



Appeal Decision

Site visit made on 24 September 2020

by A A Phillips BA(Hons) DipTP MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 October 2020

Appeal Ref: APP/H5960/C/20/3248613

5 Brynmaer Road SW11 4EN

- 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 Mr Iain Burke Hamilton against an enforcement notice issued by the Council of the London Borough of Wandsworth.
- The enforcement notice was issued on 23 January 2020.
- The breach of planning control as alleged in the notice is the erection of a timber boundary fence to the front and rear of the property along the boundary with no. 3 Brynmaer Road.
- The requirements of the notice are:
 1. Remove the refused timber fence from the front and rear of the property and to return the property to its former condition through enforcement action.
 2. Remove from site all debris from compliance with step 1 above.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with variations.

Application for costs

1. An application for costs was made by the Council of the London Borough of Wandsworth against Mr Iain Burke Hamilton. This application is the subject of a separate Decision.

The appeal on ground (a)

2. The appellant's case with reference to the appeal on ground (a) confirms that he does not seek retention of the existing unauthorised fence, but a reduced height timber boundary fence to the front and rear along the boundary with no. 3 Brynmaer Road. However, in his 'Response to LPA Statement' he states that he has put forward a revised option under ground (a) which proposes to reduce the height of the front fence from 2 metres down to 1.75 metres and the rear side fence from 3 metres down to 2.07 metres'. Therefore, for the purposes of clarity and in order to consider the potential outcomes I have considered both the existing development and the appellant's alternative option under the ground (a) appeal.
3. The deemed planning application on ground (a) is for the operational development which has been carried out. It is similar to a retrospective application under s73A of the Act. However, s177(1)(a) of the Act allows permission to be given to any part of the matters alleged. This point is

confirmed by case law ¹ which concluded that if it is found that planning permission may be granted for 'part of the matters' the correct approach is to do so and uphold the requirements of the notice, relying on s180(1) to override the effects of the notice. The case of Ioannou² confirmed that planning permission cannot be granted under s177(1)(a) for an acceptable alternative scheme that is not 'part of the matters'. Consequently, the alternative development proposed by the appellant would in my opinion constitute part of the matters to which the enforcement notice attacks.

4. The ground of appeal is that planning permission should be granted for what is alleged in the notice. The main issues are the effect on the character and appearance of the area and the effect on the living conditions of the occupants of an adjacent residential property with particular reference to outlook, enclosure and light.

Character and appearance

5. The appeal site is part of a terrace of residential properties which runs along the south side of Brynmaer Road. There is a similar but shorter terrace of residential properties opposite. The residential properties along these terraces have relatively shallow front gardens, most of which are enclosed by low brick walls with railings. There is some variety in the height and design of the railings, but most are relatively low. There are some higher more substantial railings and other boundary structures in the locality, but these are exceptions. I also noted at my visit that there is a variety of vegetation in the front of properties and where present, this does not interrupt or disturb the overall attractive pattern of front boundaries and front enclosures. Overall, there is a strong and distinctive consistency in the character of the streetscene.
6. There are some higher walls, some with trellis, along the street, but generally these are used to enclose the sides and rear of dwelling plots where they are exposed to adjacent road junctions and streets. Generally, these higher enclosures do not interrupt the established pattern and consistency along the street frontage.
7. A high timber panel fence has been erected to the front of the property along the boundary with the adjacent property, No. 3 Brynmaer Road. There is no other similar boundary treatment along this section of the road and as such it is prominent and creates inconsistency with the established pattern of development in the locality. Given its position at the front of the property and close to the street frontage, it is a conspicuous addition to the street scene, at odds with its immediate surroundings. Its scale, height, form and position in relation to other boundary features in the area exacerbates the harmful effect.
8. I recognise that the height of the railings at no. 3 are higher than others in the locality, and the timber panel fence is not a great deal higher than the front gate at no. 3, but these factors do not change the fact that the height, design and materiality of the timber fence in question defines it as being a highly prominent and incongruous feature. Consequently, when viewed in the context of other treatments and the consistency, locally, the development results in an unacceptable degree of visual harm.

