
Appeal Decision

Site visit made on 22 November 2016

by Anthony J Wharton BArch RIBA RIAS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 14 December 2016

Appeal Ref: APP/W4515/C/16/3153229
160 Whitley Road, Whitley Bay NE26 2LY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Mark Mulvaney against an enforcement notice issued by North Tyneside Council (the LPA).
 - The enforcement notice was issued on 18 May 2016.
 - The breach of planning control as alleged in the notice is: the unauthorised erection of a boundary enclosure over 1 metre in height and adjacent to a vehicular highway.
 - The requirements of the notice are as follows:
 1. Reduce the height of the perimeter enclosure, including the gate and pillars to no more than 1 metre in height measured above the natural ground level.
 2. Neatly finish the reduced brick pier with stone caps and ensure that the timber fence is finished neatly.
 3. Remove from the land all debris resulting with compliance with the above requirements and dispose of it accordingly.
 - The period for compliance with the requirements is six weeks
 - The appeal is proceeding on grounds (a), (c), (d) and (f) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is dismissed (see formal decision below).

The site, background information, planning history and relevant policy

2. The appeal site is the curtilage of a two storey detached dwelling, located on the north east side of the busy Whitley Road, close to the town centre of Whitley Bay. The property is on the corner of Whitley Road and Percy Road and there is an access, or back lane, at right angles off Whitley Road on its south east boundary. The fence abuts the footway/highway along Whitley Road, Percy Road and the side access road. Percy Road is a residential road and the houses are generally fronted by low level boundary treatments, enclosing small front gardens. A short section of fence is at right angles to Percy Road and stretches back to the north elevation of the house. It extends initially at the same height before sloping downwards to a lower height.
3. Following a complaint in April 2014, a Council Officer visited the site to establish the facts. The Council indicated that, because the fence is adjacent to sections of highway and is more than 1m in height, it does not constitute permitted development and that planning permission was required. Several letters were sent to the owner of the property inviting the submission of a retrospective planning application for the unauthorised enclosure.
4. A planning application was submitted and, when eventually validated, was considered by the Council on 10 October 2014. The application was refused on the basis of its impact on visual amenity and highway safety. The appellant appealed the

decision and the appeal was dismissed (APP/W4515/D/15/2230228). However, the Inspector did not uphold the second reason for refusal which related to the effect of the fence on highway safety. The appellant was then given time by the authority to remove the fence. There is clearly no issue regarding highway safety.

5. Despite several letters from the LPA the fence remained in place and an enforcement notice was served. Due to technical errors the notice was formally withdrawn and the notice, the subject of this appeal, was then issued.

6. The relevant development plan policy is H11 of the North Tyneside Unitary Development Plan 2002 (NTUDP). The Council's 'Design Quality' Supplementary Planning Guidance (SPG) is also relevant. The National Planning Policy Framework (NPPF) and national Planning Practice Guidance (PPG) are also significant material considerations in this case and, in reaching my conclusions, I have taken the relevant policies and guidance into account.

7. The appellant indicates that, following the appeal rejection, a re-application was submitted, around June 2015. This was stated to cover '*aesthetic modifications*' to the fence. The appellant indicates that he did not receive an acknowledgement but that he assumed the LPA had received it and that they were duly considering the re-submission. Subsequently the appellant requested information from the LPA but, as at 9 October 2016 he had not received a reply and was going to refer it to The Information Commissioners Office (ICO). However, the LPA, in its statement, indicates that no alternative proposal was received. Be that as it may, I am only empowered to deal with the enforcement notice as issued and the grounds pleaded. Any grievance that the appellant might have is between him and the LPA.

8. The appellant considers that the above situation leaves him at a disadvantage. Although it is accepted that it may not change the material facts of this appeal, he considers that it does show that he has been willing to pursue alternatives and that the LPA may be acting in bad faith. On these points I have noted what the appellant says but I can assure him that the matters outlined do not place him at any disadvantage in the appeal process relating to his appeal. The manner in which an LPA might deal with any planning matter cannot normally be a material consideration which could affect a decision. That is the case in this instance and I give no weight to these matters.

