

**Description** Enforcement matters relating to 42 Portland Drive

**At** 42 Portland Drive, Willen, Milton Keynes, MK15 9JP

**Ward:** Broughton

**Parish:** Campbell Park

**Report Author/Case Officer:** Gary Dunne  
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## **1.0 INTRODUCTION**

- 1.1 42 Portland Drive was a single storey detached bungalow granted planning permission under 17/02142/FUL (to demolish and construct a 2 storey dwelling). Building work commenced on site in January 2018. There were concerns relating to the construction of the development during the early stages and the site was visited a number of times by different enforcement officers. Discrepancies were detected early on in the construction process, however given the scale of the permitted dwelling these were considered to be acceptable. They would, as in many instances, be permissible to be addressed through the retrospective planning process, many of which could be carried out as permitted development and, as a consequence, formal action was not instigated at this time.
- 1.2 As the construction progressed it became apparent that the divergence from the approved scheme was more extensive, particularly at the roof stage, and officers informed the owner that he would be required to submit a full application to address the entire development. During this period of the investigation officers consulted internally, between Planning Enforcement, Development Management and Senior officers, as well as with local residents and the local ward councillor. Following this consultation it was considered that formal enforcement action should be instigated.
- 1.3 It should be noted that, in respect of enforcement action, paragraph 58 of the National Planning Policy Framework 2019 (NPPF) sets out that Local Authorities must act proportionately in responding to suspected breaches of planning control; taking action on a discretionary basis when it is appropriate in all the material circumstances. This is reinforced by the Town and Country Planning Act 1990 Section 172; requiring the local authority to consider expediency with reference to the development plan and any material considerations when considering enforcement action. This is also reflected in The Milton Keynes Enforcement Plan (Para 3.3). "Depending on the seriousness of the situation, we will always seek to

afford a contravener the opportunity of remedying the breach of planning control without formal action. ”

Set out below is a list of the detected breaches of planning control and the action officers took and an explanation regarding the expediency of pursuing further action for each detected breach.

## **2.0 ENFORCEMENT HISTORY AND DETECTED BREACHES OF PLANNING CONTROL**

- 2.1 Following the initial reports of alleged breaches of planning control officers continued to monitor the site and it was agreed that a full comprehensive survey of the site should be undertaken. Consequently in January 2019 officers inspected the entire development and gathered measurements from each elevation of the development. After assessing the cumulative breaches of planning control we considered that a full planning application should be submitted to address all the discrepancies within the build.
- 2.2 A planning application 19/00124/FUL was submitted at this time to address the detected breaches of control. However, following concerns at the accuracy of the submitted plans, a number of revised plans were submitted. It was following the concerns relating to the accuracy of the submitted plans that we undertook further inspections in January 2019 to ascertain the overall height of the dwelling. The house has been constructed with a hipped roof which caused difficulties when attempting to ascertain measurements which for practical reasons could not be taken externally.
- 2.3 At this point in time the house was occupied and permission was given by the owner to take internal measurements from finished floor level to the highest skylight. Beyond the highest skylight officers could estimate a small area of ridge line which we added to our final estimate of 8.987m.
- 2.4 Further to ascertaining the overall ridge height measurements Planning Enforcement , the Planning case officer and Senior officers concluded that the roof alterations would not be acceptable and that formal enforcement action should be instigated to revert the roof dimensions to that contained within 17/02142/FUL.
- 2.5 Due to the public interest in the matter, a public meeting was arranged at the beginning of February to fully discuss with residents and Ward Councillors the enforcement position relating to the site. Further to the public meeting, and officers assessment,, it was decided to increase the scope of enforcement action. The rear ground floor projection to the building was also included.
- 2.6 The enforcement notice was subsequently served on the 25th April 2019 and further to the continuing public interest in the matter another public meeting was held and the full scope of the enforcement action and implications were conveyed to the local residents.

## **Detected breaches of Planning Control**

### Rear ground floor projection

- 2.7 Site inspections identified that the rear ground floor projection exceeded the dimensions contained within the approved plans for the 17/02142/FUL planning permission, by approximately 1.22m. This was considered to be a significant breach of control because it represented an overall increase in the footprint of the dwelling which, coupled with the increased roof dimensions, was considered to represent an unacceptable overall increase in scale. This element of the development was subsequently included within the enforcement notice, which was served on 25th April 2019. It should be noted that under the Town and Country Planning (General Permitted development Order) 2015 rear extensions to detached houses can be extended by up to 4 metres in depth. Given that permitted development rights had not been removed from the property this was a significant factor that needed to be taken into consideration when considering the expediency of enforcement action. However, it was considered through a number of consultations, both internally and externally with local residents, that it would not be acceptable to allow this breach of control to be addressed via the retrospective planning route due to the overall impact created by the increase of the entire rear projection and the consequent increase in scale and square footage of the dwelling.

