
Appeal Decision

Site visit made on 19 May 2020

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 May 2020

Appeal Ref: APP/B1415/C/19/3231417

The Malvern, Malvern Way, Hastings TN34 3PX

- 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 1990 Act).
- The appeal is made by Mr Isaac Gee on behalf of Bankwell Estates Limited against an enforcement notice issued by Hastings Borough Council.
- The enforcement notice was issued on 20 May 2019.
- The breach of planning control as alleged in the notice is the erection of 1800 mm high wooden fence along the southern and eastern boundaries of the site (The Malvern, Malvern Way, Hastings, TN34 3PX).
- The requirement of the notice is:
 - (i) Remove the fence in its entirety from the southern and eastern boundaries of the site.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2) (f) and (g) 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.

Summary decision: The appeal succeeds in part and the enforcement notice is upheld with variations in the terms set out below in the Formal Decision.

Appeal on ground (f)

1. The appeal on this ground is "that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters (i.e. the matters alleged in the notice) or, as the case may be, to remedy any injury to amenity which has been caused by any such breach".
2. The step that is required by this enforcement notice is to remove the fence in its entirety. The purpose of the notice therefore clearly comes under S173(4)(a) of the 1990 Act which amongst other things states, remedying the breach by restoring the land to its condition before the breach took place. However, S173(4)(a) of the 1990 Act also states 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.
3. The appellant consider that the requirement of the notice is excessive and goes beyond what is necessary to remedy the breach. In particular the appellant states that a fence constructed to a height of 1 metre above ground level would be permitted development by Article 3 and Class A of Part 2, Schedule 2 of the

Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO 2015) and would therefore constitute a fallback position.

4. My attention has been drawn to the planning history for this site, which includes permission to convert the site from a pub to 8 flats¹, and landscaping conditions 6 and 7 of this permission, and the creation of an additional 3 flats to the approved 8 flats within the former public house², and the landscaping conditions 5, 6, 7 and 8 of this permission. These conditions were attached to ensure a satisfactory form of development in the interests of the visual amenity. The Council state that the erection of a fence through permitted development rights would conflict with the reasons for these conditions, and therefore Article 3(4) of the GPDO 2015 applies which states that "*Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order*". The Council therefore considers that permitted development (PD) rights under Class A of Part 2 of the GPDO 2015 do not apply.
5. Existing conditions which potentially invoke Article 3(4) of the GPDO 2015 should be assessed based on their wording. The condition must go beyond specifying the development for which permission is being granted and contain 'something more' which explicitly or implicitly restricts development. When imposing a condition to restrict PD rights, it is best practice to construct the condition in clear terms and refer specifically to the relevant provisions of the Order and/or Town and Country Planning (Use Classes) Order 1987 as amended (UCO 1987)³. When interpreting a condition, it is a question of fact as to whether it restricts PD rights or not.
6. Whilst the relevant landscaping conditions seek to ensure a satisfactory form of development in the interests of the visual amenity, the wording of these conditions neither explicitly states nor implicitly intends to seek to remove PD rights for any type of development within the GPDO 2015. As such, based on the evidence submitted I am satisfied that the site benefits from permitted development rights under Article 3 and Class A of Part 2, Schedule 2 of the GPDO 2015.
7. Whilst permitted development rights cannot be applied retrospectively to the development carried out it is an obvious fallback position that if the whole fence was removed the appellant would have permitted development rights to erect another fence up to 1m in height where it is adjacent to the highway. Moreover, the enforcement process is meant to be remedial and not punitive. Therefore, with this right available and a viable alternative, it is considered that the steps required by the Notice to be taken are excessive in terms of remedying the breach, and I shall vary the notice and add an alternative requirement to reduce the height of fence on the southern and eastern boundaries of the site to no more than 1 metre above ground level. This would remedy the breach of planning control, in line with s173(4)(a) of the Act. Varying the notice on this basis would cause no injustice to either party, as it would not make it more onerous.

¹ Council ref: HS/FA/08/00076 granted in 2008

² Council ref: HS/FA/13/00006 granted in 2013.

³ Carpet Decor (Guildford) v SSE [1981] JPL 806; Dunoon Developments Ltd v SSE & Poole BC (1993) 65 P&CR 101.

8. I therefore conclude, that the breach of planning control could be remedied by a lesser step and the requirements of the enforcement notice should be varied accordingly. The ground (f) appeal therefore succeeds in part.

Appeal on ground (g)

9. This ground of appeal is that the time given to comply with the notice is too short. The Council has given a 1 month compliance period, which in ordinary circumstances would be reasonable and proportionate given the harm identified in the notice. However, in light of Government policy regarding Covid-19 and restricting social contact, I consider that this period needs to be prolonged by a further month. I shall therefore vary the period for compliance prior to upholding the notice to 2 months. I also note that the current situation with the pandemic is fluid and it is unclear how long restrictions associated with this will last. However, the Council have powers under s173A(1)(b) to extend any period for compliance, a matter entirely at their discretion, without prejudicing their right to take further action.
10. To this extent, the ground (g) appeal succeeds and I will vary the notice accordingly.

Conclusion

11. I conclude that the requirements of the notice are excessive to remedy the breach and it is reasonable to require the development to comply with the GPDO 2015. I shall vary the enforcement notice prior to upholding it. The appeal on ground (f) succeeds to that extent.
12. I also conclude that the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to that extent.

Formal Decision

13. It is directed that the enforcement notice is varied by:

- Deletion of requirement i) under section 5 - What you are required to do, and substituted therefor by the following requirements:
 - “(i) Reduce the height of fence on the southern and eastern boundaries of the site to no more than 1 metre above ground level; or
 - (ii) Remove the fence in its entirety from the southern and eastern boundaries of the site.
 - (iii) remove all constituent materials resulting from compliance with either requirement (i) and (ii) from the site.”
- Deleting the words “Step (i) above to be complied with in full within one month of the date on which this Notice takes effect” under section 6 - Time for compliance, and its replacement with:
 - “Within 2 months after this Notice takes effect”.

14. Subject to the variations, the enforcement notice is upheld.

R Satheesan

INSPECTOR