



Report by the Director for Economy

ENFORCEMENT REPORT

AWEN/0132/15

ALLEGED UNAUTHORISED BUILDING WORKS: LAYING OF  
HARDSTANDING AT PANACEA MEDICAL PRACTICE, 7a SHELLEY  
ROAD, WORTHING

**1. CURRENT SITUATION**

- 1.1 This matter was last reported to the Committee in October 2017. The minutes of the meeting state:

*'After some discussion, the Head of Planning and Development suggested an alternative solution to address the issues raised by the neighbour and the car park issues for the business. The Officer stated the Committee could agree to proceed with the Enforcement Notice, but the Notice could include certain conditions to allow the car parking use to continue whilst mitigating the harm to the neighbouring resident. Members agreed with the Officer's revised recommendation.'*

***Decision***

*Members **AGREED** to proceed with the Enforcement Notice, but the Notice to be drafted to include conditions to reduce the harm the use is causing to the neighbouring resident.'*

- 1.2 Following the Committee meeting, a meeting was held with the planning agent and representatives from the Medical Practice upon whom the notice will be served while further material was received both from the complainant and her solicitor, both of whom attended

the previous Committee meeting. This material raised questions regarding the minutes of the meeting, as outlined above, as well as in respect of the actual drafting of the Notice itself. The Head of Planning and Development and Planning Services Manager have also revisited the site.

- 1.3 The Enforcement Notice was in the process of being drafted by the then Senior Lawyer & Deputy Monitoring Officer before he left the Council in December. In light of the additional information received and the length of time that has elapsed since previous consideration of this case, your Officers have brought the case back to Committee for further consideration. A possible draft Enforcement Notice is attached to the report for Members information.

## **2. PLANNING HISTORY**

- 2.1 For member's information, the planning history of the site as included within the last report is set out again in the following paragraphs:
- 2.2 In May 2015, a complaint was received regarding the laying of a hardstanding on the site of a former scout building in the grounds of a former Church building now adopted by a Company providing medical services.
- 2.3 The former scout building was granted temporary planning permission in 1980 and subsequently granted permanent permission in 1990. A condition imposed upon the permission stated that the building could only be used for purposes ancillary to the then United Reformed Church.
- 2.4 The main building was used as place of worship until 2005 when the congregation moved to another Church and the building became empty soon after.
- 2.5 In 2009, a Certificate of Lawful Use application was submitted for the proposed use of former church building as a health centre (Class D1). The Certificate was granted but did not include the land occupied by the scout building.
- 2.6 In 2011, an application was received for the replacement of the former scout building to provide a diagnostic clinic and hydrotherapy unit in

connection with the health centre. Permission was granted, but was not implemented and subsequently lapsed.

- 2.7 The building was subsequently removed and hardstanding, which has been used for parking, constructed in its place. Upon receipt of the complaint, the Council investigated the matter and considered that the laying of the hardstanding comprised unauthorised development for which a planning application was required.
- 2.8 An application to retain the hardstanding was submitted shortly after but was invalid because of insufficient information and therefore was never registered. In the absence of a valid application an Enforcement Notice was served in October 2015. The site owner immediately appealed against the Notice.
- 2.9 On receipt of the appeal, the Planning Inspectorate raised a query that the Notice alleging the breach of planning control as the laying of a hardstanding was defective as the requirements of the Notice related to the use of the land rather than the operational development itself. As the requirements of the Notice covered a use of the land and not the operational development the Planning Inspectorate stated that it was not clear if the notice complied with section 173 of the Town and Country Planning Act 1990 (as amended). The Planning Inspectorate, therefore, recommended that the Council should withdraw the Notice.
- 2.10 In December 2015, a revised Notice was served which attempted to take account of the comments of the Inspectorate and the original Notice was withdrawn.
- 2.11 The withdrawal of the original Notice meant that the appellant was entitled apply for costs for work undertaken in respect of an appeal against a Notice which the Council subsequently withdrew. The costs application was allowed and a full award of costs made to the appellant. In awarding costs, the Planning Inspector stated:  
  
*'For the avoidance of doubt, this decision should not be taken to imply any view on the Council's decision to take enforcement action in respect of the alleged unauthorised development.'*
- 2.12 A second, similar, Enforcement Notice was issued and the site owner again appealed and made a second application for costs, stating that the second Enforcement Notice was again invalid.