### Roof height and form

- 2.8 In terms of detected breaches of planning control, the overall roof height was considered to be the most significant breach of control. Officers detected a 48.5cm increase in the roof height from that contained within the 17/02142/FUL planning permission. The roof pitch had also been altered creating an overall increase in the mass and height of the roof. It was ultimately considered that the increase in roof height, unlike the increase of the rear ground floor element, would not be permissible to be carried out under permitted development rights set out in the Town and Country Planning (General Permitted development Order) 2015. Given the already significant scale of the dwelling, it was considered that this additional increase would also not be acceptable to be addressed by a retrospective planning application, and would be required to be amended. It consequently became the subject of the subsequently issued enforcement notice dated 25th April 2019.

### Ground levels

- 2.9 Inspections of the site concluded that the ground levels had been raised by approximately 300 – 500mm. Ground levels are a particularly difficult area to address with enforcement action as generally the only way to rectify the breach is the complete demolition of the building. In assessing whether this level of action would be expedient to pursue consideration should be given to whether any likely appeal would uphold the increase in ground levels. It was officers view that the demolition of the building would be unlikely to be successful at appeal (see section later on case law).

### Fenestration

- 2.10 Discrepancies in the fenestration of the dwelling were identified with window openings differing in dimension from that of the approved plans. The addition of windows and doors does not generally constitute development requiring planning permission unless there are conditions restricting their insertion. On assessing the fenestration it was concluded that the current window and door positioning would not cause any significant harm. Additionally there were no conditions contained within the 17/02142/FUL planning permission restricting the insertion of windows. This needs to be taken into consideration when considering whether this would be a breach of control that we would pursue formally. In light of the fact that windows and doors could be relocated on the building after completion without planning permission, it was not considered expedient to pursue action regarding this deviation from the approved plans.

#### Enlarged canopy to front entrance

- 2.11 The canopy at the front entrance of the building was identified as being in excess of the approved plans. However, it was considered that, although this represented a breach of planning control, it would be permissible to include this within a retrospective planning application and that, in officers view it would be likely to gain planning permission. On the basis that it was intended as a design element on the first application and the increase in scale of the canopy proportionate to the building does not cause significant amenity harm in our view. On that basis officers did not consider it to be expedient to pursue action on the canopy.

#### The increase in height of the garage

- 2.12 The increase in the garage roof has to be viewed in context with the host dwelling. On that basis officers concluded that the increase would be acceptable for a retrospective planning application and was subsequently included in the now refused retrospective planning application 19/00124/FUL. Unlike the main dwelling, officers were not of the opinion that the garage building caused significant planning harm to the amenity of residents or street scene. Although it exceeds that contained within the approved plans, it does not appear overbearing in contrast with the host dwelling. Therefore, it was considered to be acceptable development and permissible to be included within a retrospective planning application.

#### Driveway (currently an alleged breach)

- 2.13 Inspections of the new driveway were carried out in August 2019. The drive consists of permeable block paving which allows surface water to drain through. A drainage channel has been installed between the front entrance gates and therefore within the curtilage of the dwelling, this would suffice as directing run off water from the land for the purposes of The Town and Country Planning (General Permitted Development) (England) Order 2015, Part 1, Class F, permitted development.
- 2.14 Officers have also liaised with building control on the acceptability of drainage provided by block paving and the MOT type 1 sub base laid. The advice officers have received from the Council's Building Control Officers is that, although there may be a preferable sub base, permeable block paving and a MOT type 1 sub base

is acceptable for surface water drainage and consequently will be acceptable for the purposes of, The Town and Country Planning (General Permitted Development) (England) Order 2015, Part 1, Class F, permitted development. On this basis we do not consider that the development of the driveway is a breach of planning control requiring planning permission.

#### Positioning of the dwelling on the site

- 2.15 The building is positioned 0.7m back from its approved location (17/02142/FUL). The positioning of the building was not considered to cause significant material harm to residential amenity nor the street scene. In fact it lessens the building's prominence in the street scene and reduces its impact. The positioning, in officers' opinion, does not significantly amount to an increased overbearing effect on properties to the rear of the site, and does not cause a significant loss of light or any other detriment to the neighbours by virtue of the amended positioning. On this basis it was not considered appropriate to pursue formal enforcement action regarding the positioning of the building.