¹ Ahmed v SSCLG and London Borough of Hackney [2014] EWCA Civ 566

² Ioannou v SSCLG & Enfield LBC [2014] EWCA Civ 1432

9. I am aware that there are other examples of similar timber panel fences along some other streets in the locality, but there is insufficient evidence before me to conclude that these are lawful. In any case, I have considered this case on its own merits.
10. With the exception of the side wall to no. 1 Brynmaer Road, the rear boundaries of the terrace are not clearly visible from the public realm. In addition, there is no general public access to the rear of the properties and as such the rear boundaries contribute little to the overall character and appearance of the area. There is variety in the rear boundaries to the terrace, including masonry walls, some trellises and fencing, creating boundaries of different heights. There is inconsistency in the character and appearance of rear boundaries in the locality. Therefore, the fencing that has been erected to the rear of the appeal property along the boundary with no. 3 is not at odds with its setting.
11. The first alternative suggested by the appellant is to reduce the height of the front fence to a height of 1.75 metres and the rear to a height of 2.07 metres. Whilst the reduction in height to the front fence would go some way to mitigating the visual harm created by the development, there would remain a relatively high timber boundary feature to the front of the property which is alien to its surroundings and at odds with the established pattern of development in the locality. The alternative is harmful to the character and appearance of the area. The reduced height fencing to the rear would not be harmful.
12. On this issue I conclude that the overall development proposals the subject of the ground (a) appeal would be harmful to the character and appearance of the area and contrary to Policy PL1 of the Wandsworth Local Plan Core Strategy Adopted March 2016 (the CS) which, among other objectives, seeks to promote the local distinctiveness of neighbourhoods within the Borough. It also conflicts with Policy IS3 of the CS which seeks to reinforce the character of the Borough, Policy DMS1 of the Wandsworth Local Plan Development Management Policies Document Adopted March 2016 (the DMP) which requires the scale of development to contribute positively to local spatial character, Policy DMH5 of the DMP with regard to how design of the development has not taken account of the design of the property frontages in the locality, guidance in the Housing Supplementary Planning Guidance Adopted November 2016 (the SPD) and design-related provisions set out in the National Planning Policy Framework (the Framework).

Living conditions

13. The rear of the properties in question are south facing, but at my site visit I observed that there was a lot of shading to the rear and an enclosed character. The main reason for this was the angle of the sun at the time of my visit but moreover due to the density and proximity of surrounding development. Taking account of these factors when combined with the small size of rear garden areas, there is likely to be some obstruction to the amount of sunlight all year round. As a consequence, sensitivity to any further loss of light as a result of new development is increased.
14. The light report evidence presented is clear to me that, even when taking account of the boundaries that may be erected using permitted development rights under the provisions of the Town and Country Planning (General

Permitted Development) (England) Order 2015 as amended, the development has an adverse effect on no. 3 in relation to sunlight. There is insufficient evidence before me to disagree with this conclusion. The character of the surroundings, including other boundary treatments in the locality, do not provide a justification for the harm that results from the loss of sunlight at times of year when the rear garden areas normally receive sunlight. I understand that the occupants of properties may be able to access sunlight by visiting other outdoor spaces or parks instead of the back garden, but they are entitled to enjoy their private amenity space and the quality of life that such use may bring. Therefore, I find that the impact is unacceptable.

