



Appeal Decisions

Site visit made on 23 September 2019

by JP Roberts BSc(Hons) LLB(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 October 2019

Appeal A Ref: APP/W1850/C/19/3223647

Appeal B Ref: APP/W1850/C/19/3223648

37 Scotch Firs, Fownhope, Hereford HR1 4NP

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mr Carwyn Thomas against an enforcement notice issued by Herefordshire Council.
 - Appeal B is made by Mrs Catherine Thomas against an enforcement notice issued by Herefordshire Council.
 - The enforcement notice was issued on 30 January 2019.
 - The breach of planning control as alleged in the notice is:
Without planning permission, unauthorised operational development in the erection of a timber fence in excess of one metre in height adjacent to the highway on the Land shown in the approximate position marked as X on the plan attached to the Notice. The unauthorised development has taken place within the last four years and is therefore not immune from enforcement action.
 - The requirements of the notice are:
Reduce the height of the fence forming the unauthorised development to a height of no more than one metre from ground level.
 - The period for compliance with the requirements is 120 days.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a),(c) and (f) of the Town and Country Planning Act 1990 as amended.
 - Appeal B is proceeding on the grounds set out in section 174(2) (c) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decisions

1. It is directed that the enforcement notice be corrected by the deletion of the entire second sentence in the description of the alleged breach. Subject to this correction, the appeals are dismissed and the enforcement notice is upheld, and, in respect of Appeal A, planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Costs application

2. An application for an award of costs has been made by Mr Carwyn Thomas and Mrs Catherine Thomas against Herefordshire Council. This application is the subject of a separate decision.

Procedural matter

3. The second sentence in the description of the alleged breach refers to the development having taken place within the last 4 years and is not immune from enforcement action. This is not part of the description of the breach and duplicates what is said in the reasons for issuing the notice. I shall therefore correct the notice by deleting this sentence; no injustice to any party would be caused by my doing so.

Ground (c) – that there has not been a breach of planning control

4. The appellants argue that the fence is a replacement for one that previously existed on the site, in the same position, and approximately the same height (or even slightly lower than the previous fence). Thus, they argue that planning permission is not required as it is a like for like replacement. It is not disputed that the fence is erected in the same position as the previous fence.
5. Class A of Part 2 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. Paragraph A.1 says that 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 –
 - (i) (applies to schools only)
 - (ii) in any other case 1 metre above ground level.
 - (b) the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2 metres above ground level;
 - (c) the height of any gate, fence, wall or other means of enclosure maintained, improved or altered would, as a result of the development, exceed its former height or the height referred to in paragraph (a) or (b) as the height appropriate to it if erected or constructed, whichever is the greater;
 - (d) (applies to the development within the curtilage of a listed building).
6. Thus, the erection of a new fence greater than 1m in height adjacent to a highway used by vehicular traffic would fall outside of the permitted class of development. However, an altered or improved fence is permitted so long as it would not exceed its former height or, if greater, the limits referred to in A.1(a) or (b).
7. In this case, the fence is a complete replacement of the one which formerly stood there. New concrete fence posts were erected and concreted in new footings, and completely new close-boarded fencing was fitted to the posts. There is no suggestion that this was done other than as a single operation. Accordingly, the development cannot be considered as an alteration or improvement, as those terms suggest that there is a pre-existing development which has been altered or improved. Here, nothing remains of the previous fence and the whole of the development is new development. Thus, the fence falls within the category of development not permitted under A.1(a)(ii).

8. Section 55 of the Act deals with the definition of development, and at s.55(2) says that:

The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—

(a) the carrying out for the maintenance, improvement or other alteration of any building of works which—

(i) affect only the interior of the building, or

(ii) do not materially affect the external appearance of the building,

and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground.

9. My reasoning in respect of the GPDO applies here as well. There is nothing left of the original fence (the building of works) to improve or alter, and therefore the erection of the new fence constitutes a fresh act of development.
10. Accordingly, there has been a breach of planning control and the appeals on ground (c) therefore fail.

Appeal on ground (a) – that planning permission should be granted

Main Issue

11. The effect of the development on the character and appearance of the surrounding area which lies within an Area of Outstanding Natural Beauty (AONB).

Reasons

12. Scotch Firs is a small residential estate, set on a hillside, accessed from the main road which runs through Fownhope. The estate comprises a mix of bungalows and two storey houses. The boundary treatments are varied, but those fronting the highway are generally composed of low walls in brick or stone, some retaining banks behind, whilst others have hedges above, or are wholly formed of hedging. Whilst there are some close-boarded fences of a height of 1.8m or so on return boundaries, there are none directly fronting the highway, apart from the appeal example.
13. The appeal property is a two-storey house which lies on the corner of two limbs of Scotch Firs. The fence subject of the notice is about 2m high, set back from the back edge of the footway by about 0.3m, and it runs along most of the roadside side boundary together with two return stretches, one separating the rear garden with that of 38 Scotch Firs, and the other roughly in line with the front elevation of the house.
14. The combination of the length, height, colour and uniformity of fence gives it a harsh, dominant appearance in a prominent location, which is out of keeping with the means of enclosure found elsewhere fronting the road in Scotch Firs. The use of low walls and hedges gives Scotch Firs a green and open appearance, which makes a valuable contribution to the overall pleasant look of the estate. I consider that the fence harms the attractiveness of the estate and, if permitted, would make it difficult for the Council to prevent further

harmful examples to the detriment of the character and appearance of Scotch Firs. In this regard, I largely share the views of the Inspector who dealt with an appeal proposal¹ for a wall and fence on the same site. Whilst acknowledging that that appeal dealt with a higher fence and a wall, I nevertheless consider that the Inspector's findings, that it would appear overly dominant, incongruous and suburbanising, and would appear harsher and over-engineered in comparison with the leafier and more spacious nature of front gardens in the vicinity, are also applicable here.