#### Landscaping and solar panels

- 2.16 The landscaping on the site is minimal. However, planning permission 18/00391/FUL, for the brick boundary wall of 1.1m high and railings above to max height of 1.9m with brick piers and stone details, requires the retention of the front boundary hedge. There is a blanket Tree Preservation Order in place which covers the site and we consulted the Council's tree officers who identified that there is no vegetation within the site that officers would consider to be in need of urgent protection. The front boundary hedgerow to date has remained in place and there have been no protected trees removed from the site.
- 2.17 The permission for the erection of a front boundary wall has been implemented by the construction of the front boundary pillars. However, these works have not been proceeded with and the boundary hedge has been retained and officers are not currently pursuing any alleged breaches of control relating to the landscaping.
- 2.18 Solar panels are generally considered to be permitted development. However, as the dwelling has not been built in accordance with the approved plans, it is officers opinion that the dwelling at present does not benefit from permitted development rights. On this basis the installation of solar panels would be a breach of planning control. However, officers do not consider that the installation of the panels causes significant planning harm and would suggest that they would be permissible to be included within a retrospective planning application.

#### Obtaining measurements and evidence of alleged breaches of control

- 2.19 Officers have collected all of the evidence from the site independently. The two main disputed areas of concern expressed by local residents being the roof height and ground levels, were particularly difficult to ascertain.
- 2.20 These concerns were considered and all measurements were collected by the best possible means available. Officers did not merely accept the architect's

drawings and undertook to verify all dimensions on site. Total ridge height measurements needed to be undertaken when the building was substantially complete. These were taken internally by measuring via laser to the highest roof light, estimating an additional element of remaining ridge, and adding the depth of the internal first floor level giving us our final measurement of 8.987m. This represented an increase of 485mm from the approved application. Getting a truly accurate measurement due to the shape of the roof is extremely difficult. The method used by officers is considered to be the most accurate.

- 2.21 In order to obtain measurements of the increased height at ground level officers had to ascertain the original ground level and then estimate how far they had built above pre-existing ground levels. Estimates were between 300 – 500mm greater than proposed.

### **3.0 OTHER POTENTIAL PLANNING ENFORCEMENT ACTION**

- 3.1 As previously indicated, discrepancies with the development were detected during the early stages of the build. However, at this early stage it was considered that these could be dealt with by the submission of a retrospective planning application. The retrospective planning application route is a perfectly valid course of action for addressing planning breaches that are not considered harmful, or for teasing out the relevant issues and potentially adding conditions. On this basis, formal enforcement action was not considered appropriate at this point. If the view is taken that the development is not acceptable then the following options could have been explored.

#### **3.2 Temporary Stop Notice**

A Temporary Stop Notice could have been served which would have required the developers to cease works for up to 28 days while the local authority ascertained whether there was a breach of planning control. Local authorities should only use Temporary Stop Notices when it is proportionate and expedite in instances of severe breaches of control. On this basis the time to serve a Temporary Stop Notice would be at the early stages of a development when it is suspected that a continued breach of control will occur. At the site in question the full extent of the breach of planning control only became apparent once the building was substantially completed. Later on in the development, once the precise nature of the breaches had been determined, it would not have been appropriate to use a Temporary Stop Notice, given that the breaches of control had been completed and were being dealt with by an enforcement notice. Local authorities are subject to compensation for serving Temporary Stop Notices and this can be significant. Therefore, they are only used in exceptional circumstances.

#### **3.3 Stop Notice**

A Stop Notice can be served where it is apparent to the Local Authority that an unacceptable breach of control has occurred and that the works relating to the breach are continuing and it is deemed necessary to cease the works immediately. However, if a stop notice is served an Enforcement Notice must also be served regarding the ascertained breaches of control. In this case, the development had

been substantially completed by the time all the dimensions of the building had been independently confirmed and the full extent of the breaches of control had been assessed. It would therefore have served no purpose to have served a Stop Notice on a completed unauthorised development, when the service of an Enforcement Notice was considered appropriate.

3.4 Local Authorities are also liable to compensation claims relating to Stop Notices that have not been issued correctly. In terms of the current position, a Stop Notice cannot be served where there is a current Enforcement Notice that has taken effect and a Stop Notice cannot prevent the use of a building as a dwelling. On this basis officers are of the view that a Stop Notice was not, and is not presently, a viable enforcement option. Ultimately it is very rare for a local authority to serve a Stop Notice and Milton Keynes Council has only served one Stop Notice in the last ten years and this was 8 years ago regarding the creation of 4 self-contained dwellings.