2.13 The appeal decision found that the second Enforcement Notice was indeed, again, invalid. The Inspector stated in the appeal decision:

*'The notice with which I am concerned alleges the laying of a hardstanding and the requirements are to cease the use of the hardstanding for car parking and to erect a wooden fence. The notice therefore combines an allegation of operational development with requirements relating to a material change of use. This formulation does not accord with the statutory requirements of the purposes of the notice as provided for in s.173(4) which are purposes dependent on the allegation, that is, either a material change of use for which the requirement is to discontinue the use; or operational development for which the requirement is restore the land to its condition before the breach took place; or to remedy any injury to amenity which has been caused by the breach.*

*The Council's case is that the requirements seek to remedy the injury to amenity caused by the breach and it is under-enforcing pursuant to s.173(11) because complete removal of the hardstanding would be excessive. But to my mind this argument is misconceived because the injury to amenity must arise from the breach, in this case, the operational development of laying the hardstanding. This is an argument the Council appear to accept as it is also said in its statement that 'it is not the physical works of the laying of the hardstanding which are harmful rather the resulting use of the area so created'.*

*Similarly it seems to me that any under-enforcement also has to relate to the operational development alleged. It is notable that the Council also appears to acknowledge this in that it states 'a second notice could be served relating to the unauthorised change of use of the land for car parking'. However, the Council did not issue a second notice because it considered 'this would have placed an additional burden on the Appellant and was felt to be excessive when one notice could suffice*

*For the reasons given above I find that although the notice is flawed it does contain the statutory requirements as provided for in s.173, albeit incorrectly applied, and it is not therefore a nullity but it is invalid.'*

- 2.14 In respect of the second award for costs, the Inspector again found in favour of the appellant stating:

*'The Guidance advises that although a Council has a general discretion to take enforcement action it is expected to exercise care when deciding to issue a notice and is at risk of an award of costs if it is concluded that an appeal against a notice could have been avoided if it had ensured that the notice was accurate. Given the similarity between the withdrawn notice and the notice in this appeal I consider that the Council acted unreasonably in issuing a second notice with the same flaws. In reaching this view I note that the Council appeared to be aware of the inconsistencies in the notice in that it says in its statement that 'it is not the physical works of the laying or the hardstanding which are harmful rather the resulting use of the area so created' and 'a second notice could be served relating to the unauthorised change of use of the land for car parking'.*

### **3. SITE DESCRIPTION**

- 3.1 The area in question is accessed via Grafton Road, with the former Church building now housing Panacea Ltd, being situated to the north in Shelley Road. To the south of the site are residential properties in Chandos Road and there are other residential properties to the west in Buckingham Road.
- 3.2 The entire area is rectangular in shape, with the eastern side historically used for parking. When the former scout building was removed, hardstanding was laid in its place. There is also some landscaping in the south western corner of the site although this does not rise above the low boundary wall that borders the site in that location. The western boundary has a 2 metre high close boarded fence while properties towards the south eastern side of the site have erected their own close boarded fence behind the low boundary wall. Essentially, in terms of neighbour impact any harm is primarily on the properties in Chandos Road to the south western corner as they have no other screening than a boundary wall and are closer to the additional parking area.

### **4. ASSESSMENT**

- 4.1 Members will recall from the previous report that the agent acting for the medical practice does not consider that planning permission is

required for the additional car parking area, it being ancillary to existing area used for car parking. The Council disagrees with this view and had requested a planning application be submitted to retain the use. If such an application were granted permission, it could have been subject to conditions to protect the amenities of neighbouring properties. Your officers remain of the view that this would have been the simplest solution to the issue and it is regrettable that the applicant's agent did not follow the Council's suggestion.

