The Planning Inspectorate

Appeal Decision

Site visit made on 12 December 2016

by K R Saward Solicitor

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

Decision date: 5 January 2017

Appeal Ref: APP/Y0435/X/16/3153570
2 Walgrave Drive, Bradwell, Milton Keynes MK13 9EU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mrs Gail Christofe against the decision of Milton Keynes Council.
- The application Ref 16/01079/CLUP, dated 25 April 2016, was refused by notice dated 29 June 2016.
- The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is a 1.8m high close board fence near to edge of property boundary behind existing hedge replacing a damaged brick wall.

Decision

1. The appeal is dismissed.

Procedural Matters

2. The application form submitted to the Council did not contain a description of the proposed development as such and so I have taken the description from the Appeal Form. This more specifically describes the proposal than the Council's decision notice which does not prescribe the height of the fence.

3. The planning merits of the proposed development are not relevant to the consideration of the purely legal issues involved in determining an application under section 192(1)(b) of the 1990 Act. Therefore, the presence of similar development in the vicinity is not a factor that influences whether the proposal would be lawful in this instance.

Main Issue

4. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded. This turns on whether the proposed development would constitute permitted development by virtue of the provisions of Article 3(1) and Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ('the GPDO').

Reasons

5. In an LDC appeal the onus of proof is on the appellant to show that, on the balance of probabilities, the development would be lawful at the time of the application.

6. The proposal is for a 1.8m high close boarded fence to be erected along part of the western side of No 2 Walgrave Drive. Currently, the rear garden is largely enclosed by a damaged brick wall. A relatively wide strip of land belonging to No 2 is located down the side of the house and next to the rear garden wall. It is covered with foliage and some trees. By erecting the fence, much of this strip of land could become useable private garden space.

7. Running directly alongside the side boundary of No 2 is a "Redway", being a term applied to a network of shared use paths in Milton Keynes generally surfaced with red tarmac. In answer to my request for further clarification, the Council's Highway's Engineer has confirmed that Redways are dedicated by agreement under section 38 of the Highways Act 1980 as cycleways open to public use by means of pedal cycles or on foot only (but includes wheelchairs, including electric ones). Any use of a Redway by a motor powered vehicle is not permitted although there are some exceptions such as maintenance and cleansing vehicles and emergency needs. A plan of the adopted highway in the vicinity has been produced by the Council and this includes the section of Redway beside the appeal property.

8. The proposed fence would be set in 0.6m from the edge of the Redway behind a hedge that would be planted to continue the line of an existing low level hedge which is further along the side boundary.

9. The erection, construction, maintenance improvement or alteration of a gate, fence, wall or other means of enclosure is development permitted under the provisions of Schedule 2, Part 2, Class A of the GPDO, subject to certain limitations. Limitation A.1. says that such development is not permitted if (a) the height of any gate, fence, wall or means of enclosure, erected or constructed adjacent to a highway used by vehicular traffic, would, after the carrying out of the development, exceed (ii) "…..1 metre above ground level".

10. As the fence would exceed 1m in height, the issue in contention is whether or not the fence would be "adjacent to a highway used by vehicular traffic". If it is, then the fence cannot be permitted development and planning permission would be required. Alternatively, if it is not adjacent to a highway then a fence up to 2m in height would be permitted without the need for express planning permission pursuant to paragraph A.1.(b).

11. "Highway" is not defined in the GPDO for the purposes of Part 2. Section 336 of the principal 1990 Act defines the term by reference to the meaning within the Highways Act 1980. The interpretation section of the 1980 Act says "highway" means the whole or a part of a highway other than a ferry or waterway." There can be little doubt that the 'Redway' falls within the definition of a 'highway' given the Council's confirmation, as local highway authority, that it has been so adopted.

12. The Council has taken the view that as Redways are for use by cyclists as well as pedestrians then they are used by 'vehicular traffic'.

13. No definition of 'vehicular traffic' exists either within the GPDO, the 1990 Act or the Highways Act 1980. In the Road Traffic Act 1988, a "cycle" is interpreted to mean a bicycle, a tricycle, or a cycle having four or more wheels, not being in any case a motor vehicle (section 192). Yet, there is nothing to suggest that for the purposes of the GPDO, the term 'vehicular traffic' is confined to motorised vehicles or that the highway must be open to all forms of vehicles.

Although a 'vehicle' will often have an engine, an ordinary definition of the word does not exclude other forms of vehicle and there is no reason to suppose it should be interpreted so restrictively when applying the GPDO.

14. From the viewpoint that a cycle is a mode of transport which provides a means for the rider to travel, it seems to me that it is a vehicle and use of the Redway by cyclists would thus amount to vehicular traffic. Accordingly, the limitation in paragraph A.1. of Class A applies.

15. The issue turns to whether or not the proposed fence would be "adjacent" to the Redway. There is no definition of "adjacent" within the GPDO, but in past Orders where the word "abutting" was used, the Court of Appeal declined to rule that "abutting" equated to touching. A normal everyday dictionary definition of adjacent is 'being near or close'. The assessment of what constitutes "adjacent" must therefore amount to a question of fact and degree.

16. At 0.6m, the setback from the highway boundary would not be very far. Whilst a newly planted hedge could provide some separation, the fence would still form a physical and visual barrier between the Redway and the appellant's garden. Indeed, the planting and retention of a hedge could not be compelled through a LDC application. In any event, the fence would have much greater prominence than any hedge, at least initially, and would fulfil the function of forming a boundary which defines and encloses the garden.

17. I find in the particular circumstances of this case that as a matter of fact and degree the fence would be sufficiently close to the Redway to be adjudged "adjacent" to the highway under the GPDO. As the fence would exceed 1m in height it cannot be permitted development. Planning permission would therefore be required.

Conclusion

18. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a 1.8m high close board fence was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

KR Saward

INSPECTOR