### 3.5 Breach of Condition Notice

Where it is apparent that a condition of the relevant planning permission has been breached a Breach of Condition Notice can be served. In respect of the current development it could be argued that the development has not been built in accordance with the approved plans, and therefore represents a breach of planning permission 17/02142/FUL – Condition 1- requiring the approved development should be carried out in accordance with the approved drawings. However, there are significant limitations regarding the penalties for the non-compliance with a Breach of Condition Notice. In terms of penalties, these are restricted to a maximum fine not exceeding £2,500. On this basis the serving of a Breach of Condition Notice would be unlikely to act as a sufficient enforcement tool for the remedy of the current breaches of control.

### 3.6 Enforcement Notice

An Enforcement Notice has been served to reduce the mass and height of the roof and the reduction of the rear ground floor element. The non-compliance with an enforcement notice is an offence which is liable to an unlimited fine. On this basis, the enforcement notice possess far greater leverage and deterrent when attempting to resolve breaches of planning control.

3.7 At present the property owner at the site in question has appealed the Enforcement Notice under grounds A, F, G. This means that the appellant is seeking planning permission for the works carried out (Ground A), that he considers the steps required to be taken are excessive (Ground F) and that officers have not given sufficient time to complete the works (Ground G). The appeal will be considered by the Secretary of State and officers understand that these appeals are taking in the region of seventy two weeks to be considered at the moment.

3.8 The works that have been set out in section 1 above were completed at the time of investigating and were either considered not expedient or, as with the roof and rear extension, have been included within the Enforcement Notice. At present, the view is that an Enforcement Notice is the most appropriate and powerful enforcement tool to be used in the current circumstances. Officers also considered the likelihood of a successful appeal and in their view additional action may have resulted in the works being allowed.

### 3.9 Article 4 Direction

Article 4 directions are used to restrict development that would otherwise not require planning permission. They are often used within conservation areas to protect development relating to heritage assets. An Article 4 direction can be used for non-designated purposes, for example outside of conservation areas to restrict the use of houses in multiple occupation. However, they need to be justified and show that they are preventing harm to the amenities of the area. This is why generally they tend to be area wide directions with the purpose of restricting potentially harmful development or activity within an area. Paragraph 53 of the NPPF refers to Article 4 Directions, and states that their use should be limited to situations where this is necessary to protect local amenity or the wellbeing of an area.

- 3.10 It is considered that the imposition of an Article 4 direction on a single dwelling would be a disproportionate use of the direction and that the Council would face difficulty justifying area wide amenity harm caused by a single dwelling. Where an Article 4 Direction is made by a local authority with immediate effect, legislation allows for a claim of compensation to be made against the local authority. Such a claim can be made where, an application for planning permission is made within 12 months of the Article 4 Direction taking effect and planning permission is refused or granted subject to conditions; then a claim for compensation can be made.

### Injunctions

- 3.11 Section 187B of the Town and Country Planning Act 1990 (the 1990 Act) enables the Local Planning Authority, where they consider it expedient for any actual or apprehended breach of planning control to be restrained, to apply to the High Court or County Court for an injunction.
- 3.12 Injunctions are best used during the early stages of development or before any development has taken place at all. An injunction for planning enforcement purposes would be best used to prevent a breach of control or prevent further breaches of control from occurring. However, the more advanced the development has become and the more established the existing breach of control has become an injunction would be unlikely to have a significant impact. With reference to the current site the breaches of control have been identified and are established, therefore an injunction would not be an appropriate measure. Developments where injunctions are used tend to be for significant breaches of control, such as development in the green belt or unauthorised gypsy/traveller encampments. (Please see case law section 4)

## 4.0 **CASE LAW**

### 4.1 **Tapecrown Limited v First Secretary of State (2006).**

This case is relevant as, despite the facts being slightly different, the Court held that “the inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive” and that “if on his consideration of the submissions and in the light of the site view, it appears to him that there is an

obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it.

#### **4.2 Ahmed v Secretary of State for Communities and Local Government (2014)**

The question was whether the Inspector had erred in law by failing to consider an 'obvious alternative' in accordance with the principles in *Tapecrown Ltd v First Secretary of State* (2006).

