



Appeal Decisions

Site visit made on 18 May 2020

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

an Inspector appointed by the Secretary of State

Decision date: 26 May 2020

Appeal Ref: APP/J1860/C/19/3233537 and 3233538

Appletree Cottage, Hereford Road, Leigh Sinton, Malvern WR13 5DS

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Paul Dolphin and Mrs Kate Dolphin against an enforcement notice issued by Malvern Hills District Council.
 - The enforcement notice was issued on 28 June 2019.
 - The breach of planning control as alleged in the notice is:
Without planning permission, the unauthorised erection of a wooden fence in the approximate position as marked in green on the attached plan.
 - The requirements of the notice are:
 1. *Remove the wooden fence as approximately marked green on the attached plan.*
 2. *Lawfully remove all resulting materials from the Land as edged red on the attached plan and reinstate the Land to its condition before the breach took place.*
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be varied by adding the words at the end of paragraph 5.1 "or reduce the fence in height so that it does not exceed 1m in height above ground level", and by substituting for the period of compliance "4 months" in place of "2 calendar months". Subject to these variations 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 as amended.

Reasons

Appeal on ground (c) – that the matters stated in the notice do not constitute a breach of planning control

2. The fence in question has been erected on either side of a vehicular access to the property from Hereford Road, the vast majority of which is alongside the boundary with the footway, and adjacent to the carriageway of Hereford Road.
3. There is no dispute that the fence comprises operational development. Rather the disagreement is whether part of it is lawful. Part 2 of Schedule 2 and Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 permit the erection, construction, maintenance or alteration of a gate, fence, wall or other means of enclosure. Paragraph A.1 provides that 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 would, after the carrying out of the development, exceed 1m above ground level.

4. All of the fence exceeds 1m in height above ground level, but the appellants argue that not all of the fence is adjacent to a highway used by vehicular traffic, in that there are splayed sections of the fence which are angled away from the road, immediately on either side of the access, with the furthest parts being about 5m away from the road.
5. However, the parts of the fence that might be said not to be adjacent the highway are nevertheless part and parcel of the overall development. This principle was given judicial approval by the Courts in *Garland v City of Westminster* (1968) 20 P & CR 93, where, in the case of an unauthorised building, it was held that the demolition of the entire structure could be required by an enforcement notice and not simply [to allow] the retention of that part of the extension which fell within the permitted cubic capacity.
6. It would be irrational artificially to disaggregate parts of the fence on either side of the gates; rather, the whole should be treated as a single operation, which I find does not comply with the limitations set out in the Order.
7. Accordingly, I find that the matters stated in the notice amount to a breach of planning control, and that the appeal on ground (c) fails.

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

Main issue

8. The main issue is the effect of the fence on the character and appearance of the surrounding mainly residential area.

Reasons

9. The appeal site lies in a central part of the small village of Leigh Sinton. It is not a conservation area, and I have not been told of any other designation in relation to its character or appearance. Nevertheless, the village is an attractive one, with a variety of dwelling designs, ages, sizes and positions in relation to the road. However, the Hereford Road frontage is characterised by properties with low walls, hedges and low fences, providing either a green enclosure, or an open aspect across the front gardens. Where there are roadside fences, shrubs or trees are generally planted behind, and are visible over the fences. These features contribute to a semi-rural character to the core of the village, which is a distinctive and positive feature.
10. The fence subject of the notice is a 1.8m high close-boarded timber fence which is starkly out of keeping with the lower-key enclosures to which I have referred above. Its combination of height, length and pale colour makes it a dominant and unattractive feature in the street scene, and it fails to represent good design which pays adequate regard to the village context. The development fails to provide the high-quality design sought by Policy SWDP21 of the South Worcestershire Development Plan, which deals with design. I find no significant conflict with Policy SWDP25 which deals with landscape character, as this is primarily a townscape matter.
11. I have had regard to possible fallback positions. Whilst there was a 4 foot high fence bounding the footway previously, this fence was removed, and there is

no lawful fallback to allow it to be re-erected. However, there are permitted development rights under Article 3 and Class 2 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 which permit the erection of a fence up to 1m high in circumstances such as this. I recognise this to be a valid fallback, and consider it likely that the appellants would utilise these rights if the appeal were to be dismissed. However, there would be a considerable difference between the impact of a 1m high fence and the fence as constructed; a lower fence would be more in keeping with the village and would be less dominant in the street scene. Thus, whilst I acknowledge the existence of the fallback, it does not serve to justify the retention of the fence as built. I shall refer to permitted development rights again on the appeal under ground (f).

12. I have taken into account the appeal decision (Ref: APP/J1860/D/14/2228245) in relation to a proposed 2m high roadside fence at 1 Nash Green. The Inspector in that case found that the fence would be unacceptable, but I recognise that Nash Green, being a modern estate, is not wholly comparable to the current appeal site. Even so, the Inspector assessed the context of the site, including the fence at the property on the corner with Sherridge Road, which is close to the current appeal site. He said: "(It) has a high fence immediately on the edge of the footpath screening a short front garden. I have no information regarding the circumstances under which that was constructed, and I consider that it has a somewhat stark appearance and does not necessarily serve as an example to be followed in this case." This appears to be one of the two fences referred to by the appellants in support of their case, but I too consider that they are not good examples to follow, and are anomalous examples in the overall street scene.
13. The appellants have suggested a number of measures to mitigate the impact of the fence. Staining the fence a different colour may help to make it less prominent, but it would be insufficient to overcome my concerns. The same applies to the idea of planting behind the fence – it would help to provide some greenery which would make the fence appear less stark, but it would not reduce its prominence or incongruity. In any event, it would take time to grow, and then there could be no certainty that it would not be removed, cut back, become diseased or die, so its long-term retention could not be assured.
14. I see no reason why a 1m high fence would not provide adequate safety for the occupiers of the appeal property, and the appellants could utilise such rights to provide adequate safety if they so wished.
15. The requirement of the enforcement notice to remove the fence of a family home engages with the rights of the appellants 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.
16. 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 would not be insignificant, the burden of complying with the enforcement notice would be necessary and would not be disproportionate.

17. I have had regard to the letter of support from the appellants' neighbour, but this is insufficient to alter my conclusion, that for the reasons given above, the appeal on ground (a) fails, and that planning permission is refused.

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

18. The notice seeks to remedy the breach of planning control by restoring the land to its condition before the breach took place. The breach took place after the removal of the previous fence, and thus there can be no requirement to replace the previous fence. However, as referred to above, there are permitted development rights which permit the erection of a fence up to 1m high in circumstances such as this. As this is a realistic fallback position, there seems to me to be little point in requiring the complete removal of the fence, only for a 1m high fence to be erected immediately afterwards. I shall therefore vary the requirements of the notice to provide an option to reduce it in height to 1m.

Appeal on ground (g) – that period for compliance is too short

19. In normal circumstances I would consider that 2 months would be an adequate length of the time to comply with the notice. However, the Covid-19 pandemic has resulted in some uncertainties, and building and similar projects have been put on hold, and contractors may have incurred a backlog. I shall therefore vary the period of compliance to 4 months to address this.

Overall conclusions

20. For the reasons given above, I conclude that the appeals should be dismissed, other than to the extent indicated, and that the notice should be upheld, subject to variation.

JP Roberts

INSPECTOR