

Parish:	Downham Market	
Proposal:	Retrospective change of use from open plan garden(s) to enclosed residential garden land	
Location:	6 & 7 Burdock Close Downham Market Norfolk PE38 9AZ	
Applicant:	Mrs S Endresz & Mr A Travers	
Case No:	19/01053/CU (Full Application)	
Case Officer:	Bradley Downes	Date for Determination: 7 August 2019 Extension of Time Expiry Date: 6 September 2019

Reason for Referral to Planning Committee – Called in by Councillor Don Tyler

Neighbourhood Plan: No

Case Summary

The proposed development is for the change of use from "open plan gardens to enclosed residential garden land". This change of use is facilitated by the erection of a 1.8m close boarded fence. The piece of land in question lies immediately to the south of the dwellings No. 6 and No. 7 of Burdock Close, in Downham Market and was used as amenity land and as a landscape buffer associated with the original estate. The piece of land is adjacent to the highway verge of the A1122, and lies within the development boundary for Downham Market.

Key Issues

Principle of development
Context and character
Public rights of way

Recommendation

REFUSE

THE APPLICATION

The site lies immediately to the south of the dwellings No. 6 and No. 7 Burdock Close, in Downham Market. The piece of land is adjacent to the highway verge of the A1122, and lies within the development boundary for Downham Market. The application has been made to the Local Planning Authority following an enforcement investigation determined that planning permission would be required.

Planning Committee
2 September 2019

The description of the proposed development as submitted is for the change of use from "open plan gardens to enclosed residential garden land". This description is not considered to be completely accurate. Following the enforcement investigation, the occupiers were invited by the LPA to apply for planning permission because even though privately owned, the existing use of the land was considered to be 'amenity land' and not garden land. It is not uncommon for amenity land in housing estates to be privately owned by the occupiers of the dwellings, and in most cases that land is open or at least undeveloped. The land is not automatically garden just because it happens to be in the same ownership.

The land in question was originally intended to be part of the landscaping of the estate. The land also acts as a buffer between the A1122 Strategic Route and the housing, mitigating the visual impacts of the housing, and is used as an unofficial footpath. As such it was considered a material change of use had taken place, and retrospective planning permission would be required.

The proposed change of use is facilitated by the erection of a 1.8m close boarded fence. The erection of a fence under 2m is usually permitted under Class A of Part 2 of Schedule 2 of the Town and County Planning (General Permitted Development) Order 2015 (as amended). However, the operational development consisting of the erection of the 1.8m timber fence is intrinsically linked to the change of use taking place, and therefore also requires the benefit of planning permission.

SUPPORTING CASE

On the site plan which accompanied the original 04/01811/F planning application, a 5m strip of land was shown at the rear of plots 3-6 (to become 5,6,7 & 8 Burdock Close) as amenity land for planting a tree belt. However, that tree belt was never planted (just as well because it would have been far too close to the properties) and the land was sold with the properties. When the owners of nos. 6 & 7 purchased their properties, they realised that they owned land beyond what was the existing rear fence line and recently decided to incorporate it into their gardens, not realising that there was any difference between the use as private open garden area and enclosed garden area. This seemed a logical thing to do because it would enable them to maintain their land much easier.

Unfortunately, the land has been illegally used by dog walkers, who were actually trespassing, probably without knowing it because this privately-owned land was not fenced off. Enclosing the land will hopefully prevent the littering and dog fouling which had become a problem for the landowners. Obviously, the tree planting belt is not going to happen. If this was part of a planning condition, then it can no longer be enforced because more than ten years has passed since completion of the development. There is no right of access for the public and the enclosure of the land will make this clear and also make it much easier for the landowners to maintain their property.

Terms such as 'blocked the footway', and 'loss of footpath' are misleading; the land in question is privately owned, it was never intended to be a footpath and is not a public right of way. This application will not create a precedent for other green spaces to be claimed, because those other green spaces are owned by the Borough Council and maintained for public use. It is my clients understanding that a path can only become legal following 20 years continuous public use, but there seems to be no indication this is the case here. In any event, this would be a civil matter and not to do with the planning process.

PLANNING HISTORY

04/01811/F: Application Permitted: 22/12/04 - Construction of 10 bungalows - Land Off, Woodsage Drive, Downham Market, PE38 9UG

RESPONSE TO CONSULTATION

Downham Market Town Council: OBJECT

The Town Council will not support any application which involves the loss of public amenity areas and in this particular case, the curtailment of a mature, green landscape belt enjoyed by many of the townsfolk during the past 15 years.

From the records of the original planning permission (04/0181/F); condition 7 established a landscaping belt along the southern boundary of the site and condition 9 established the positioning and construction of walls and fences. Furthermore, the developer in requesting to discharge condition 7 submitted drawing 3020/1C which clearly shows the southern gardens stopping short of the site boundary and establishing a greenbelt strip.

