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## Appeal Decision

Site visit made on 2 June 2020

**by Timothy C King BA (Hons) MRTPI**

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

**Decision date: 6 July 2020**

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**Appeal Ref: APP/M1595/C/19/3239693**

**16 Rowley Road, Orsett, Essex RM16 3ET**

- 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 Mrs G Adkins against an enforcement notice issued by Thurrock Borough Council.
  - The enforcement notice was issued on 25 September 2019.
  - The breach of planning control as alleged in the notice is: Without planning permission, the enclosure of amenity land into an adjacent residential garden by the erection of a 1.95m wooden fence with concrete posts above ground level adjacent to a highway used by pedestrian and vehicular traffic, resulting in the change of use from open amenity land to a private garden area.  
The siting of the wooden fence and concrete posts is contrary to Permitted Development restrictions imposed upon the Site.
  - The requirements of the notice are to:
    - (i) Remove the wooden fence, concrete posts and any footings from the Land.
    - (ii) Make good the Land, restoring it back to open amenity land.
  - The period for compliance with the requirements is two (2) months from the date this notice takes effect.
  - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under Section 177(5) of the Act as amended, and falls to be considered.
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### Summary of decision

1. The enforcement notice is corrected and varied, as described in the Formal Decision set out below.
2. Subject to this correction and variation the appeal is allowed, and planning permission is granted subject to a condition set out in the Formal Decision, but should the appellant choose not to undertake Requirement 1(b), as set out in the Formal Decision below, the enforcement notice, as corrected and varied, is upheld.

### Matters concerning the enforcement notice

3. The appeal dwelling was permitted as part of a wider scheme (planning permission 02/01433/REM). Its terms and conditions prohibit any additional fences or gates erected beyond the forwardmost part of any wall of a dwelling which fronts a highway. The Council has also indicated that, adjacent to the driveway at the rear of the site, the fence height increases as it gets closer to the highway. In the circumstances, and in the interests of simplicity, the allegation's wording can be simplified as follows:

*"Without planning permission the enclosure of amenity land into an adjacent residential garden by the erection of a wooden fence with concrete posts, resulting in the change of use from open amenity land to a private garden area."*

## **Background**

4. The owner of No 16, a corner property, also holds title over a strip of land which, prior to being partly enclosed by close-boarded timber fencing and subsumed into its rear garden, fronted onto Wingfield Drive, ahead of the property's return. When the dwelling was built this strip of land, as I understand it, sat outside of the then rear-garden boundary brick wall.
5. The remainder of the strip, beyond the dwelling's flank wall, has not been enclosed, although, a small hedgerow feature has been planted adjacent to the footway at this point to create some demarcation.
6. In 2018 the Council refused planning permission (ref 18/01178/HHA) for the replacement of the original garden wall with fencing, and the decision was subsequently upheld on appeal (*APP/M1595/D/18/3218177*). In her decision letter the Inspector, in commenting that the fence looks out of place, refers to it as an "alien feature". This decision is a material consideration in my determination of the current appeal.
7. Despite the planning position, the fence has remained in situ and the Council saw it expedient to issue an enforcement notice in an attempt to secure its removal.

## **The Appeal on Ground (b)**

8. The appeal on ground (b) is whether the matter alleged to be a breach of planning control has occurred as a matter of fact. The appellant must show on the balance of probability that those matters have not occurred. The relevant date is that of the issue of the notice ie 25 September 2019.
9. The appellant considers that a particular allegation in the enforcement notice, namely the change of use of open amenity land to a private garden area, could not have occurred as, in her opinion, public amenity is not a use of land. She says that the land to which the appeal relates was, and remains, garden land associated with No 16.
10. The actual issue here relates to what can be considered as residential curtilage. With regard to case law it was held in *Dyer v Dorset CC* [1989] that curtilage constitutes a piece of ground attached to a dwellinghouse and forming one enclosure with it; thereby it comprises the area attached to and containing a dwellinghouse and its outbuildings.
11. The case of *McAlpine v Secretary of State for the Environment* [1995] did not depart from the above judgement save for the mention of it being constrained to a small area around a building, whilst the Court of Appeal in *Secretary of State for the Environment, Transport, and the Regions v Skerritts of Nottingham* [2000] decided that the definition of a curtilage in relation to a building must remain a question of fact and degree in each case.
12. In this particular instance, the strip of land the subject of the notice, although under private ownership, was outside the curtilage that had been allotted to

the appeal property. Instead, the piece of land performed the function of an open, grassed verge or incidental open space. Despite the appellant's claims it could not be realistically termed as, or been put to effective use as, garden land associated with No 16.

