
Appeal Decision

Site visit made on 30 September 2020

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26th October 2020

Appeal Ref: APP/G5180/C/20/3253047

41 Steyning Grove, Mottingham, London SE9 4NG

- 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 Miss Elizabeth Seal against an enforcement notice issued by the Council of the London Borough of Bromley.
 - The enforcement notice, numbered L8 T58.3839, was issued on 15 May 2020.
 - The breach of planning control as alleged in the notice is, without planning permission, the erection of a fence and associated gravel boards extending to a maximum height of 2 metres, which does not benefit from permitted development.
 - The requirements of the notice are (1) Remove from the land the unauthorised fence, concrete posts and gravel boards; (2) Leave the land in a neat and tidy condition after compliance with the requirement above; and (3) Reinststate the Land back to its former condition.
 - The period for compliance with the requirements is one month after the notice takes effect.
 - The appeal is proceeding on the ground set out in section 174(2)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
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Decision

1. The enforcement notice is quashed.

The notice

2. The notice defines the alleged breach of planning control as the erection of a fence and associated gravel boards extending to a maximum height of 2 metres on the land shown edged in red on the accompanying plan. This red edge follows the boundaries of 41 Steyning Grove with the highways of Steyning Grove and Mells Crescent and shared boundaries between No 41 and the neighbouring dwellings at 39 Steyning Grove and 1 Mells Crescent.
3. I saw different sections of fence, of differing ages and designs, on and within the red edge. The notice and the accompanying plan do not specify which of these sections of fence the alleged breach of planning control relates to.
4. Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (the GPDO) grants planning permission for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. However, by reason of limitation A.1, such 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, after the carrying out of the development, exceed in all cases, with the exception of schools, 1 metre above ground level.
5. All of the sections of fence I saw were significantly above 1 metre in height and Steyning Grove and Mells Crescent are both highways used by vehicular traffic. It is therefore necessary to determine whether any sections of the fence, and if so which sections, are adjacent to Steyning Grove or Mells Crescent.
 6. The GPDO does not define "adjacent" but in previous Orders where the word "abutting" was used, the Court of Appeal declined to rule that "abutting" equated to touching. An everyday definition of adjacent is "being near or close" and what constitutes "adjacent" in any given case is therefore a question of fact and degree.
 7. The section of fence along the back of the footways of Steyning Grove and Mells Crescent is clearly adjacent to those highways. In view of this, and its exceeding 1 metre in height, this roadside fence is in breach of limitation A.1(a)(ii) to Class A of Part 2 of Schedule 2 to the GPDO and is operational development requiring express planning permission. The appellant does not dispute that she erected this section after moving in, and therefore less than 4 years before the notice was issued.
 8. A second section of fence on the red edge, separating the back garden of No 41 from a parking area belonging to 1 Mells Crescent, is visible in an image dated July 2008 provided by the Council. Therefore, even if it were to exceed permitted development limits, this section cannot be part of the alleged breach of planning control by reason of its age.
 9. A third section of fence on the red edge, separating the side garden area of No 41 from the adjacent parking area belonging to No 1, has gravel boards and thus matches the description of the alleged breach of planning control. This section is over 1 metre in height and extends as far as the footway forming part of the highway of Mells Crescent, so any part deemed to be adjacent to that footway would exceed permitted development limits and thus be development requiring express planning permission. However, the notice does not state how much of this section of fence is deemed to be adjacent to the highway and which it therefore requires to be removed.
 10. Images provided by the Council indicate that this section was erected between May 2014, over 6 years before the notice was issued, and June 2019. It is of a different design to the roadside fence described in paragraph 7 and is adjacent to a parking area belonging to No 1 that has been resurfaced in recent years, raising the possibility that it formed part of the same project. If that were so, this section may not be on the land within the red edge.
 11. A fourth section of fence forms a passage along the side of the house and the images provided by both parties indicate it has recently been extended towards the highway of Steyning Grove, terminating at the back of the footway. This section is over 1 metre in height, so any part adjacent to the footway would exceed permitted development limits and form part of the alleged breach of planning control. However, the notice does not state how much of this section of fence is deemed to be adjacent to the highway and which it therefore requires to be removed.

12. While the Council may not have intended all the sections of fence described above to be removed in line with the requirements of the notice, that is not apparent from the notice itself. As such, and even though the appellant will know what sections of fence she has erected, it is questionable whether she, or any other recipient of the notice, can reasonably be expected to know whether any sections of fence matching the description in the alleged breach of planning control were erected before she moved in in April 2019 and in the 4 years preceding the issue of the notice.
13. In view of these matters, I have strong reservations about the overall clarity of the notice. In particular, it is questionable whether, in line with the test set in the *Miller-Mead* case¹, it fairly tells a recipient, including any successor in title, with reasonable certainty what has been done wrong and what must be done to remedy it.
14. On an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to any party. However, it may be the case that defects are too fundamental to be corrected without causing injustice, in which event the notice must be quashed.
15. In this case, the uncertainty as to which sections of fence the notice requires to be removed, or which it could alternatively require to be lowered to not exceed 1 metre in height, is too fundamental for me to correct it without risking injustice. Such injustice could be suffered by the appellant or by the Council if I were to identify either too much or too little of the sections of fence described in paragraphs 9-11 above. A further risk of injustice arises in respect of the section of fence described in paragraphs 9 and 10, in view of the possibility that it may not be within the control of the appellant but of a neighbour not served with a copy of the notice.
16. For these reasons the deficiencies in the notice cannot be corrected in accordance with my powers under section 176(1)(a) of the 1990 Act without risk of injustice were I to do so. Consequently, the enforcement notice is invalid and will be quashed. In these circumstances, the appeal under ground (a) as set out in section 174(2) of the 1990 Act does not fall to be considered.

Mark Harbottle

INSPECTOR

¹ *Miller Mead v MHLG* [1963] 2 WLR 225