9. I am only empowered to deal with this enforcement notice in relation to what is alleged in the notice. It is not for me to consider any alternative '*aesthetic modifications*'. Any number of modifications could be carried out which might alter the situation but these would be matters strictly between the appellant and the LPA. I can understand any frustrations relating to whether or not the LPA received the re-submission but, again, these are not matters for me to resolve.

The appeal on ground (c)

10. To be successful on ground (c) it must be shown that planning permission is not required for the development carried out, either because a planning permission is already in place or that the works constitute permitted development. There is no permission in place and thus, to be authorised, the development must satisfy the requirements of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).

11. In particular the works must satisfy Schedule 2, Part 2, Class A of the GPDO. This sets out that any gate, fence, wall or means of enclosure erected adjacent to a highway is not permitted development (PD) if it exceeds 1 metre in height. Case

Law has established that a reasoned approach to what denotes being adjacent to a highway is being within 2 metres of the said highway.

12. The appellant contends that the notice is punitive, extending to the entire perimeter fence. However, having seen the full extent of the works I do not accept this argument since the alleged breach relates to the entire fence. It is clear that, as a matter of fact, part of the boundary frontage along the access road, that along Whitley Road and also that along Percy Road (to the boundary of the adjacent house in Percy Road) all have a timber close-boarded fence on top of the lower boundary wall and that all of these sections are adjacent to the highway and that the overall enclosures are all in excess of 1m in height.

13. As indicated above Case Law has established what denotes being '*adjacent to a highway*' and that a reasonable figure is within 2 metres. In this case, therefore, it is my view that, as a matter of fact and degree, even the section at right angles to Percy Road (which then slopes down slightly) is '*adjacent to the highway*' for the purposes of the GPDO. All sections of fence, as enforced against, are therefore '*adjacent to the highway*' and do not benefit from permitted development rights. In my view there is no injustice caused by the notice as drafted and issued.

14. It follows that the alleged contravention, as set out in the notice, is correct in that there is no planning permission in place for any of the sections of fence or the overall enclosures. I do not accept the appellant's contention therefore, that the notice is invalid in any way. It is also obvious that it has always been clear to the appellant that the works carried out are considered by the Council to be unauthorised and, although the requirements are questioned, there is no doubt about what is expected to be done to comply with the notice (see also ground (f) below). I do not consider that my consideration of it, on the above basis, causes any injustice to either the appellant or the Council.

The appeal on ground (d)

15. To be successful on this ground the onus is on the appellant to conclusively show that the precise sections of fence/enclosure were in place four years before the date of issue of the notice. That date would be 18 May 2012.

16. In relation to a breach of planning control relating to operational development, the period after which a planning authority cannot take enforcement action is 4 years and not 10 years. The latter figure relates to a change of use of land or buildings. I acknowledge that the original boundary structure is well over 10 years old and that there was a lower level of fencing on top of the wall prior to this breach occurring. However, by his own admission the appellant indicates that fencing which is now in place was installed in 2014. It is clear to me, from all of the submissions, therefore, that the breach of control occurred well within the relevant 4 year period and that the Council was entitled to take enforcement action against the unauthorised operational development. It follows that the appeal cannot succeed on ground (d).

The appeal on ground (a)

17. The main issue is the effect that the unauthorised various lengths of fence (surmounted on the original walls) have had on the character and appearance of this part of Whitley Bay.

18. In support of his case the appellant has indicated that the construction is considered reasonable, given other examples in the area and that the house is on a road where most of the properties are in commercial use. It is also argued that the fence is required for security reasons and that it is essential to him under Article 8 of the European Court of Human Rights (ECHR). The appellant has referred to the re-

submission (see above) and contends that the Council is inconsistent in dealing with fences. Photographs of other installations have been submitted.

19. Having seen the sections of fencing on top of the brick walls, I share the concerns of the LPA and those of the previous Inspector. As the latter stated this is a part of Whitley Bay where boundary fences are not normally encountered. As one travels past the site, towards the town centre, the commercial premises extend to the edge of the footways (pavements) and to the south east there is a health centre and a car park both with trees to their frontages. The roads at right angle, are residential in character where the frontage boundaries are generally low.

