
Appeal Decision

Site visit made on 28 January 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 21 February 2020

Appeal Ref: APP/N5090/C/19/3232539

Land at 62 Crescent Road, Barnet EN4 9RJ

- 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 Yianni Zertalis against an enforcement notice issued by the Council of the London Borough of Barnet.
- The enforcement notice was issued on 23 May 2019.
- The breach of planning control as alleged in the notice is without planning permission the erection of a fence in excess of 1 metre in height adjacent to the highway.
- The requirements of the notice are: -
 1. Reduce any part of the front fences which are within 2m of the public footpath to a height of no more than 1m.
 2. Permanently remove all constituent materials resulting from the works listed above from the property.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b) and (c) of the Town and Country Planning Act 1990 as amended (the 1990 Act).

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with corrections.

The Notice

1. On an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority. It may be the case that defects are too fundamental to be corrected without causing injustice, leading to the notice being quashed.
2. I observed at my site visit that there are a number of fences within the appeal site that are in excess of 1 metre in height adjacent to the highway. As such, I consider that there could be uncertainty as to which fence/fences the breach of planning control within the enforcement notice relates to. Therefore, I requested the Council's comments on what corrections would be required to the notice, in its opinion, to make it clear which fence/fences the enforcement notice relates to.
3. The Council provided a copy of an aerial photograph with coloured lines marked on it and stated that the description of the alleged breach could be corrected to state "*without planning permission the erection (in the rough location of the yellow line on the attached photograph) of a fence in excess of 1 metre in height adjacent to the highway.*" I consider that to be more precise the word 'rough' within that suggested correction should be replaced with the word

'approximate' and subject to this it would clarify which fence the enforcement notice relates to. The appellant was given the chance to comment on the Council's response and confirmed that the fence fronting onto Crescent Road was the fence that they understood formed part of the enforcement notice. I therefore intend to add the wording '*in the approximate location of the yellow line on the attached photograph*' between the words 'erection' and 'of' in the description of the alleged breach. I also intend to attach a copy of the aerial photograph to the enforcement notice. I consider that I can carry out these corrections without injustice to either party.

4. I also consider that requirement 1 of the enforcement notice needs to reflect the description of the alleged breach and it requires clarification in relation to the works required to the fence. Therefore, I intend to delete the wording '*front fences which are*' and replace it with '*fence which is*'. The Council have confirmed that the intention of the notice is to reduce the height of the fence to one metre above ground level so that it would accord with the deemed planning permission granted under Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). As such, I intend to add the wording '*above ground level*' at the end of requirement 1 so that it reflects the wording of the GPDO. I consider that I can carry out these corrections without injustice to either party.

Procedural Matters

5. The Council's Statement of Case highlighted that the appellant's evidence with regard to the ground (b) appeal could be considered as a ground (c) appeal. Both parties have had the chance to submit evidence and comments on this matter and therefore, no injustice would be caused to them. I have dealt with the appeal on this basis.
6. The reasons for issuing the enforcement notice cite Policy DM01 of the Barnet Development Management Policies document but I have not been provided with a copy of that document. As such, I cannot take it into account and I have dealt with the appeal on this basis.

The ground (b) and (c) appeals

7. The issue under ground (b) is whether or not the breach of planning control alleged in the enforcement notice has occurred as a matter of fact. The appellant must therefore demonstrate that a fence in excess of one metre in height adjacent to the highway has not been erected. An appeal on ground (c) is a claim that the fence does not constitute a breach of planning control.
8. The burden of proof in appeals on grounds (b) and (c) falls to the appellant, and the test of the evidence is on the balance of probability.
9. During my unaccompanied visit I noted that a horizontal slatted fence, the subject of the notice, has been erected above a rendered wall and that parts of that fence are within close proximity of a pavement that is alongside the carriageway of Crescent Road. There is no dispute that the fence is adjacent to a highway. The appellant has stated that the height of the fence is 1.8 metres above the finished level of the garden and the Council have stated that it is around 2 metres in height. As such, I conclude as a matter of fact, that a fence in excess of one metre in height adjacent to a highway has been erected, as alleged in the notice, and the appeal on ground (b) must therefore fail.

10. The appellant's case is that the fence is a replacement for one that previously existed on the site, in the same position, and approximately the same height. Thus, it is argued that planning permission is not required as it is a like for like replacement. Photographs of the previous boundary treatment have been submitted to support this argument. However, from the photographs it is not entirely clear if a fence constituted part of the boundary treatment fronting Crescent Road due to the mature landscaping that appears within the photographs.
11. In any case the appellant has stated, in correspondence with the Council, that an existing fence with shrubbery and a tall tree were removed in order to rebuild the boundary retaining wall, which was unstable due to root growth of the tree. It is also stated that new foundations and a new retaining wall were erected to the level of the existing garden and on completion a new fence was put up.
12. Class A of Part 2 of Schedule 2 to the GPDO 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).
13. 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).
14. In this case, the fence is a complete replacement of the boundary treatment which previously existed above a retaining wall that fronted this part of Crescent Road. It is not disputed that a new retaining wall was erected with new foundations, and a completely new fence was erected above that retaining wall. Therefore, even if there was a fence above the previous wall on this frontage there is no dispute that a whole new fence was erected on top of the retaining wall. 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.

