

12.9114 From amenity open space

The incorporation of “amenity open space” land within garden areas is accepted as being a material change of use from open space. If the land is part of a housing development built with planning permission it is quite likely that such a development would also be a departure from approved plans or be in breach of a planning condition.

In *Broadland District Council v Trott* 28/7/2010 an injunction was sought restraining the defendant from preventing land being available for the enjoyment of residents of adjacent flats. In 1991, planning permission to develop land for housing including the flats was granted on appeal subject to conditions. A modified permission was granted in 1992 subject to a condition that “the development...shall not be carried out otherwise than in accordance with the submitted application as amended by (3 identified drawings)”. Condition 4 provided that “the development...shall not be carried out otherwise than in accordance with conditions 2,3,4,5 and 6 of planning permission 900922”. The identified drawings showed the overall area to be developed but did not describe the area in dispute as amenity space. Condition 2 of planning permission 900922 provided that: “no development shall take place until there has been submitted to and approved by the local planning authority a scheme of landscaping (including provision for the treatment of boundaries).” A scheme of landscaping was submitted by the defendant and in subsequent correspondence regarding the scheme the defendant's agent stated that a specification would be provided for the eastern boundary of the “secluded garden” (ie the affected land). In March 1996, an enforcement notice was served alleging that the amenity land had been incorporated into the garden of a dwelling. On appeal, the Inspector varied the enforcement notice by substituting a new para.3 to state that there had been a failure to comply with Condition 2 of 912177 in that the amenity area had not been incorporated into the overall site as an area to be landscaped, rather it had been retained as an extended garden area for one dwelling and upheld the enforcement notice. This inspector’s decision was not challenged. Subsequently, the defendant decided to treat the amenity area as exclusively his and as part of the curtilage of his property and gates to the amenity land had been locked preventing access by the residents of the adjacent flats. As a result, injunction proceedings were commenced. In response the defendant ,amongst other things, raised the following issues: (i) The matter of which complaint was made did not constitute a breach of planning control and the proceedings were therefore misconceived; (ii) What the court was being asked to do was to enforce the requirements of an enforcement notice that was null and void. The court allowed the application concluding that:

- A planning condition had required that development should not commence until a landscaping scheme (including provision for boundary treatment) had been submitted to and approved by the local planning authority. In fact, the development commenced without any such submission and approval so that there was a breach of planning control at the outset. There had been an actual or apprehended breach of planning control.
- **Although the affected land was not described expressly on the plans as an amenity area it was quite clear that it was intended to be and was shown on the plans to be part of the development, open land separated from the remaining garden of No.3 by a new hedge. The defendant retained ownership of the affected land and the residents' leases gave**

them no express rights over the affected land. Their security with regard to the availability, enjoyment and landscaping of the land rested in the terms of the planning permission granted. Those acquiring leases would see from the permission what was to be open land and where the boundaries were drawn. The defendant had openly stated that he wanted to provide the area as a quiet secluded part of the site for the enjoyment of the residents. Granting an injunction would not be an unjustified interference with the defendant's rights as owner of the land. It was in the interests of the public that the affected land should be made available for residents and occupiers of the flats and to grant an injunction would not be detrimental to any planning interest or any member of the public. It was in the public interest generally that enforcement notices should be obeyed.

- Persistent non-compliance by the defendant made it just and equitable that the claimant be granted an injunction restraining the defendant and his successors in title from preventing the amenity land being available for the enjoyments of the residents for the time being of Waterside Flats, whether by preventing access to the amenity or otherwise.

More examples....

The principal issue in cases where housing estate **amenity land** is **to** be incorporated into the **garden** of an adjacent house is whether such **land** should be retained **to** preserve the visual **amenity** of a housing development, and/or a useful facility for play or sitting out which has positive benefit for nearby residents. Precedent may also be a matter of some concern.

In cases where the estate is one erected with planning permission, the planning authority concerned may well have negotiated for the **amenity** space **to** be incorporated in the estate layout at the design stage and the maintenance of the **land** may be the subject **to** a planning condition. For applicants, it is often argued that **amenity** ground has not fulfilled its original function - it maybe unkempt, used as a short cut or abused by dogs and children. The latter two objections backfired on an appellant in Motherwell 10/4/1989 DCS No [035-194-957](#) where a reporter observed that his own evidence showed that the public enjoyed a piece of **amenity** land. However, in Dunfermline 7/12/1988 DCS No [046-078-070](#) an unmaintained kick-about area was thought not **to** be suitable for its purpose, and an alternative did exist nearby. Inadequate **garden** space available **to** an existing house or lack of suitable access for vehicles may also be argued.