- 4.2 The key issue remains as set out in the previous officer conclusion that the retention of the hardstanding causes harm to the amenities to properties in Chandos Road to the extent that, without mitigation, planning permission would be refused for its retention.
- 4.3 Essentially, the consideration of the case depends on whether an Enforcement Notice can be served which achieves such mitigation.
- 4.4 As outlined above, the previous Enforcement Notices failed because they combined an allegation of operational development with requirements relating to a material change of use. The Inspector considered this formulation does not accord with the statutory requirements of the purposes of the notice as provided for in s.173(4) which are purposes dependent on the allegation, that is, either a material change of use for which the requirement is to discontinue the use; or operational development for which the requirement is restore the land to its condition before the breach took place; or to remedy any injury to amenity which has been caused by the breach.
- 4.5 At the previous meeting, members resolved to consider whether conditions could be used to remedy the breach which is effectively 'under enforcing'. This would give the result that the remaining parts of the breach which are not contained within the Enforcement Notice are effectively granted planning permission under the terms of the Notice.
- 4.6 The issues in the previous Enforcement Notices were that the Council were seeking to under enforce against an alleged breach of operational development. As such, it would be more appropriate if the Council sought to enforce against the material change of use that has occurred instead.
- 4.7 As Members will again recall from the previous meeting, some landscaping had been undertaken in the south western corner of the

site. This has grown over time and to a limited extent has the ability to mitigate some of the harm caused by the car parking. Your officers are of the view that the erection of a fence in addition to the retention of the landscaping would, in combination, satisfactorily mitigate the harm caused by the change of use of the western part of the site to car parking. The properties further to the east in Chandos Road are already screened from the car parking by their own existing fencing. It would be difficult to argue that either the existing or extended car parking adversely affects the amenities of these properties (especially given that no complaints have ever been received from those properties). Using a similar assessment to the property further west of the complainant, then it is considered that the erection of a similar fence, but set further away from the mutual boundary and with the existing landscaping maintained in between would result in an acceptable level of mitigation and would balance the needs of an operational business in the town with the need to protect neighbouring residential amenity.

4.8 It is strongly contended by the complainant and her solicitor then any under enforcement is almost bound to fail and that, at the very least, the erection of the fence and the cessation of parking should be specified in the Enforcement Notice and preferably the hardstanding should be removed as well.

4.9 Your officers have considered these points very carefully and have been made aware of the complainants concerns on a number of occasions. A significant amount of material from the complainant has been considered recently by the Council's lawyer but it is felt that the appended Enforcement Notice would successfully meet the requirements of the Planning Act. However, it must be borne in mind that it is not clear cut that the Council would win any enforcement appeal given that there have not been widespread complaints concerning the use from other residential properties in close proximity to the site. Equally, though, the Council has resolved to serve two previous enforcement notices and to that end it is felt that the revised Notice balances the competing objectives of the business and residential amenity.

## **5. COMMENTS OF THE SOLICITOR TO THE COUNCILS**

5.1 The legal power to take enforcement action is contained in Section 172(1) Town and Country Planning Act 1990 (as amended), that

states that a Local Planning Authority may issue an enforcement notice where it appears to them:-

- (a) that there has been a breach of planning control; and
- (b) it is expedient to issue an enforcement notice, having regard to the provisions of the development plan and to any other material considerations

5.2 The revised notice has been drafted taking into account and remedying the previous comments made by the Planning Inspector in respect of the previous defective notices. However, as with any enforcement notice, the risk of a further appeal cannot be ruled out.

5.3 The recipient will have until the date specified in the notice in which to appeal, which must be at least 28 days from the date the notice has been served. Accordingly, once served, the Council will know whether the notice has been confirmed and the desired outcomes achieved, or contested within a relatively short period of time.

5.3 Paragraph 207 of the National Planning Policy Framework reiterates that enforcement action is discretionary, and local planning authorities should act proportionately in responding to breaches of planning control.

## **6. CONCLUSION**

6.1 Members are therefore requested to endorse the recommendation and the file will then be passed to Legal Services to facilitate the erection of a fence and the retention of the existing landscaping.