15. There is no dispute that the fence, the subject of the notice, is in excess of one metre in height and is adjacent to a highway used by vehicular traffic. Thus, the fence falls within the category of development not permitted under A.1(a)(ii). Since the development is not “permitted development” and does not benefit from any other planning permission it constitutes a breach of planning control. Therefore, the appeal on ground (c) must also fail.

The ground (a) appeal and deemed planning application

Main Issue

16. The main issue is the effect of the development on the character and appearance of the area.

Reasons

17. The appeal property is a dwelling which lies on the corner of Crescent Road and Margaret Road. It is located in a mainly residential area which has a distinct urban grain and is characterised by predominantly semi-detached and detached traditional dwellings. The properties are set back from the road and have modest enclosed front gardens and driveways. The boundary treatments are varied, but the frontages of those gardens are generally composed of low walls in brick or stone, some have hedges above, or are wholly formed of hedging. There are some fences of a height of around 2 metres on return boundaries and where a side boundary to a property is adjacent to a highway as to the Margaret Road frontage of the appeal site. Nevertheless, the generally low walls and hedges to the frontages and gardens convey a sense of space and help to soften the urban grain.
18. The fence, subject of the notice, is about 1.8 to 2 metres high, set above a rendered wall that is around one metre in height, on the frontage to the dwelling’s garden with Crescent Road and the dwelling’s driveway. As such, the overall height of the fence in combination with that of the rendered wall appears to be between 2.8 and 3 metres. This has resulted in a dominant structure in a prominent location that appears appreciably taller than the majority of boundary treatments on other frontages that are in the vicinity of the site. Moreover, the length and position of the fence, adjacent to the footway, presents an enclosed frontage to passers-by, which contrasts markedly with the sense of space that characterises the frontages of nearby dwellings. Consequently, the fence is a dominant and incongruous feature that appreciably harms the character and appearance of the area.
19. I have had regard to the previous boundary treatment which stood on this part of the appeal site. However, any fence that was on this boundary appears to have been largely hidden by landscaping. The appellant says that it is his intention to cover the fence with honeysuckle, jasmine and climbing clematis. It is also stated that a hedge is to be planted behind the fence and with the intention that when it has reached a safe height that the fence can be removed or reduced to one metre in height. In my judgement, any planting would have to be on the garden side of the fence given the position of the fence in relation to the retaining wall. In addition, whilst climbing plants may eventually help to soften the appearance of the fence, they would not mitigate the overall height and sense of enclosure imparted by it.

20. I have taken into account the advice provided in the Council's Design Guidance Note No:9 Walls, Fences and Gates (1994) which suggests that any fencing should consider the boundaries that already exist in the locality.
21. I have also taken into account the fallback alternatives, utilising the rights under the permitted development provisions referred to above. Thus, a fence that does not exceed 2 metres in height above ground level could be erected in a position which would not be adjacent to the highway. However, I consider that the fence as erected is, because of its dominance, clearly more harmful than such a fence as it would be set further back from the highway. Moreover, even though a similar design of fence has been installed on the Margaret Road boundary the wall below it is not as tall as the retaining wall on the Crescent Road frontage. In addition, there appears to have been a fence on that boundary prior to the existing fence being installed and that fence forms a side return rather than the frontage to the site. As stated above, the requirements of the enforcement notice are intended to reflect the permitted development rights for a fence adjacent to a highway.
22. I appreciate the appellant's desire to provide a private, safe and secure place for anyone using the garden. Due to the dwelling's location at the road junction the main garden area for the dwelling appears to be to its side rather than its rear. I recognise that there is often a difficulty in achieving these aims within gardens for properties situated on corner plots, as is the case here. However, it appears to me that these aims could be achieved by enclosing a smaller area of the garden, with fencing that was not adjacent to the highway or by planting a hedge.

Other matters

23. No conditions have been suggested by either party that could be imposed to mitigate the harm identified above.
24. I have noted the points made by the appellant about the Council's handling of the matter. However, these points have not affected my decision, which is based on the planning merits of the proposal.
25. The references to other development plan policies have been noted. However, the development plan policies to which I have referred are considered the most relevant to this appeal.

Conclusion

26. For the reasons given above and taking into account all other matters raised, I conclude that the fence has caused appreciable harm to the character and appearance of the area. It follows that the development conflicts with Policy 7.4 of the London Plan and Policy CS5 of the Barnet's Local Plan Core Strategy that seek high quality design that preserves or enhances local character. In this case, there are no material considerations of sufficient weight to indicate that the appeal should be determined other than in accordance with the development plan.
27. In view of the above, I conclude that the appeal on ground (a) must fail. I shall uphold the enforcement notice with corrections and refuse to grant planning permission on the deemed application.

Formal Decision

28. It is directed that the enforcement notice be corrected by: -

- Adding the wording '*(in the approximate location of the yellow line on the attached photograph)*' between the words 'erection' and 'of' in the description of the alleged breach;
- Attaching a copy of the aerial photograph, annexed to this decision, to the enforcement notice;
- Delete the wording '*front fences which are*' and replace it with '*fence which is*' in requirement 1;
- Add the wording '*above ground level*' at the end of requirement 1.

29. Subject to these corrections the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act.

D. Boffin

INSPECTOR



Aerial Photograph

This is the plan referred to in my decision dated: 21 February 2020

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Scale: Not to scale