It is clear the known wishes of the then Downham Market Town Council and Downham Market by Design advisory group were taken into account by the planners, who considered the two conditions necessary and demonstrated an intention of the landscape belt to join up with that already established in the earlier phases of the Bennetts Meadowfields development, creating this one mile strip known locally as 'The Green Mile' alongside the A1122, stretching from London Road to Trafalgar Industrial Estate.

In addition to the loss of this most pleasant footpath, the landscape belt provides an important buffer to the effects of the A1122 Southern Bypass in terms of creating a wildlife corridor, both environment and visual impacts, and providing a physical barrier. It is to be noted mature trees on public land have been destroyed in the course of extending the two gardens.

From the initial construction of the 10 bungalows forming Burdock Close (04/01811/F) and prior to any occupancy, the 1.8m high fence line was installed in accordance with drawing 3020/1C creating the landscape belt and thus consequently householders have never had the benefit of the land now in question.

Highways Authority: NO OBJECTION

The land to be enclosed is not registered as part of the road network and would appear to form part of the tree belt area found detailed under the drawings of planning reference 04/01811/F. I therefore have no grounds to object to the principle of the application from a road safety point of view. I do however observe the points raised by David Mills in respect of a public right of way consideration which I suggest is the key consideration in relation to public access.

NCC Public Rights of Way: NO OBJECTION

This is potentially a complicated situation. I have some sympathy for the applicants if this land is registered to them although perhaps this situation could have been avoided if there had been some level of consultation before the land was fenced. The applicants clearly knew that they were going to obstruct a used route whether it was registered as a right of way or not. I also suspect that it should have been laid out as a strip of amenity land to

match that previously provided in the earlier phases of development. It just would not make any sense for the remainder of the land to just become a dead end.

The issue of it being private land is largely irrelevant when it comes to the establishment of public rights of way. As a rule all land is privately owned. The Borough Council will be considered as the private owners of the amenity land but the use allows public access. A public right of way is a line of public passage over private land.

In regard to public rights, these can be created by established use. In this instance the right may well already exist by virtue of prior public use but it will require those members of the public aggrieved by the current situation to make a "claim" to have those rights formally registered and protected. If a claim were to be submitted to Norfolk County Council in respect of this route it would be fully researched and a decision made on the balance of evidence whether the right of way has been created. This process may take a year to complete but if successful, anything placed upon that route in the meantime (fences and any other garden features) would have to be removed at the householders expense.

While these properties have been in existence 15 years or so it indicates that there is at least 15 years use of the route now obstructed. While the formal requirement for the establishment of public rights is 20 years use, the application would determine whether there was use of a route prior to the Burdock Close development. Bearing in mind that the initial development is probably from the 1980's there has been the provision of the adjacent amenity land for well in excess of 30 years and it stands to reason that some "exit point" was established at the eastern end. The 1978 aerial photo suggests there was an accommodation route provided for access to farmland prior to the development of the main estate and it may well be the same access that was used by the public to link the estate to the Downham Road near the junction with the A1122, it appears to follow the same alignment.

I cannot pre-judge any potential claim but it would appear on the face of it that public rights may well have been established but remain as yet unrecorded.

Open Spaces Officer: NO OBJECTION

The land is owned by the property owners, with no registered public right of way over it, so it appears the residents are in their rights to do this. The land is not adopted by the Borough Council. It was previously maintained out of courtesy, as an informal extension to the "Green Mile" track which is largely under BCKLWN ownership.

REPRESENTATIONS

8 Letters in **objection** were received, raising the following comments:

- Land was clearly always intended to be amenity land, from looking at the original approved planning application and its associated drawings and conditions.
- Downham Market by Design - a Town Design Statement for Downham Market" talks about protecting and enhancing the town's rural character, maintaining the open countryside and green space within and around the town, including historic tracks, footpaths and long views etc. The core strategy echoes this message.
- Many people have been walking their dog behind these properties in excess of 15 years.
- Council has been maintaining this land over the last 15 years.
- Council have installed a dog poo bin along part of the amenity belt.
- Two objectors thought the land was a public right of way, due to its years of usage.

Planning Committee
2 September 2019

- Garden fence blocks the well-established foot path between Greenwich Close to London Road.
- Walkers must now instead walk up the highway verge and adjacent to the A1122, which is dangerous.
- Since the land has been enclosed, the area to the rear of No. 5 is inaccessible and has become overgrown, becoming an unattractive town gateway.
- They had council trees cut down without permission.
- The fences go right up to the council ditch, not leaving enough space for council employees to carry out maintenance to the trees.
- Fence at 5 Burdock Close also blocks access.
- Application amounts to an opportunist land grab.
- Approval will set a precedent for green spaces to all be claimed.