WORTHING BOROUGH  
COUNCIL

Planning Committee

18 April 2018

Agenda Item 7(b)

Ward: Northbrook

Report by the Director for the Economy

**ENFORCEMENT REPORT**

**7 Blackbird Lane, Worthing**

**AWEN/0303/17: Erection of fence and incorporation of land designated as public open space into residential curtilage contrary to condition 13 of planning permission AWDM/0521/12 and associated legal agreement**

**1. BACKGROUND**

- 1.1 In October 2017, the Council received a complaint that an area of land had been fenced off and incorporated into residential curtilage at 7 Blackbird Lane.
- 1.2 Blackbird Lane is part of the development originally permitted under reference AWDM/0521/12 for *Proposed mixed use development comprising; 117 residential properties (including 17 affordable units), car showroom (Sui Generis) and care home (C2) with associated access roads and landscaping on land east of Northbrook College.* Many of the properties have now been constructed and occupied.
- 1.3 The development was subject to both a landscaping condition and legal agreement. The legal agreement required landscaping to be carried out in accordance with the approved landscaping plans, and made specific reference to a landscaping Masterplan that was submitted with the application (see attached).
- 1.4 The Masterplan showed the area of land in question to be outside of any residential curtilage and therefore to be maintained as public open

space as part of the overall Masterplan for the development. The land is immediately to the south west of the retained copse which forms a central part of the open space strategy for the development as a whole.

- 1.5 Following a site visit in connection with the complaint, it was established that the area of land had been fenced off with a close boarded fence on its western side and incorporated into the residential curtilage of 7 Blackbird Lane, a property which sits to the south east of the land in question. The land in question is therefore in front of the property, to its north west. There is already a rear garden to the south of the property.
- 1.6 Upon further investigation, your officers found an unusual situation. Although relatively newly built, the current occupier of the property is the second owner of the property. The erection of the fence and enclosure of the garden had been undertaken by the previous owner of the property who had purchased the land from the housing developer, Bloor Homes. The sales particulars of the property from sale of the property to the current owner clearly show the incorporated area of land and indeed listed it as an additional benefit of the property: *'the property offers a unique prospect having additional garden space to the side that measures 125m<sup>2</sup> which could offer a number of options'*. The Council had not been made aware of the original sale of the land by Bloor Homes. It is noticeable that the sales details described this as additional garden.
- 1.7 In accordance with the planning permission and s106 agreement the land in question should have been transferred from Bloor Homes to the Management Company. On this basis this would constitute a breach of the s106 and there has been an unauthorised change of use from public open space to residential curtilage. The fence is also unauthorised on the basis that it does not accord with the approved landscaping or boundary plans submitted with the application.
- 1.8 Unfortunately the first owner purchased the land from Bloor Homes and erected a fence enclosing the land as residential curtilage and this land has now been sold again to the current occupier. Shortly after the occupation of the property by the current owner (when a second much smaller fence was erected around the remainder of the incorporated curtilage), the complaint in connection with the unauthorised development was received.

1.9 Where an Enforcement Notice is served, it must be served upon the current owner of the land, regardless of whether the actual breach of planning control was carried out by themselves. It became apparent to Officers that the current occupier was unaware of the legal agreement and planning conditions. In the first instance, therefore, your officers approached Bloor who, presumably, would have been aware of the restrictions relating to the property.

1.10 In response to your Officer's original enquiry, Bloor responded in December 2017:

*I would inform you that when we sold this property there was no fence enclosing this area as a residential garden!!*

*This fence has been erected relatively recently by either the current property owner or the previous occupier.*

*The ownership of the land is not relevant in terms of the fact of management and if the homeowner has erected a fence that breaches your planning rules, then that must be down to them. The land has not been sold by us as a separate transaction, it would have been conveyed at the time of the original sale from us.*

*The descriptive on the estate agents details, is again not relevant to this Company, what they describe is a matter for them and was not representative of what we sold to the original purchaser.*