20. When seen in its overall context I agree with the previous Inspector that the high fence/wall sections surrounding the appeal property are incongruous and intrusive elements within the street scene. When viewed from Whitley Road (from both directions), the fencing appears as a stark, alien and visually intrusive built form against the traditional boundary treatments in the immediate vicinity. I consider that it is contrary to Policy H11 of the NTUDP as well as to policies within the NPPF which require good design. At paragraph 64 of the NPPF it is stated that permission should be refused for development of poor design that fails to take the opportunity available for improving the character and quality of an area and the way it functions. The poor design of this enclosure was refused planning permission by the LPA and this decision was upheld on appeal.

21. In my view, the fencing as installed is significantly harmful to the character and appearance of this part of Whitley Bay. Taking into account the LPA decision and that of the previous Inspector, in my view there can be no justification in granting permission under ground (a) at this enforcement appeal stage.

The appeal on ground (f)

22. The contention that the LPA has not demonstrated any material evidence of harm, or impact, cannot normally be a conclusive argument that the requirements are excessive and that lesser steps would overcome any harm. In any case I am satisfied that the LPA, as well as the previous Inspector, have clearly demonstrated the harm that has been caused. Although there are references to the re-submission scheme, there are no specific suggestions to indicate which precise '*lesser steps*' could overcome the identified harm.

23. I have noted the reference to the sloping ground and acknowledge that the requirements cannot simply be met by cutting an equal amount from the top of each section of fencing. However, the requirements can, in my view, still be met by ensuring that no section exceeds the height set out in the GPDO. As for alternative proposals the appellant would not be precluded from growing a naturally planted hedge along the boundary, whilst keeping the operational development built form to 1m or less in height. Overall I do not consider that the appeal can succeed on ground (f). The requirements of the notice are valid and there has been nothing in the submissions to persuade me that they are excessive.

Other Matters

24. With regard to the appellant's reliance on other fences being approved (or not, as the case may be), I do not have the details before me and, in any case, each situation must be assessed on its merits. I also refer to the previous Inspector's comments about other examples of works carried out and relied upon by the appellant. There are indeed many unattractive aspects of development (specifically boundary enclosures) which can, and have, caused harm to the street scene in other parts Whitley Bay. I accept that some of these may not have needed to satisfy

planning requirements. However, there can be no justification in allowing another enclosure which exacerbates and adds to the harm caused by any other fences, and/or enclosures, in the LPA area.

25. I have specifically taken into account the appellant's concerns regarding security and litter and whilst acknowledging that these are very valid and understandable concerns, I do not consider that they are sufficient to outweigh the harm caused to visual amenity by the development as carried out. In any case, there are many other ways to ensure security including lighting; closed circuit television and landscaping (natural planted screening as opposed to solid walls or fencing) which would not require planning permission.

26. In the context of the relevant NTUDP and NPPF policies and all submissions in this case, I have taken into account the appellant's arguments relating to his (and those of his family) Human Rights. In particular, I have taken into consideration the right to a fair hearing and the right to respect for family life. I consider that in this appeal there can be no dispute that the appellant has had a fair hearing. He has been given the opportunity to appeal and this has been dealt with in an open, fair and impartial manner. I also consider that the need to comply with the requirements of the notice are proportional and necessary in order to safeguard the amenities of this part of Whitley Bay in the public, rather than in the appellant's private interest and with regard to his rights under the ECHR.

27. Finally, in reaching my conclusions on the grounds of appeal and my final decision, I have taken into account all of the other matters raised by the appellant. These include those set out in the 'Final Comments' dated 10 October 2016 (*covering the re-application, reference to the ICO, the reasons for the notice, the LPA comments on grounds of appeal, the paragraph 8 conclusions and the matters relating to 'security', 'harm' and 'steps to comply'*); the points set out in the e-mail, dated 9 September 2016, to the case officer (*covering representations from the businesses opposite, the service road, the area in general and security and litter*) and the appeal documents as submitted (*the notice, the UDP policies, copies of version 1 of the appeal documents dated 24/06/2016, all of the photographic evidence related to version 1, the conveyancing letter re 160 Whitley Road, the letter dated 18 May 2016 from the LPA, version 2 of the appeal document, dated 13 August 2014, and the drawings of the fencing submitted with version 2*).

28. However none of these carries sufficient weight to alter my conclusions on the grounds pleaded and nor is any other factor of such significance so as to change my decision that the appeal should fail and be dismissed on all counts.

Formal Notice

29. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177 (5) of the Act as amended.

Anthony J Wharton

Inspector