
Appeal Decision

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 June 2020

Appeal Ref: APP/M3645/X/19/3242945

50 Crossways, Tatsfield TN16 2BW

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr and Mrs Ian and Sarah Kirk against the decision of Tandridge District Council.
 - The application Ref TA/2019/1711, dated 23 September 2019, was refused by notice dated 29 November 2019.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is erection of fencing and changes to fenestration.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application originally sought to confirm that both the erection of fencing and changes to the fenestration of the appeal property would be lawful. This appeal relates solely to the decision of the Council to refuse to grant an LDC in respect of the erection of fencing. The Council issued an LDC separately for the change to the fenestration¹ on 29 November 2019. In accordance with section 195(1) of the 1990 Act which allows for an appeal to be made against a refusal to issue an LDC for a development either in whole or in part, I have determined the appeal on that basis. The proposed changes to fenestration do not fall to be considered.
3. The appeal forms indicate the appeal is made against the Council's decision referenced 2019/1145 which relates to a previous LDC application at the appeal property. However, the submissions of the parties indicate that the appeal is actually made against the Council's decision on LDC application reference TA/2019/1711 dated 29 November 2019. I have proceeded on that basis.
4. The Planning Inspectorate initially intended for this appeal to be determined following a site visit. That event could not take place given the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and related guidance.

¹ Council Reference: 2019/1711

5. The file has subsequently been reviewed to consider the optimal procedure for the appeal. It appeared that the appeal could be determined on the papers – that is, without a site visit – without causing prejudice to any party. This is because the case turns on legal points and the parties have submitted sufficient photographs to understand the nature of the site and surrounding area given the points in dispute. The parties were contacted on 23 April 2020 and it was agreed that as the appointed Inspector I could proceed to a decision on this basis.

Main Issue

6. Planning merits are not relevant to this appeal. The main issue is whether the Council's decision to refuse the application for a certificate of lawfulness is well founded. The burden of proof rests with the appellants and the appropriate test of the evidence is the balance of probabilities.

Reasons

7. Article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) grants planning permission for those classes of development described as 'permitted development' set out in Schedule 2. Class A of Part 2 of Schedule 2 sets out that the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is permitted development.
8. That permitted development is subject to the limitations in paragraph A.1. Limitation A.1(a)(ii) is that development is not permitted by Class A if the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would exceed 1 metre above ground level. Limitation A.1(b) is that development is not permitted by Class A if the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2m above ground level.
9. The parties agree that Crossways is a highway for the purpose of the GPDO. Nevertheless, it is a matter of dispute whether the fence would be adjacent to the highway and therefore meet the limitations. The Council says that it would and therefore would not meet the limitation in A.1(a)(ii) of Class A. In contrast, the appellants argue that those parts of the fence which would abut the highway would be 1m in height whilst those parts of the fence exceeding 1m would be set back from the highway sufficient as to fall outside of the term 'adjacent'.
10. The word adjacent is not defined in the GPDO. Its common dictionary definition is 'near or next to something else'. Determining what constitutes 'adjacent' is therefore a matter of fact and degree.
11. The majority of the fence would physically adjoin the highway with a height of 1m. Part of the fence would have a height of 1.5m either side of a 2m high gate, close to the boundary with 52 Crossways. This part would extend back to a point 2.5m from the highway edge. A short section of the fence would also be at a height of 1.5m along the edge of a parking area on the Greenway side of the property.
12. The appellants refer to the *Simmonds v SSE and Rochdale MDC [1981]* case in which a fence less than 1m from a highway was found to be adjacent to it. The appellants argue that the circumstances here differ from the *Simmonds* case

because those parts of the fence which would exceed 1m are between 2m and 2.5m from the highway.

13. However, in my view, the purpose of those parts of enclosure which exceed 1m in height would be to clearly define the boundary of the property near the highway. Indeed, it would be perceived to do so, particularly where it is set back 2.5m from the highway adjacent to No 52, since the space to the front of the gate and fence would not be big enough to park a car or van.
14. In any event, regardless of whether or not that part of the fence which extends above 1m in height is adjacent to the highway, it seems to me that the fence as a whole would form a continuous means of enclosure erected in one operation. There would be no physical or visual detachment between the sections of the fence. Rather, the erection of the fence would form a single act of development, with the sole purpose of enclosing the front garden of the property and delineating the driveway from the house.
15. Case law has established that permitted development rights apply to the development taken as a whole. The development cannot be broken down into constituent parts for the purposes of the GPDO. Thus, given that parts of the fence would exceed the 1m height limitation, I find the whole of the means of enclosure would be development that is not permitted by A.1(a). As a consequence, the development would not constitute development granted planning permission by virtue of Article 3 of the GPDO. It would not therefore have been lawful at the date the application was made.

Conclusion

16. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of fencing was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

J Whitfield

INSPECTOR