*You are correct in that the current property owner did not purchase this property directly from Bloor Homes, he did indeed buy it from our purchasers who bought the property back in July 2015.*

*The current property owner will be in the "buyer beware" situation known as "caveat emptor" and any issues relating to a breach of planning or otherwise, would and should have been dealt with by his solicitors acting through his own buying process from the original owner.'*

1.11 Your officers did not consider this a particularly helpful response to the matter given that it did not indicate why Bloor had sold the land in the first place or had made the planning status of the land clear to the then purchaser. Moreover, upon revisiting the site, your officers also

noted that the fence erected is exactly the same design as erected elsewhere on the estate and indeed physically adjoined the fence of the property to the south, 4 Skylark Rise.

1.12 The subsequent response from Bloor stated:

*'The fact that it appears the same in terms of its construction and indeed material is not evidence enough for the assumption that we put it there!! It is also not for us to prove that someone else has put it there.*

*The fact of the matter is that you have not had complaints of it being there since the original transaction took place between ourselves and our original client until recently, something must therefore have changed.*

*We are not able to prove that our client or the current occupier installed it.*

*I do however attach the enclosures plan and the conveyance plan relating to this phase. It is these details to which we would have installed fencing and conveyed land.*

*The conveyance plan clearly shows this element of land would have been transferred as part of the original plot transaction.*

*All of the above being the case, I would confirm that this Company is neither the landowner nor the responsible party for erecting the relevant fence and I would therefore suggest any actions you wish to take will need to be directed elsewhere.*

1.13 Your Officers advised the current occupier of the property of the responses from Bloor Homes as it appeared unlikely that a solution could be reached via Bloor and hence any serving of an Enforcement Notice would fall upon the current occupier, even though the breach had not been carried out by him.

1.14 Upon further investigation, your Officers noted that the orientation of the plot immediately to the south of the land in question (4 Skylark Rise) had altered (via subsequent planning permissions submitted as non material minor amendments) but the legal agreement was not amended in relation to the area of land currently in dispute. This

matter was also raised with Bloor (and had also been raised by the current occupier of No. 7 Blackbird Lane).

- 1.15 Bloor responded to the latter point, (which included reference to the approved masterplan on the unamended legal agreement):

*Whilst I can only agree with the extract from the masterplan that you have noted, there was a later revised consent for phase 2, which you will note, revised the position and orientation of plot 24.*

*This created a different configuration to the open space at that point and magnifies your point regarding closure of the boundary by plot 23.*

*I do not see any issue with ownership of the area of land on the proviso that the area is not enclosed and is laid out to the appropriate consent, which I believe it originally was.*

- 1.16 As seemingly acknowledged by Bloor in their last correspondence, there is a clear breach of the planning permission and associated legal agreement as a result of the fencing off of the land and the incorporation of the land into public open space.
- 1.17 The current occupier of the land, who had erected a second smaller fence around the northern section of the land, has stated that the enclosure of the land is necessary as there had been a long standing issue with unauthorised access to the privately owned frontages of numbers 3-7 Blackbird Lane, to the extent that the police had visited as the current occupier had suffered verbal abuse, stoning of windows, theft from the garden and trespass.
- 1.18 Your Officers, aware of the concerns of the current occupier, suggested that a planning application be submitted to incorporate the land into residential curtilage. Your officers did indicate, as a without prejudice to any decision, that it was unlikely that such an application to retain the fence in its current form would be recommended for approval, but that given the circumstances of the situation, the final decision would be made by the Committee. The submission of a planning application would have allowed a formal period of public consultation where the views of all surrounding neighbours could have been sought and reported to the Planning Committee. However, the current occupier, it is understood on solicitor's advice, has declined to submit an application. As there is a clear breach of the original

planning permission and legal agreement, with an outstanding complaint, it is therefore necessary to consider whether enforcement action should be taken to remedy the breach.