15. The lighting report concludes that there is no unacceptable effect on daylight reaching the interior of the neighbouring property, no. 3, and I find no reason to disagree with that conclusion.
16. Part of the appellant's option on ground (a) is to reduce the height of the rear fence to 2.07 metres, but this is clearly intended to be part of a package of measures alongside the proposal to reduce the height of the front fence to 1.75 metres. The proposed reduction would take the fence to a height that would be barely perceptible above the height of a fence that could be erected as permitted development. However, given that this is only part of a wider package of measures, and part of that wider proposal has been found to be harmful, it is not appropriate for me to approve the reduced height rear fence.
17. There is no dispute between the main parties with respect to the effect of the rear fence on the outlook experienced by the occupants of no. 3, but the Council maintains that the front fence would harm the outlook of the occupants and cause an undue of enclosure to the front garden. Given its location along the boundary I can see that the fence would enclose the front garden area to a degree. The front garden area of no. 3 is only small and therefore a relatively high fence that has been erected does cause an undue sense of enclosure, particularly on the approach to the front door. However, the effect on outlook is limited given the position of the bay window on the other side of the house to the fence. Nonetheless I find that the resultant sense of enclosure created would be unacceptable. The alternative reduced height fence would partly mitigate the harmful effect, but not sufficiently for me to conclude that the harm would be overcome.
18. Therefore, on this issue I conclude that the development would be harmful to the living conditions of the occupants of an adjacent residential property with particular reference to outlook, enclosure and light and contrary to Policy DMS1 of the DMP and the Framework which, among other objectives, state that development should not harm the amenities of nearby properties through sunlight/daylight.

Other matters

19. The Battersea Park Conservation Area is close to the appeal site. However, it has not been identified as a reason for refusal and, indeed, the Council has confirmed that while the unauthorised works can be read visually in the context of the conservation area along Brynmaer Road, it would not harm the setting of the adjacent conservation area. I see no grounds to disagree with the Council's assessment on this matter.

Conclusion

20. The appeal on ground (a) is dismissed and the deemed planning application refused.

The appeal on ground (f)

21. The ground of appeal is that the steps required by the notice to be taken exceed what is necessary to achieve that purpose. The purpose of an enforcement notice are set out in s173 of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). Since the notice requires the entire removal of the fence from the front and rear of the property and return the property to its former condition, the purpose is clearly to remedy the breach. Leaving any part of it in place would not achieve that purpose. In this respect, the appeal on ground (f) fails.
22. Nonetheless, I am mindful that enforcement action is intended to be remedial rather than punitive. With there being a ground (a) included in this appeal it would be possible to grant planning permission for part of the development. The ground (f) alternative proposed by the appellant is to reduce the height of the front boundary fence to a height of 1 metre and the rear to a height of 2 metres. The Council does not appear to dispute that these would align with permitted development rights pursuant to Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (the GPDO).
23. Permitted development rights under the GPDO are a material consideration in considering the planning merits and where permitted development rights would allow partial re-instatement of works prohibited by the notice, case law³ states that it is necessary to make a finding as to the realistic likelihood of 'fallback' permitted development rights being exercised. In this case the appellant has suggested a realistic fallback position that exists through the implementation of permitted development rights and I see no reason to dispute this. In such circumstances it would be churlish for me to require full removal of the fence only for the appellant to then rebuilt in line with permitted development allowances.
24. Therefore, in these circumstances I consider that the notice can be varied to reduce the height of the front fence to 1 metre and the rear fence along the boundary of no. 3 to 2 metres. To that extent, the appeal on ground (f) succeeds.

The appeal on ground (g)

25. The ground of appeal is that the time given to comply with the requirements is too short. The notice requires the works to take place within two months. The time given would be sufficient to reduce the height of the fences as required by the varied enforcement notice. The 4 month period suggested by the appellant would be excessive given the ongoing harm caused by the unauthorised development. In addition, I see no reason why the period should be extended because the varied notice requires less works to be undertaken than the original enforcement notice.
26. The appeal on ground (g) fails.

³ Brentwood DC v SSE & Gray [1996] JPL 939

Conclusion

27. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the deemed application.

Formal Decision

28. I direct that the enforcement notice shall be varied by:

- a) The deletion of requirements 1 and 2 from paragraph 5 of the notice and the substitution therefor of the words

“1. Reduce the height of the fence to the front of no. 5 Brynmaer Road adjacent to no. 3 Brynmaer Road to a height of 1 metre; and

2. Reduce the height of the fence to the rear of No. 5 Brynmaer Road adjacent to the boundary to no. 3 Brynmaer Road to a height of 2 metres; and

3. Remove from the site all debris arising from compliance with steps 1 and 2 above.”.

- 3. Subject to these variations the appeal is dismissed, 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.

A A Phillips

INSPECTOR