13. In such circumstances it is very difficult to argue that there has been no material change of use, even if the land remains in the same physical condition as before. The mere fact that the land has been annexed by the erection of a fence is ample evidence that it now forms part of the residential curtilage of No 16.
14. Having had regard to the evidence produced by both main parties I must therefore conclude that an unauthorised material change of use was in occurrence on 25 September 2019, when the enforcement notice was issued. Accordingly, the requirements of the notice may specify the removal of all the physical appurtenances that are part and parcel of that change of use. This includes the garden fence.

### **The Appeal on Ground (a) and the Deemed Planning Application (DPA)**

#### **Main Issues**

15. The main issues are:

- 1) the development's effect on the character and appearance of the surrounding area; and
- 2) the development's effect on highway safety.

#### **Reasons**

##### *Character and appearance*

16. The appellant refers to her appendix SOC4. My reading of this e-mail exchange is that, on 10 October 2018, the Council planning officer sent to the appellant the comments of the local highway authority (LHA) relating to the intended enclosure of the land. The second paragraph states:

*"It is unclear from the application whether the land registry deeds of the property allow for the occupant to enclose the area grass (sic) within their garden or whether it should remain open space with the wall/fence along its original alignment."*

17. The appellant, in her response of 11 October 2018, indicates herself that the freehold does allow for the grassed area to be enclosed, and she also refers to previous e-mails and telephone calls with the Council whereby she was advised that she could erect a fence without planning permission. However, I have not been provided with any such evidence to confirm these assertions. Nonetheless, as I have already mentioned under the Ground (b) appeal heading, planning permission is, in fact, needed to enclose the land and erect the fencing. Indeed, the Council's decision to refuse permission for such has since been upheld on appeal.
18. The fence lines up with edge of the driveway accessing the garages belonging to the appeal property and No 2 Wingfield Drive, and it is roughly in line with the front boundaries of the four dwelling terrace of which it forms part. Beyond

the footway fronting the terrace is a row of iron railings, and on the opposite side of the railings is grass verge.

19. Further to the above I also observed at my site visit that the original layout arrangement which I have described pertaining to No 16 is not replicated along this section of Wingfield Drive. Indeed, rather than uniformity of layout, there is variation. In illustration, No 1 Wingfield Drive, the property directly opposite, does not reflect the arrangement that was laid out to the side of the appeal property. Instead, its front door faces Wingfield Drive, beyond which is its front garden, the footway and then an adjacent grass verge running next to the carriageway.
20. The immediate area is also green and leafy in character due to the presence of a number of trees, two of which are within the rear garden of No 16, and whose canopies now spread over the garden fence. It would appear from the Tree Preservation Order 5/98 that these trees are two hawthorns (T36 and T37) and are protected, accordingly. It also seems that prior to the fence enclosure being erected these stood on the open grass verge. Nonetheless, were the fence to now be removed, involving the reinstatement of a garden wall or a new fence with concrete posts, this may have harmful implications for these healthy, prominent trees.
21. The previous Inspector mentions that holly planted to screen the fencing does not alter the fact that the open character of the grass verge has been removed. Whilst some openness has clearly been lost I am, though, mindful that the Inspector visited the site in early March 2019 and the growing seasons since this time has meant that foliage is now having its desired effect, reaching halfway up the fencing panels. In this context I also observed that the fencing only extends along the rear garden boundary. Save for a row of shrubs planted along a line parallel with the flank wall of the house there is still a general feeling of openness both in the area between and, importantly, beyond, towards the front of the property. I have also taken into account that the only letter of representation received in response to the appeal was one from a local resident who wrote in support of the development.
22. Despite my findings on this main issue it does not, of course, mean that the enclosure of amenity land, as has occurred here, will be acceptable in other situations. Each case must be considered on the individual circumstances involved. In this particular context I am, though, satisfied that the development, given the factors described, does not cause significant harm to the character and appearance of the surrounding area, and the objectives and requirements of policies CSTP22 and PMD2 of the Council's Core Strategy and Policies for Management of Development (CS).

#### *Highway safety*

23. Prior to the previous appeal I note that the appellant indicated an intention to alter the fence where it stands adjacent to the driveway, in order to provide an appropriate visibility splay for the drivers of cars reversing out onto the carriageway so as to aid pedestrian safety. A plan was produced to this end (drawing no Bld-1624-1), although the Council, at the time, appeared to have questioned the accuracy of the drawing. In fact, no such modifications were made but, from my observations, I am satisfied that the necessary alterations could potentially be made to improve the current arrangement.

