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## Appeal Decisions

Site visit made on 10 May 2017

**by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor**

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

**Decision date: 31 May 2017**

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### **Appeal A: APP/G5180/C/17/3169385**

#### **Land at 78 Manor Way, Beckenham, BR3 3LR**

- 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 G Hall against an enforcement notice issued by the Council of the London Borough of Bromley.
- The enforcement notice, numbered 16/00007/BOUND, was issued on 20 December 2016.
- The breach of planning control as alleged in the notice without planning permission, the erection of a fence, incorporating an open wooden trellis fence on top of a close panelled wooden fence, running the length of the rear garden boundary with number 76A Manor Way, Beckenham, and having a height of approximately 2.5 metres in total.
- The requirements of the notice are: Reduce the total height of all the elements of the fence described in paragraph 3 to a maximum of 2 metres.
- The period for compliance with the requirements is 1 month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

**Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a correction.**

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### **Appeal B: APP/G5180/C/17/3169388**

#### **Land at 78 Manor Way, Beckenham, BR3 3LR**

- 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 Mrs J Hall against an enforcement notice issued by the Council of the London Borough of Bromley.
- The enforcement notice is the same as per appeal A.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.

**Summary of Decision: The appeal is dismissed and the enforcement notice upheld with a correction.**

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### **Application for costs**

1. An application for costs was made by Mr G Hall and Mrs G Hall against the Council of the London Borough of Bromley. This application is the subject of a separate Decision.

### **Procedural matters**

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2. Through an administrative error, an objection from the occupiers of No. 76A Manor Way was not communicated to the applicants until after the site visit. However, they were given an opportunity to comment and declined to do so.

### **The notice**

3. The appellants draw attention to ambiguity in the allegation and say "complete certainty" as to the terms and requirements of a notice is essential, as criminal proceeding may ultimately result. Having regard to *Miller Mead v Minister of Housing and Local Government* [1963] 2 WLR 225 and the note at paragraph P173.06 of Sweet and Maxwell's Encyclopedia of Planning Law and Practice, they contend that the notice is a nullity.
4. However, in the words of Upjohn LJ in *Miller-Mead*, for a notice to be a nullity on the basis of uncertainty in the allegation or requirements, it needs to be "hopelessly ambiguous and uncertain so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or... that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches".
5. The appellants say that the most obvious meaning of the allegation is that the breach consists of the whole fence along the boundary with No 76A, including an open wooden trellis, all of which has a height of 2.5m. I agree; that is what the notice alleges. The Council accepts that this is "misleading", because it is only concerned with 5 fencing panels with a trellis on top. However, the allegation is not hopelessly ambiguous. On the basis of what they describe as the "most obvious meaning" of the words used in the notice, the appellants can tell with reasonable certainty what they are alleged to have done. In fact, they have not done precisely what the notice alleges, but I can address that under ground (b). There is no suggestion that the requirements of the notice are anything but clear and I am satisfied that the notice is not a nullity.

### **Ground (b)**

6. To succeed on this ground, the appellants must prove on the balance of probability that the matters alleged in the notice have not occurred as a matter of fact.
7. The appellants state that the only part of the fence they have erected is the open section of trellis, approximately 9m in length between the 2 houses. The Council clarified in its statement that the breach of planning control relates to the 5 panel length of fencing and trellis, which exceeds 2.5m in height. The appellant says that the trellis was erected on top of an existing fence. As shown in submitted photographs and confirmed during my site inspection, there are 5 fence panels, topped with trellis, between the house at No 78 and its neighbour at No. 76A. Both the fence panels and the trellis appear quite new, but whether or not they were erected together, the notice effectively only required removal of the trellis. Most of the boundary from the western end of that new fence and the rear end of the garden is marked by a hedge and trees. There are sections of fence within the hedge, some with trellis panels on top, but all of these have overall heights of less than 2m.
8. As indicated above, a fence, incorporating a trellis with a total height of 2.5m has not been erected along the whole length of the boundary as the notice

suggests. In this regard, the notice is incorrect. However, the allegation can be corrected so that it relates clearly to the 5 panels in question. This would not necessitate any consequential variation of the requirements and, whilst contending that the notice is a nullity, the appellants invite me to make that correction. I am satisfied that correcting the notice in this way would not cause any injustice to the appellants. It would not alter the arguments on the merits under ground (a) and the deemed application, or any of the other grounds of appeal.

9. I will correct the allegation as indicated and, to this limited extent, the appeals succeed on ground (b).

### **Ground (c)**

10. To succeed on this ground, the appellants must prove on the balance of probability that the matter alleged in the notice does not constitute a breach of planning control.
11. The basis of the appellants' case was that the whole of the boundary fence was included in the allegation, but parts of it are less than 2m in height and therefore constitute permitted development (PD) under Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015. However, as corrected, the allegation only relates to the section of fence which exceeds 2m in height. Accordingly, the matter alleged does constitute a breach of planning control and the appeals on ground (c) must fail.

