
Appeal Decisions

Site visit made on 6 April 2017

by R J Perrins MA MCMI ND Arbor TechArborA

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

Decision date: 07 April 2017

Appeals Ref: APP/C1435/C/16/3153897 & 3153905

11 Phoenix Close, Hailsham, East Sussex BN27 2JX

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Michael Delaney & Mrs Jayne Delaney against an enforcement notice issued by Wealden District Council.
 - The enforcement notice, numbered C/2015/0370/HLM, was issued on 20 May 2016.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a close-boarded wooden fence ("the Fence") in excess of 1 metre in height adjacent to the highway in the approximate position shown by a green line on the attached plan.
 - The requirements of the notice are:
 - EITHER: (i) Demolish, dismantle and remove the Fence from the Land
(ii) Remove from the Land all materials, rubble, rubbish, debris, tools and equipment arising from compliance with requirement (i) above
OR: (iii) Reduce the height of the Fence to a height not exceeding 1 metre at any point along the length of the Fence
(iv) Remove from the Land all materials, rubble, rubbish, debris, tools and equipment arising from compliance with requirement (iii) above.
 - The period for compliance with the requirements is three months.
 - The appeals are proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the applications for planning permission deemed to have been made under section 177(5) of the Act as amended do not fall to be considered.
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Decisions

1. The appeals are dismissed and the enforcement notice is upheld.

The appeals on grounds (b) and (c)

2. These grounds of appeal are (b) that the matter alleged has not occurred and (c) that those matters (if they occurred) do not constitute a breach of planning control. The arguments advanced by the appellants under these grounds are closely linked, in which case I will deal with them together.
 3. I saw on site that the fence extends along the south and east boundaries of the property which occupies a corner plot. It was agreed on site that the fence measure some 1.93 metres in height. In simple terms the appellants maintain that the fence replaced an existing higher hedge, sits alongside Council land and because it is less than 2 metres in height does not require planning
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permission. The Council are of the opinion that it has been constructed adjacent to the highway and therefore does require planning permission.

4. In that light the main consideration for me is whether the fence has indeed been erected adjacent to the highway. I say that as Article 3 and Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) Order 2015 ("the Order") sets out where fences do not require planning permission.
5. Class A of the Order sets out that the following would be permitted development:

The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.

But development is not permitted by Class A 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 -

(i) for a school, 2 metres above ground level, provided that any part of the gate, fence, wall or means of enclosure which is more than 1 metre above ground level does not create an obstruction to the view of persons using the highway as to be likely to cause danger to such persons;

(ii) in any other case, 1 metre above ground level;

6. That is to say when a fence is erected adjacent to a highway it can be no more than 1 metre in height to comply with the Order. For the purposes of the Order therefore, and this case, it is important to establish the extent of the highway. The Council assert that the front three panels of fencing, as indicated in green on the enforcement notice plan, front onto the highway and thereby the fence requires planning permission. The appellants set out that it is Council land adjacent to the fence although they refer to 'highways' and the road. In that light, and from what I saw on site, there is no dispute that the section of fence, indicated in green on the notice, faces onto the highway.
7. Therefore the key consideration relates to whether the fence has been constructed adjacent to the highway. To that end a fence does not have to touch the edge of a highway to be considered adjacent. There may be some distance between a highway edge and a fence serving a property, yet it may still be close enough to have the perceived function of forming a highway boundary. Whether a fence, in such circumstances, is adjacent to the highway is a matter of fact and degree in each case.
8. I accept the fence is set back from the highway kerb and it was agreed on site that the three panels, at their nearest point, were set back by some 1.33 metres and at the furthest point by 2.87 metres from the back of the kerb. There is therefore some distance between fence and highway. Nevertheless, it remains close to the edge of the highway. In addition, when viewed from all the surrounding directions, it would be perceived as a boundary treatment separating the highway from the appellants' garden. As such, and as a matter of fact and degree, I consider it has been erected adjacent to the highway.

9. There is no dispute that it exceeds 1 metre in height it does not therefore benefit from the permitted development rights granted by the Order. The fence requires planning permission.
10. Furthermore, any claim of permitted development rights must be measured against each and every one of the sub-clauses of the relevant part of the Schedule. Case law has established that if any of the limitations, exemptions or provisos are exceeded, then the whole development is unlawful, not just that element in excess of PD rights. The fence provides a means of enclosure and the part of the fence that is adjacent to the highway is considerably higher than 1 metre. Consequently, the whole development falls outside the scope of permitted development rights. Thus the appellants cannot rely on the rights in the Order as a basis for the lawfulness of what has been erected.

Other Matters

11. The appellants also refer to a number of matters including other fences in the locality, the fact there is no garage compound to the rear, the impact of the previous hedge, the need for security with particular regards to their dogs and the needs of one of the occupiers of the property. In addition they suggest the fence has made the area safer for highway traffic and the hedge was difficult to maintain. There is also support from local residents.
12. Whilst I have a good deal of sympathy with the appellants with regard to the circumstances in which they find themselves, and I am in no doubt they acted in good faith, I am simply unable to consider such matters under these grounds of appeal. In the absence of a ground (a) appeal (which is in effect a retrospective planning application) there is simply no opportunity to take those matters, along with any other planning merit arguments, such as the impact of the fence upon the character and appearance of the area, or the impact of the previous hedge, into account.
13. The appeals on grounds (b) and (c) are thus bound to fail.

Conclusion

14. For the reasons given above I conclude that the appeals should not succeed and the enforcement notice will be upheld.

Richard Perrins

Inspector