LDF CORE STRATEGY POLICIES

CS04 - Downham Market

CS08 - Sustainable Development

SITE ALLOCATIONS AND DEVELOPMENT MANAGEMENT POLICIES PLAN 2016

DM15 – Environment, Design and Amenity

DM22 - Protection of Local Open Space

NATIONAL GUIDANCE

National Planning Policy Framework (NPPF)
 Planning Practice Guidance (PPG)

National Planning Policy Framework – sets out the Government’s planning policies for England and how these are expected to be applied.

PLANNING CONSIDERATIONS

The main considerations are:

The principle of development
 Form and character
 Rights of way
 Crime and disorder
 Other material impacts

Principle of development:

The site lies within the development boundary for Downham Market, and is part of the residential development of the 10 bungalows in 2004. The land was part of a buffer between the end of the gardens of the properties and the A1122. Policy CS04 of the Core Strategy 2011 concerns development in Downham Market. It states that one of the aims of development is to respect and enhance the built, historic and natural environment, and maintain the landscape and the quality of open space in Downham Market.

Planning Committee
 2 September 2019

Policy DM22 from the SADMPP 2016 states that the Council will have regard for open space when assessing applications. The relevant factors in this case are public access, landscape character and recreational value. DM22 states that proposals which result in loss or restriction of access to locally important open space will be refused.

Lastly, the NPPF states that access to a network of high quality open spaces is important for the health and wellbeing of communities. Existing open space should not be built on unless it can be demonstrated the open space is surplus to requirements or if replaced with equivalent provision in a suitable area.

When the 10 bungalows were approved, the intention was for the piece of land to be planted with trees. However this planting was never undertaken, but the approved use of the land as part of the open space network still stands.

Form and character:

Policy CS08 of the Core Strategy says that new development should respond to the context and character of places by ensuring scale, density, layout and access will enhance the quality of the environment. The land and its function as a buffer positively contribute to the open character of the area, and also serve to soften the landscape impact and visual relationship between Downham Market and the countryside. It is considered the layout of the development would detract from these qualities.

Rights of way:

The members of public who have objected to the application say that they have used this land as a footpath for in excess of 15 years, with two people believing it was already a Public Right of Way (PROW). The land is not currently part of a PROW. If a PROW claim was granted, anything that has been erected along the route will need to be removed. But until such a claim is determined, the land cannot be considered to be a PROW. The use of the land as open space used by the public is relevant however, and this has been considered as part of the assessment for the principle of the development in accordance with Policy DM22 of the SADMPP 2016.

One of the objectors has pointed out a fence has been erected elsewhere which blocks the path, however this fence does not enclose any land. This fence was observed on the site visit. Such a fence would not require planning permission because it is not facilitating the change of use of any land. However as stated by the NCC Rights of Way Officer, if the land becomes a registered Public Right of Way would this fence need to be removed.

Some objectors have mentioned that the land is managed by the Borough Council, and we have even installed a dog waste bin. It is true that most of the same track has been maintained by the Borough Council. However, it has been confirmed that the section of land behind No. 5-8 Burdock Close is not owned by the Council.

The comment that approval of this application will set a precedent is not relevant, as all individual applications are assessed on their own merits, and subsequent similar applications would undergo the same rigour as this one.

Crime and disorder:

There is no material change, either significant positive or negative, on crime and disorder through of this application.

Other material impacts:

Some objectors have said and there is evidence on-site of some felling that has taken place. This is alleged to have taken place in the highway verge, in order to facilitate the fences. The trees were not protected by a Tree Protection Order, and it is a matter to be investigated by Norfolk County Council highways as a civil matter if they see fit.

CONCLUSION

The change of use of the land from open amenity land to private enclosed residential garden facilitated by the erection of a timber fence is considered to be inappropriate development. This application would fail to maintain the character of the landscape surrounding Downham Market which - regardless of ownership - forms part of the open space network in the town. The failure of the development to respect and preserve the landscape and open space of Downham Market is contrary to Policy CS04, by fundamentally removing the ability of the land to function as it was designed.

The land is also well used by the public and restricting access is contrary to Policy DM22 and to the aims of the NPPF. Hence it is clear that obstruction of this land would be inappropriate development. As the erection of the fence is intrinsically linked to the proposed change of use, the development as a whole should be refused.

RECOMMENDATION:

REFUSE for the following reason(s):

- 1 The proposal to enclose the open land to the rear of No. 6 & 7 Burdock Close is harmful to the function of the land as a buffer between the dwellings and the A1122, and would detract from the quality of the open space and the landscape in Downham Market. Further the development also restricts access to the open space, which functions as an important unofficial route. As such, the development would be contrary to Policies CS04 and CS08 of the Core Strategy 2011, Policy DM22 of the SADMPP 2016 and Paragraphs 97 and 98 of the NPPF.