Further cases of interest follow:

- Enclosing an open area of grass adjacent **to** an appellant's home in Hampshire was rejected because it would undermine the structural integrity of the estate. An inspector decided that the grassed area formed an important component of the estate and enabled pedestrians **to** move around the area safely. Enclosing the space would create a pinch point and alleyway with little natural surveillance **to** deter antisocial and criminal behaviour. It would also undermine the positive relationship between open areas and the buildings. Havant 20/5/2011 DCS No [100-072-264](#).
- A curtilage extension into recreational open space in Greater Manchester was allowed on the basis of overriding personal circumstances. The **garden** extension was proposed **to** provide outdoor **amenity** space for the appellant's

severely disabled daughter, and accommodate the bulky outdoor play and exercise equipment she used. About 30 per cent of the rear **garden** had been lost following the construction of an extension **to** provide more practical living accommodation and the **garden** extension was intended **to** compensate for this. The **garden** would be extended onto the grounds of an adjacent primary school. This **land** had been designated as part of a football pitch **to** make up for the loss of recreation **land** after the construction of a Sure Start children's centre at the school. Following considerable local opposition, however, the soccer pitch had been omitted. The details required by the planning condition had since been approved and showed the area as being used for informal recreational space. The inspector therefore decided that the proposal would not prejudice the implementation of the approved scheme or the developer's ability **to** comply with the condition. A unitary development plan stated, however, that the development of designated open space for any other purpose would not be permitted unless it fell within a number of categories, which did not include **private** garden. The inspector considered, on balance, that the benefits arising from the proposal in terms of the health and wellbeing of the appellant's daughter would outweigh the slight degree of harm caused by the loss of the small area of land, and would not significantly affect the wider long-term recreational function of the **land** or erode its recreational quality. On this basis he decided that a personal permission was appropriate. Rochdale 7/2/2011 DCS No [100-071-072](#)📍.

- **Garden** allowed **to** expand onto defunct playing field In allowing an appeal involving the change of use of part of a recreation ground **to** a domestic **garden** an inspector ruled that the circumstances of the case were unusual and justified allowing the development. The appeal site comprised a narrow strip of **land** approximately 29m long and under five metres wide at the edge of the recreation ground. The appellants wished **to** incorporate the **land** into their garden, which was resisted by the council who argued that it would lead **to** the loss of open space without compensatory provision. The inspector agreed that the loss of recreational open **land** in recent years was of concern and the general approach involving its retention should not be lightly overturned. However, the appeal site comprised a very small area and was overgrown containing nettles and rough grass. Its public **amenity** value was negligible, he opined, and it would be very difficult in practice **to** require the appellants **to** make alternative provision elsewhere. He therefore allowed the appeal. Mendip 11/3/2008 DCS No [100-054-085](#)📍.

- An inspector allowed a footpath **to** be incorporated into a **garden** associated with a dwelling in Leeds, concluding that it was in the public interest. The appellant stated that the footpath was untidy and that there was anti-social behaviour, graffiti and damage **to** fences associated with its use. He stated that the footpath was little used by local residents and requested that his **garden** be extended over the footpath. The inspector noted that the footpath joined a busy main road at a point where the footpath was narrow. The footpath and pavement at this point was dark due **to** overhanging trees and the height of the boundary fences and walls could encourage anti-social behaviour and crime. Although access **to** the remaining part of the footpath would require a 90m detour via another route, he decided that the latter would be via a more convenient and attractive pavement which was more secure and commodious. He therefore allowed the appeal. Leeds 14/6/2006 DCS No [100-042-872](#)📍.

- An extension of 58m² to a garden in Northumberland was proposed. An inspector noted that the rear gardens of a terrace of properties had access to triangular areas of open space and it appeared that these spaces were intended to be semi-private for use by the residents of the dwellings to meet, chat and allow children to play. However, this objective was not achieved and the areas became vandalised and strewn with bricks and bottles. The appellants' assertion that the area had become the haunt of unruly youths was noted and it was observed that some residents had sealed their rear gates to prevent entry. The inspector felt it was difficult to agree with the council's view that the area represented an 'effective open space.' There were fundamental defects with the way in which the space relates to the surrounding area such that it was very unlikely that the existing situation would be reversed. Tynedale 11/2/2004 DCS No [053-536-776](#).
- Enforcement action was taken against multiple garden extensions taking in land at the rear of houses erected in 1972. The land was a narrow strip of land which was used for ball games etc. and it was argued that this caused considerable loss of amenity to adjoining residents, and was a route for burglars etc. An inspector accepted that the land was too narrow and confined for the purpose for which it was being used and its layout/situation was contrary to Circular 5/94 *Planning Out Crime* and the appeal was allowed. Stockton-on-Tees 3/4/1996 DCS No [048-155-628](#).
- An appellant offered to move all the mature shrubs and plants on the land which he proposed to take into his garden onto other amenity space land, but a reporter thought that this would result in the death of most of them (Kirkcaldy DC 15/2/1990).