## **2. ASSESSMENT**

- 2.1 This is an unusual and highly unfortunate situation. Nonetheless, the Council must consider the planning merits of the situation - it is for the relevant individuals concerned to consider any civil action arising out of the sequence of events. The relevant planning policies in respect of this consideration are contained within the National Planning Policy Framework, Planning Practice Guidance and Policy 16 of the Worthing Core Strategy.
- 2.2 The layout of the development in this area centres around the retained copse which is rectangular in shape and faced on 3 sides by the recently built properties to the north, south and west. To some extent, it could be considered surprising that the area of land in question, which is to the south west of the copse, was designated as public open space. However, the road serving properties in Blackbird Lane runs along the southern boundary of the copse towards Skylark Rise but is a cul de sac. The designation of the land as public open space was therefore to maintain a landscaped buffer between the two roads in question. It also allowed a view across to the copse when travelling along Skylark Rise, the road serving the northern part of the development, from the south west as well as a view from the properties to the west which were built as part of a later phase of the development. The occupiers of these properties would have been aware of the approved plans and purchased their properties on this basis.
- 2.3 Regrettably, the enclosure of the land as residential curtilage has compromised these objectives. The erection of the close boarded fence in particular on the western boundary of the land in question has not only blocked the open view of the copse from Skylark Rise and the properties to the west, but also introduced an unnaturally long section of fencing in an area characterised by open frontages, albeit the relocated plot to the south has a small, approved, section of fencing alongside its side garden (it is apparent this was planned purposely as the section of fence aligns with the frontages of properties in Blackbird Lane). Your Officers are of little doubt that had the erection of the fence and enclosure of the garden into residential curtilage before it

had taken place, then an unfavourable response would have been given.

- 2.4 Your Officers are aware that prior to the erection of the fencing, the land in question appeared to be used as a cut through towards the copse area, to the apparent detriment of the amenities of the properties in Blackbird Lane. Had this been identified as an issue, though, it was open to Bloor to, for example, improve the landscaping in this area to prevent such occurrence.
- 2.5 Not only is it considered that the fence has a detrimental appearance to the character of the area, but the use of enclosed land as a residential curtilage when it is located diagonally in front of the property in question also appears illogical. No. 7 Blackbird Lane does not lack amenity space as it has one of the larger rear gardens on the estate and there is not a space requirement, when measured against garden space standards for an additional portion of land serving the property.
- 2.6 Accordingly, therefore, your Officers have no option but to conclude that the retention of the fencing and the use of the land as residential curtilage rather than public open space is unacceptable.
- 2.7 However, your Officers do have some sympathy for the current occupier of the property as he has purchased the property in good faith and had assumed that the extended garden was part of his property. Whilst, the legal agreement is a charge on the property and binding on successors in title, it does appear that the original error was by Bloor Homes in not transferring the land with the adjoining copse as open space to the Management Company and the Company should not have sold the land with the original plot. As indicated earlier, however, the Council can only take action against the current owner of the land.

### **3. COMMENTS OF THE SOLICITOR TO THE COUNCILS**

- 3.1 The legal power to take enforcement action is contained in Section 172(1) Town and Country Planning Act 1990 (as amended), that states that a Local Planning Authority may issue an enforcement notice where it appears to them:-
  - (a) that there has been a breach of planning control; and

(b) it is expedient to issue an enforcement notice, having regard to the provisions of the development plan and to any other material considerations

3.2 Section 172(2) of the Town and Country Planning Act 1990 confirms that an enforcement notice should be served on the owner or occupier of the land and any other person having an interest in the land that is materially affected by the notice. Paragraph 207 of the National Planning Policy Framework reiterates that enforcement action is discretionary, and local planning authorities should act proportionately in responding to breaches of planning control.

#### **4. RECOMMENDATION**

4.1 It is recommended that Committee authorises enforcement action to remedy the breach of planning control with the file passed to Legal Services to review and consider enforcement proceedings. This could entail the removal of the fence to ensure that the character of the area is maintained but if members felt it appropriate for the area of land in question to remain within the ownership of 7 Blackbird Lane, then any Enforcement Notice could specify, for example, the necessity to plant hedging to prevent public access to the land in question.