24. Details of such could be submitted to the Council for subsequent written approval, and a suitably worded retrospective type condition can be imposed to this end. Should the highway authority not consider the proposed visibility splay as adequate, the condition is worded so as to deal with such an eventuality.
25. Subject to the implementation of a scheme considered acceptable, in accordance with a timetable to be agreed between the main parties, I consider that the modified fence would address the outstanding matter of highway safety, and thereby meet the objectives and requirements of CS policies CSTP22 and PMD2, in this particular respect.

#### Conclusion on Ground (a) appeal

26. I conclude that the development is acceptable in terms of its effect on the character and appearance of the area, and I am also of the opinion that adaptations can be made to meet highway safety standards. For the reasons given above, and having had regard to all matters raised, the appeal on Ground (a) succeeds and planning permission, by way of the DPA, is granted, but subject to an appropriate condition as set out in the Formal Decision below.

#### **The Appeal on Ground (f)**

27. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. S173(4) provides that the purpose shall be either to remedy the breach of planning control or to remedy any injury to amenity. In this case it would appear from the requirements of the notice that its purpose is to remedy the breach by restoring the land to its condition prior to the breach taking place.
28. Under this ground the appellant is offering to modify the fence to provide an appropriate visibility splay to meet highway safety standards. However, as I have already dealt with this matter under the DPA there is no need for me to consider this ground further.

#### **The Appeal on Ground (g)**

29. As I am varying the enforcement notice to give the appellant a choice of either removing the wooden fence or making necessary modifications, it is only if the first option is chosen that the compliance period, as specified in the notice, remains relevant.
30. The appeal on ground (g) is that the period for compliance with the notice falls short of what is reasonable. The appellant considers that a two month period is insufficient time to carry out the steps and believes that a more reasonable period for compliance would be six months.
31. The requirement involves only the removal of the fence and the reinstatement of the amenity land. It does not specify that a new boundary enclosure must be erected within the two month period. Accordingly, to ensure security it is possible, in the event that the fence is removed and an appropriate replacement structure was not immediately erected, a makeshift, temporary means of enclosure could be put in place. In any event, the extent of the works involved are not substantial. Accordingly, I find that, in the circumstances, a period of two months is adequate.

## Formal Decision

32. The enforcement notice is corrected and varied as follows:

The allegation is corrected to read:

"Without planning permission the enclosure of amenity land into an adjacent residential garden by the erection of a wooden fence with concrete posts, resulting in the change of use from open amenity land to a private garden area."

Delete Requirements 1 and 2 and replace them with the following:

"Requirement 1:

Either:

a) Remove the wooden fence, concrete posts and any footings from the Land;

Or:

b) Carry out works to the fence in accordance with a detailed scheme, acceptable to the local highway authority, and submitted to the local planning authority for subsequent written approval."

Delete requirement 2 and replace with:

"Requirement 2:

Either:

On completion of Requirement 1(a) above, make good the land, restoring it back to open amenity land."

Or:

In accordance with Requirement 1(b) above the appeal is allowed for the enclosure of amenity land into an adjacent residential garden by the erection of a wooden fence with concrete posts, resulting in the change of use from open amenity land to a private garden area, and planning permission is granted on the application deemed to have been made under s177(5) of the 1990 Act as amended, for the enclosure of amenity land into an adjacent residential garden by the erection of a wooden fence with concrete posts, resulting in the change of use from open amenity land to a private garden area, at 16 Rowley Road, Orsett, Essex RM16 3ET, subject to the following condition:

- 1) The fence hereby permitted shall be removed, the land made good, and restored to open amenity land within 8 weeks of the date of the failure to meet any of the requirements set out in (i) to (iv) below:
  - i) within 2 months of the date of this decision a scheme for the fence to be modified to provide an appropriate visibility splay, shall have been submitted for the written approval of the local planning authority, and the scheme shall include a timetable for its implementation.
  - ii) within 10 months of the date of this decision, if the local planning authority refuse to approve the said scheme or fail to give a decision within the prescribed period an appeal shall have been made to, and accepted as valid by, the Secretary of State.

- iii) If an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted scheme or details, if deemed acceptable, shall have been approved by the Secretary of State.
  - iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.”
33. Subject to this correction and variation the appeal is allowed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the enclosure of amenity land into an adjacent residential garden by the erection of a wooden fence with concrete posts, resulting in the change of use from open amenity land to a private garden area, subject to the stated condition, but should the appellant choose not to undertake Requirement 1(b) the enforcement notice, as corrected and varied, is upheld.

*Timothy C King*

INSPECTOR