
Appeal Decision

Site visit made on 11 March 2020

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 24 March 2020

Appeal Ref: APP/G5750/C/19/3223843

Land at 47 Hatherley Gardens, East Ham, London E6 3HG

- 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 Ms Aldona Rusiene against an enforcement notice (EN) issued by the London Borough of Newham (the LPA).
 - The enforcement notice, numbered 18/00819/ENFC, was issued on 1 February 2019.
 - The breach of planning control as alleged in the notice is the '*erection of additions to existing boundary treatments*'.
 - The requirements of the notice are as follows:
 1. Demolish the additions to the existing boundary treatments (as shown in the approximate locations, delineated in blue on the attached plan and as shown edged in yellow, on the photographs attached at Appendix 1).
 2. On completion of step 1 above, remove all materials and debris from the site.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on grounds (c), (d) and (f) as set out in section 174(2) 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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Decision

1. The appeal is dismissed. See formal decision below.

Matters of clarification

2. Because there is no appeal on ground (a) and the deemed application does not, therefore, fall to be considered, I am not empowered to deal with the question of whether or not the boundary treatment fencing works, as carried out, should be granted planning permission. I can only consider whether or not the works constitute a contravention of planning control; whether or not the LPA was precluded from taking enforcement action and whether or not the requirements of the notice are excessive and that lesser steps would overcome the objections.

Background information

3. The appeal site is located on the eastern side of Hatherley Gardens, which links Lonsdale Avenue to the south, with Central Park Road (the B167) to the north. The property is a two-storey, terraced, dwelling house and the immediate area is characterised by houses of similar age and style. The Council indicates that the site has no specific designation within the Newham Local Plan (NLP) Policies Map and that it does not lie within a conservation area or close to any listed building. The relevant planning history of the property is set out in the Council's Delegated Report dated 25 January 2019 and there is no dispute about the details. None of the other enforcement or planning references are directly relevant to this appeal.

4. The boundary treatment, the subject of the EN, comprises timber fencing (with planting) which has been positioned at the rear of the property, along its northern and southern boundaries. It builds upon, and is in addition to, the existing fencing along the boundary to the property. The unauthorised fencing has been built approximately to a height of 5m, on top of an existing wall.

5. This has resulted resulting in an excessively high boundary treatment and the height varies as it runs along, from east to west, across both boundaries. It is described by the Council as '*abnormal when compared with the rest of the properties within the terrace which, in general, present timber fencing within the tolerances of Permitted Development (2m)*'. It is clearly visible from Haldane Road.

6. Both the Council and the appellant have referred to relevant planning policies. These include policies contained within the London Plan (LP) and Newham Local Plan (NLP). The policies in the LP are policies 7.1 and 7.4 which, in turn, relate to the principles of design and the requirement for development to have regard to the form, function and structure of an area, place or street, as well as to the scale, mass and orientation of surrounding buildings. The relevant policies within the NLP include policies S6, SP1, SP2 and SP3 and these all echo the same principles of the LP policies.

7. However, the merits of the development do not fall to be considered and, as indicated above, I am not empowered to consider whether or not planning permission should be granted for the additional height boundary fencing as erected. Thus the policies are not directly relevant to my considerations of the grounds pleaded. Grounds (c) and (d) are made on legal grounds only and the appeal on ground (f) is simply made on the basis that the requirements are excessive.

The appeal on ground (c)

8. To be successful on this ground the onus is upon an appellant to conclusively show that there has not been a contravention of planning control. It must be shown, therefore, either that there is a planning permission in place for the development carried out (the erection of additions to the boundary treatment), or that one is not required in the first instance. This might be because the works constitute permitted development (PD). As indicated above the merits of the case are not considered.

9. Clearly, there is no planning permission in place and this is not in dispute. The next question, therefore, is whether or not the works as carried out constitute '*permitted development*' under the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). The relevant section of the GPDO is Schedule 2, Part 2, Class A (gates, fences, walls etc). The appellant's case under this ground is simply that the fence was built to protect the territory from trespassers and that it is not considered to be excessive in terms of its height or construction.

10. However, the GPDO specifies that the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is not permitted if 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 would exceed 2 metres above ground level. As erected the additional boundary fencing (trellis type) which I noted during my site visit, has a total height which is more than double the 2m height allowed under the GPDO.

11. Therefore, the extension to the boundary treatment to the appellant's property does not meet the requirement as set out in the GPDO and cannot, therefore, constitute permitted development. It follows that there has been a contravention of planning control and so appeal cannot succeed on ground (c).

