.

The main advantages in taking direct action are that it is a relatively quick procedure which directly remedies the breach of planning control; and the LPA can attempt to recover its costs, for example, through a charge on the Land. The principal risk is that the LPA may not recover some or all of its costs or that the scope of work changes once clearance has begun resulting in a cost increase. The cost of the work will be covered by grant funding received from the Ministry of Housing, Communities and Local Government to assist the authority in resolving breaches of planning control.

Having regard to the enforcement options outlined above, it is considered that direct action is the most appropriate option because it should lead to a timely and conclusive resolution of this long running breach of planning control. It is especially effective where the land owner may have neither the willingness nor ability to comply with the requirements of the enforcement notice.

Taking direct action will require contractors appointed by the Council to undertake works to the satisfaction of the requirements of the Notice. Items removed from the

land would be stored and could be re-claimed by Mr Gapper within a specified period. Any items remaining unclaimed would be disposed of with costs recovered where possible.

Other action

There are various options outlined above as to how the Local Planning Authority could take further action to resolve the outstanding breaches of planning control however consideration needs to be given to the option of taking no further action. The use of the land is controlled by the enforcement notice and the use for open and covered storage will never become lawful. The use of the land may cease if the land is sold in the future.

In considering whether or not to take no further action it must be noted that the unauthorised use of the land continues to attract complaints regarding its on-going unauthorised use and non-compliance with the enforcement notice. It is considered therefore that doing nothing is not in the public interest.

Assessment

Whilst an enforcement notice is in effect on the land which will prevent the mixed use of the land from becoming immune from enforcement action or from becoming lawful it is not considered that there are any suitable alternative methods to control the breach of planning control as explored above.

Taking into account all of the particular circumstances of this case, the LPA considers it necessary and expedient to take direct action through works to clear the land of the items stored and remove the buildings and fence.

Human Rights and Equalities Issues

Mr Gapper owns the land and uses it for storage of items. Taking direct action to clear the land and remove the buildings could represent an interference with his right to the peaceful enjoyment of their possessions under Article 1 of Protocol 1 of the European Convention on Human Rights. The Planning Committee must consider whether any interference with his right to peaceful enjoyment of his possessions has struck the requisite fair balance between the demands of the general interest of the

public and the requirements of the protection of the individual's fundamental rights, or whether it imposed a disproportionate and excessive burden on him (*Cusack v. London Borough of Harrow* [2013] UKSC, 19).

It is the Officer's view that (i) there would be no interference, but (ii) in any event, the demands of the general interest of the public, are legitimately protected by taking direct action and any interference is proportionate. The protection of the public interest cannot be achieved by means that are less interfering with the Owners' rights. The action would not, therefore, result in violation of the Owners' rights under Article 1 of Protocol 1 of the European Convention on Human Rights, or any other Convention article.

With regards to equalities issues, the Council is not aware that Mr Gapper has any protected characteristics.

Conclusion

In light of the above report, having considered the relevant enforcement options available it is recommended that authority is delegated to the Team Manager – Planning Enforcement, to:

- a) exercise the powers of the authority under s178 of the Town and Country Planning Act 1990 to enter the Land and take the steps required by the Notice; and
- b) exercise any powers of the authority to recover the expenses of doing so.