



Appeal Decision

Site visit made on 13 January 2020

by B M Campbell BA(Hons) MRTPI

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

Decision date: 27th January 2020

Appeal Ref: APP/U1430/C/19/3225600

Church Cottage, Parsonage Lane, Icklesham, East Sussex TN36 4BL

- 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 N Du Pre against an enforcement notice issued by Rother District Council.
 - The enforcement notice was issued on 18 February 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a timber close boarded fence on the Land over 1 metre high adjacent to a highway used by vehicular traffic.
 - The requirements of the notice are to:
 - i) Reduce the height of the fence on the Land to 1 metre.
 - ii) Remove from the Land all materials and debris resulting from step (i).
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Formal Decision

1. The appeal is dismissed and the enforcement notice is upheld.

The appeal on ground (b)

2. The ground of appeal is that the matter alleged has not occurred. The Appellant infers that the allegation, which reads "the erection of a timber close boarded fence on the Land over 1 metre high" is in fact referring to the land being over 1 metre high. His argument is that none of the land is over a metre high.
3. It is well established that the test for the validity of an enforcement notice is whether it tells the person on whom it is served fairly what he has done wrong and what he must do to remedy it. Taking the notice as a whole there is no doubt that the ordinary man in the street would know that it is the fence that is being attacked. Indeed, there is no misunderstanding on the Appellant's part as his case is concentrated on the fence. I find the argument to amount to a matter of hair-splitting technicality which the Courts have, in recent years, sought to discourage.
4. The Appellant also claims that what has been undertaken falls within the description of altering, improving maintaining or repairing an existing fence. I have no reason to doubt the Appellant when he says there was a pre-existing fence, nor that it was of the same height as that now existing. In this respect I have also noted the content of the letter from the contractor who carried out the work. However, what I saw at my visit was, in my judgement, an entirely

- new fence supported on new timber posts. The fact that the pedestrian gate and the posts which support it might be original does not change my view.
5. The base of some timber posts which might have formed part of a pre-existing fence were drawn to my attention during my visit, but these were not attached to the new fence and, even if they had been, that would not have been sufficient to indicate that what had been undertaken was a repair rather than a replacement fence. Indeed the old fence posts, located inside the boundary wall, suggest that any pre-existing fence was located along the inside edge of that wall whereas the new fence is located along the outer edge of the boundary wall with the supporting fence posts outside the wall along the road frontage.
 6. In my judgement, from the evidence before me and from my observations at my visit I find, as a matter of fact and degree, that what has occurred is the erection of a new timber close boarded fence as alleged. The Appellant has failed to demonstrate otherwise and in an appeal on legal grounds such as this the onus is on the appellant to make out his case. The appeal on ground (b) fails.
 7. I have noted the Appellant's argument that there was no "well-established mixed shrub and hedge line" removed as described in paragraph 4 of the notice but rather a dilapidated fence covered in ivy. That might well be so, but that description does not form part of the alleged breach. The breach is the erection of a new fence and does not include the removal of whatever was there previously. Whilst the pre-existing situation might have been relevant had planning merits fallen to be considered in comparing what was there before with what is there now; no ground (a), that planning permission should be granted, has been brought. For similar reasons the comments made about the appropriateness of the current fence and comparison with others in the vicinity are not relevant to the grounds of appeal brought.

The appeal on ground (c)

8. The ground of appeal is that the matter alleged does not constitute a breach of planning control. In this respect the Appellant claims that planning permission was not required as the height of the fence has not been increased.
9. First of all, the work undertaken comprises operational development within the meaning of section 55 of the Act for which planning permission is required. However, Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) grants planning permission for classes of development described as permitted development in Schedule 2.
10. Part 2 of Schedule 2 addresses "Minor operations" and Class A permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. That, however, is subject to certain limitations. In this case paragraph A.1(a)(ii) is applicable and that says development is not permitted if the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic exceeds 1 metre above ground level. As the fence exceeds 1 metre above ground level it is not permitted by this Class.
11. The Appellant relies on paragraph A.1(c) of Class A which, in essence, provides for the maintenance, improvement or alteration of any gate, fence, wall or

other means of enclosure provided its former height is not exceeded. However, that provision is not relevant here since in my consideration of the appeal on ground (b) I have found that what has been undertaken is the erection of a new fence (albeit that it might be a replacement) and not the maintenance, improvement or alteration of an existing fence.

12. The erection of the fence amounts to development requiring planning permission and no such permission has been granted either by way of the GPDO or by the grant of an express permission. The appeal on ground (c) fails.

The appeal on ground (d)

13. The ground of appeal is that at the time the notice was issued, it was too late to take enforcement action. Section 171B(1) of the Act states that for operational development, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed. The fence would, therefore, have had to have been substantially complete by 18 February 2015. For the reasons already given I do not accept that the fence now existing on the site has been there more than 20 years as claimed by the Appellant.
14. The work was undertaken in December 2017 as is confirmed in the letter dated 17 December 2017 from the firm who carried it out. The new fence which I saw was not, therefore, substantially complete more than four years before the issue of the notice and the appeal on ground (d) therefore fails.

The appeal on ground (f)

15. The ground of appeal is that the steps required by the notice to be taken exceed what is necessary. The alternative to the specified requirement suggested by the Appellant is to soften the appearance of the fence with foliage. That would be more appropriate as a condition that might have been attached to a planning permission granted had an appeal on ground (a) been brought and the planning merits of the development considered.
16. As it is, the steps specified in the notice do not require the breach to be remedied as it is the whole fence that is unauthorised and not just that part in excess of what might have been erected as permitted development.
17. The Appellant says the requirement to reduce the height of the fence is unclear but it does not seem to me to be so. On an ordinary reading, the step requires the height of the fence itself to be reduced to 1 metre. Whilst from the representations made by the Council it would appear that the intention was to require the combined height of the wall and fence to be reduced to no more than 1 metre above ground level, that is not what is specified.
18. The appeal on ground (f) fails.

Other matters

19. I note from the representations made by the Appellant that he feels aggrieved with the way in which he has been treated by the Council. However, this is a private matter between the two parties and one with which I cannot become embroiled. My remit is to determine the appeal on the specific grounds brought.

20. I note the Appellant's argument that he doubts the Council had due regard to his Human Rights in deciding to take enforcement action but that is not a matter for me. As far as this appeal is concerned, the Appellant's Human Rights are not engaged insofar as the legal grounds of appeal (b), (c) and (d) are concerned since there is no discretion to be exercised; the decision on each is a matter of law which neither creates or removes rights. With regard to the appeal on ground (f), section 173(3) and (4) of the Act enable the Authority to specify steps to remedy the breach. However, in not requiring the whole unauthorised fence to be removed, the Council has required less than a complete remedy which seems to me to be a proportionate response.
21. I have had regard to all other matters raised in the written representations made but there is nothing which leads me to conclude otherwise than that the appeal should be dismissed and the notice upheld.

B M Campbell

Inspector