The Judge held that the Inspector had erred in law and held that, "in my judgment the Inspector overlooked an obvious alternative that could have remedied the breach of planning control that was the object of the notice". Further to this, he confirmed the reasoning in *Tapecrown Limited v Secretary of State* – "The Appellant contends that the guidance of the court in *Tapecrown*, read as a whole, makes it clear that if there is a readily identifiable alternative to complete demolition which can remedy both the planning and amenity objections, then the Inspector should consider this option and should be prepared both to vary the enforcement notice and to grant permission, subject to any requirements of procedural fairness which may arise on the facts of a particular case"

#### **4.2 Warwick DC v West Midlands International Airport Ltd**

Warwick District Council was unsuccessful in obtaining an injunction to prevent the use of an airport terminal building whilst awaiting the outcome of an EN Appeal (*Warwick DC v West Midlands International Airport Ltd*, 25/05/04). In that case, the judge considered that the Council's application was "wholly inappropriate" and draconian, where there was no evidence of a flagrant breach as well as a possible attempt to usurp the planning inspector's powers to consider the case.

### **5.0 UPDATE ON THE CURRENT SITUATION**

**5.1** A revised Decision Notice for the refusal under planning (reference 19/00124/FUL) was issued, due to typographical errors on the original Decision Notice, backdated to 29th July 2019 which was the date of the original Decision Notice. A question has been raised by a third party as to whether the Decision Notice should have the date on which it was re-issued, rather than being backdated to 29th July 2019. The question has been put to the Council's Legal Officers and this will be addressed in a final update, prior to October DCC.

**5.2** An appeal against the planning application refusal (reference 19/00124/FUL) was lodged with the Planning Inspectorate (PINS). The Planning Authority made a telephone enquiry into the progress of the appeal on 24th September 2019 and was verbally informed that the appeal was turned away as it was received outside the statutory time limit (in this case 28 days). In terms of the current enforcement position, an appeal is in progress relating to the service of the Enforcement Notice.

#### **5.3 Withdrawal of Current Notice**

It is officers view that the withdrawal of the current notice and the service of a second Enforcement Notice would weaken our position in terms of an appeal

determined in the Council's favour. With reference to the list outlined in section 1, it has already been considered that we have included the maximum level of enforcement action, to remedy the breaches of planning control within the Enforcement Notice. It is officers' view that to include any further requirements within an Enforcement Notice will only seek to diminish our case and potentially lead to a successful appeal by the appellants, which could ultimately see the house permitted in its current form.

- 5.4 As indicated above, the withdrawal of the current Enforcement Notice and the issue of a second Enforcement Notice would still allow the owner of the property to appeal the Enforcement Notice. It should also be noted that, in the event of a successful appeal by an appellant to any second Enforcement Notice issued, the Council could be liable to an application for costs, which can be increased if the local authority has been deemed to have acted unreasonably.

	<b>Recommendation for action relating to alleged breaches of planning control at 42 Portland Drive.</b>	<b>Enforcement recommended</b>
	<b>TABLE 1 – Breaches of control considered expedient to enforce.</b>	
<b>Single Storey Rear Extension</b>	The depth of the single storey rear element has been increased by approximately 1.22m .	<b>Y</b>
<b>Roof Height and form</b>	The roof has increased in height by approximately 48.5cm. The form as built is considerably larger than what has been approved.	<b>Y</b>
	<b>TABLE 2 - Breaches that are not expedient to enforce</b>	
<b>Building Location</b>	The building has been moved back slightly within the site not more than 0.7m.	<b>Not expedient</b>
<b>Ground Levels</b>	The ground level of the house has been raised by approximately 30-50cm, although this is an estimate.	<b>Not expedient</b>
<b>Height of garage</b>	The height of the attached single storey garage on the north-western part of the site has been increased from the approved by 4.4m to 5.2m.	<b>Not expedient</b>
<b>Fenestration /Balcony</b>	The ground floor rear windows have been increased in size. The ground and first floor side windows have been increased in size. The front balcony has been increased in depth from 1.50m to 2m.	<b>Not expedient</b>
<b>Solar Panels</b>	The installation of solar panels although considered to be a breach of control do not in our view cause significant planning harm.	<b>Not expedient</b>
	<b>TABLE 3 – Matters identified that are not breaches of Planning Control</b>	
<b>DRIVE</b>	The construction of the drive is considered to be permitted development.	<b>No action required.</b>

## **6.0 CONCLUSIONS AND RECOMMENDATIONS**

- 6.1 In conclusion as per the enforcement options set out within section 3 of this report it is officers recommendation that the current enforcement appeal processes proceed. It is officers view that the demolition of the current dwelling would represent a disproportionate action and that the current enforcement notice sufficiently addresses the outstanding breaches of planning control.
- 6.2 Alternatively the position could be interpreted that the breaches identified are so severe that the sufficient remedial works cannot be accepted and that a new enforcement notice is required.