The appeal on ground (d)

12. To be successful on this ground the onus is upon the appellant to conclusively show that the development (the extension in height of the boundary treatment) was carried out more than 4 years before the LPA issued the enforcement notice and that it had been in place for a continuous 4 year period commencing on 1 February 2015 (the relevant date): that is, 4 years prior to the issue of the notice.

The gist of the case for the appellant

13. The appellant states that the fence was erected more than 4 years ago and that this is confirmed by receipts for the materials used. There are 4 receipts all dating back to April 2012. They are all from the same supplier and are receipts for Studwork Timber; a Bristol Panel; a Fence Post; Deck Post Ball; Deck Post Flat and a Skeleton ? element which is not clear from the receipt provided. It is also stated that the fencing was erected for security reasons, soon after thieves broke into the house. As this happened more than 4 years ago it is contended that, in accordance with section 171(B)(1) of the Act, no enforcement action could be taken by the Council.

The gist of the case for the Council

14. The Council indicates that aerial images provided within the Officer's Report indicate that the boundary treatments were erected after 1 February 2015. The Council also refers to a letter submitted by the appellant during the initial enforcement investigation. This confirms that the robbery happened 2 years ago and with the letter dated 17 October 2018 suggests that the boundary additions were erected during 2016 and not prior to 1 February 2015. In addition the Council stresses that the initial complaint was only received by the Council on 24 September 2018.

My assessment

15. Having seen the additions to the boundary which are the subject of the notice, as well as other fencing elements along the boundary, I do not consider, on the balance of probabilities, that the appellant has conclusively demonstrated that the additions to the boundary the works were carried out on or prior to 1 February 2015. Whilst acknowledging that the receipts show materials purchased in April 2012, there is no proof that these were the exact materials used to extend the boundary treatment. In referring to these receipts for materials the appellant states that '*just the back patio fence was built later after the theft incident*'. It is this back patio fence (trellis type) which is the subject of the enforcement notice.

16. The timber studding, fence posts and the fence panel purchased at that time could well have been used for other parts of the boundary. A Bristol fence panel is usually of more solid construction than the open lattice fencing which is the subject of the notice. The discrepancies relating to the burglary and the previous letter reinforce my conclusion that the works as carried out could not have been in place for a continuous 4 year period, commencing on or before 1 February 2015.

17. In conclusion, therefore on this ground of appeal, I consider that the LPA was not precluded, under the 4 year rule, from taking enforcement action against the works carried out to extend the boundary treatment at the appeal property. The appeal also fails, therefore, on ground (d).

The appeal on ground (f)

18. The appellant considers that the removal of the fencing is overly excessive and that the effect could be nullified by alterations to the additions to the boundary and that in doing so this would avoid the '*death of plants living on the additions*'. However the Council refers to section 173 of the Act and indicates that the purpose of the

notice was to '*remedy the breach of planning control that has occurred*'. In this respect it is contended that the only remedy is to demolish the existing boundary treatments. It is not accepted by the Council that any lesser steps would overcome the objective of remedying the breach of planning control.

19. Having considered the appeal on this ground I acknowledge that the appellant has referred to the effect being nullified by alterations. However, no such alterations are specified and, even if they had been, it is my view that anything less than the demolition of the additions to the boundary, would not remedy the breach of control. It follows, therefore, that the appeal must also fail on ground (f). Whilst sympathising with appellant's concerns regarding security and the possible loss of the planting, these matters are not sufficient justification, in my view, to allow retention of the excessively high trellis fencing.

Overall conclusion

20. The works carried out do not benefit from any planning permission and do not constitute permitted development. There is insufficient evidence to indicate that the works (the high boundary trellis fencing) are lawful by virtue of them being in place for the relevant and necessary 4 year period and I have found that lesser steps would not overcome the harm caused by the breach of planning control. The appeal fails, therefore on all three grounds pleaded.

Other matters

21. In reaching my conclusions on the grounds of appeal I have taken into account all of the other submissions made by the appellant, the Council and the neighbour (at No 49 Hatherley Gardens) who supports the appellants case. On this latter point I accept that the neighbour is satisfied that the works do not breach any of his rights; do not cause any discomfort; protect other gardens from trespassers and improve the beauty of the neighbourhood. However, most of these are merit points and do not go to the heart of the arguments relating to grounds (c), (d) and (f).

22. I have also noted the appellant's final comments which include reference to the neighbour at No 1 Haldane Road and the taking of photographs; the accusation that the appeal works place that property at risk and the fact that the neighbour has not mentioned any issues regarding the fencing since 2012. However, these do not assist me in my deliberations of the grounds pleaded. Nor is any other matter of such significance so as to alter my conclusions on each ground of appeal or to change my decision that this appeal should be dismissed.

Formal Decision

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

Anthony J Wharton

Inspector