### **Ground (a)/the deemed application for planning permission (appeal A only)**

12. The scope of the deemed application is defined by the allegation as corrected. In other words, it only concerns the 5 identified fence panels incorporating trellis on top.
13. The **main issues** are the effect of the fence on the character and appearance of the area and its effect on the living conditions of the occupiers of No 76A in terms of outlook, loss of light and overshadowing.
14. The appeal site lies in an established and leafy residential area characterised mainly by 2-storey detached houses set back from the road in spacious plots. Front boundaries are marked typically by low walls and hedges, maintaining a spacious feel. Given their overall height, the 5 fence/trellis panels are a little at odds with the surrounding area. However, as they are located between the flank walls of 2 dwellings and there is a high hedge to the east of those panels, they can only be glimpsed from the public domain. In these circumstances, they have no significant impact on the street scene or the open nature and character and appearance of the area. Accordingly, I find no conflict with those parts of saved Policies BE1 and BE7 of the London Borough of Bromley Unitary Development Plan (UDP), adopted July 2006, which seek to safeguard that character and appearance.
15. Turning to neighbours' living conditions, whilst I note the appellant's evidence that the footprint of the dwelling at No. 76A is larger than that of the dwelling it replaced, the fence and trellis are less than 1m from the flank elevation of that house. There are French doors and windows in that elevation, which serve an open plan kitchen/dining/living area. Given its proximity to those windows, even a 2m fence would restrict outlook and have a somewhat oppressive visual

- impact. Of course such a fence would be PD, but the incorporation of trellis panels, increasing the overall height to some 2.5m exacerbates that impact.
16. By its nature, the trellis has a partially open quality, but the appellant indicates that it is intended to provide a degree of privacy<sup>1</sup> and such a feature would normally be intended to facilitate the growth of climbing plants up and indeed over the fence. It is likely then, that the impact on outlook would increase over time and indeed there could be additional loss of light and overshadowing to the neighbours' south facing habitable room windows.
17. I conclude that the development has an unacceptable impact on the living conditions of the occupiers of No 76A, in terms of outlook, loss of light and overshadowing. It therefore conflicts with UPD Policy BE1 which requires the relationship of new development to existing buildings to allow for adequate daylight and sunlight and to complement the layout of adjacent buildings. Although Policy BE1 was not cited in the reasons for issuing the notice, it is a relevant development plan policy and I must have regard to it. Furthermore, it is consistent with the National Planning Policy Framework, which indicates that planning should always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings.
18. I note that the appellant could plant trees along this section of the boundary, which could grow to a height of 2.5 metres or more, but other statutory controls exist in relation to high hedges. I also accept that a shed or similar outbuilding could be constructed to a height of 2.5 metres as PD. There is already a small shed adjacent to the easternmost panel enforced against, but its eaves are around 2.5 metres high. Given the limited space available between the fence and the flank wall of his property, it is unlikely that he would wish to erect a larger shed there. In these circumstances, the fall-back position, in terms of the potential for outbuildings to be erected or tall trees planted does not outweigh my concerns about the existing fence.
19. Notwithstanding my conclusion on the first main issue, and having regard to all other matters raised, I am satisfied that the appeal should be dismissed on the basis of the harm to neighbours' living conditions.

### **Ground (f)**

20. The appellants suggest that a reduction in height to somewhere between 2m and 2.25 would overcome any harm. I accept that a fence will not necessarily be harmful just because it exceeds the PD limit of 2m. However, in this particular location, given the close relationship with habitable room winds, I have already indicated that even a 2m fence has some negative impact.
21. I am not therefore persuaded that lesser steps would remedy the harm and the appeals on this ground must fail.

### **Ground (g)**

22. This ground is that more than 1 month should be allowed to remedy the breach and in fact a period of 3 months is requested. The appellants refer to future commitments and planned holidays but provide no details, including the dates of any absences. In any event, the works required to remove the 5 trellis panels to comply with the notice are minor in nature. I am satisfied that it is

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<sup>1</sup> There are however no affected ground floor windows in the flank elevation of the appellant's house.

reasonable to require compliance within 1 month and therefore ground (g) must also fail.

## **Decisions**

### **Appeal A: APP/G5180/C/17/3169385 and**

### **Appeal B: APP/G5180/C/17/3169388**

23. The enforcement notice is corrected by deleting the requirement in section 3 and substituting: "Without planning permission, the erection of 5 fence panels incorporating an open wooden trellis on top, having an overall height of approximately 2.5 metres, and located along that section of the common boundary between the northern flank elevation of No 78 Manor Way and the southern flank elevation of No 76A Manor Way." Subject to this correction the appeals are dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made on appeal A under section 177(5) of the 1990 Act as amended.

*J A Murray*

INSPECTOR