15. The harm that I have found is localised as the site is very much part of the built-up area of Fownhope. Thus, the fence has no material effect on the scenic beauty of the AONB.
16. I have had regard to the previous fence which stood on the site. However, that was largely hidden by the conifer hedge which was planted between the fence and the footway. The appellant says that it is his intention to plant shrubs in the gap between the fence and the footway. No planting plans, or suggestions of species have been provided, and in my judgement, the small size of the area available for planting, in terms of its distance between the fence and the edge of the footway, and the amount of space already occupied by concrete footings, means that it is unlikely that a robust hedge could be quickly established sufficient to mitigate the harm that is caused by the appearance of the fence.
17. I also recognise that the former conifer hedge along the boundary was in poor condition and overhung the footway and may have been a hindrance to passage. Even so, this does not justify what I consider to be a damaging replacement which fails to respond positively to the attractive and distinctive context of the appeal site.
18. There are walls and fences that abut the highway in other parts of the village, and a number of examples have been referred to me. In some cases, such as the brick wall on the main road not far from the junction of Scotch Firs, the traditional village street context is very different from the planned estate layout of Scotch Firs. Other instances referred to me indicate to me that they are not good examples to follow.
19. I have also taken into account the fallback alternatives, utilising the rights under the permitted development provisions referred to above. Thus, a 2m fence high fence could be erected in a position which would not abut the highway. However, I consider that the fence as erected would, because of its dominance, be clearly more harmful than a 2m high fence set further back from the highway. A 1m high fence could be erected in the same position as the current fence but the requirements of the notice reflect this fallback position.
20. I have considered whether conditions could be imposed to make the development acceptable. As explained above, planting would not adequately mitigate the harm that I have found. A condition to require the fence to be reduced in height somewhere between its current height and the 1m height sought by the notice would still result in an incongruous and harmful appearance. Nor would painting or staining the fence overcome my objections. No other conditions have been suggested to me, and none would bring the fence into an acceptable condition.

¹ Ref: APP/W1850/D/3164557

Other matters

21. I have had regard to the extent of support for the fence which has been offered by local residents and the Parish Council. However, having regard to the importance that is attached to good design in the Revised National Planning Policy Framework, this support is insufficient to overcome the strong planning objections to the fence. The requirement of the enforcement notice to reduce the height of the fence which encloses a private garden of a family home engages with the rights of the appellants' and their family to respect for their family life and their home under Article 8, as well as the right to respect for property, under Article 1 of the First Protocol, which are Convention rights enshrined into UK law by the Human Rights Act 1998. However, these rights are not absolute, and interference may be justified in the public interest. In this case, upholding national and local planning policy, and the importance of good design are matters of legitimate public interest. There are no lesser steps which could be taken to meet the policy objectives, and whilst I recognise that the interference with the appellants' rights and those of their family would be significant, the burden of complying with the enforcement notice would be necessary and would not be disproportionate.
22. I therefore conclude that the fence causes material harm to the character and appearance of the surrounding residential area, and conflicts with Policy SD1 of the Herefordshire Local Plan Core Strategy, which deals with sustainable design and energy efficiency. It also conflicts with Policy FW 16 of the Fownhope Neighbourhood Plan which deals with design criteria, and specifically discourages hard and soft landscaping which results in a suburbanised appearance, giving timber board or panel fencing as an example. Accordingly, planning permission should not be granted, and the appeal on ground (a) fails.

Appeal on ground (f) – that the requirements of the notice are excessive

23. Section 173(4) of the Act sets out the purposes which the steps required to be taken in an enforcement notice may achieve. They are:
- (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
 - (b) remedying any injury to amenity which has been caused by the breach.
24. Rather than require the breach of planning control to be remedied in its entirety, the notice requires that the fence be reduced to a height that would accord with the deemed planning permission granted under Class A of Part 2 of Schedule 2 of the Order. Accordingly, the steps required do not exceed what is required to make the development comply with the terms of the deemed planning permission. The appellants have not said what lesser steps they feel should be specified, and none are apparent to me. I have explained above why conditions would not overcome the harm I have found, and therefore there are no lesser steps which would be appropriate in the circumstances of the case.
25. I therefore conclude that the requirements of the notice are not excessive, and that the appeals on ground (f) fail.

Overall conclusion

26. For the reasons given above, I conclude that the appeals on grounds (a), (c) and (f) should be dismissed, and that, subject to correction, the notice should be upheld.

JP Roberts

INSPECTOR