The Planning Inspectorate

Appeal Decisions

Site visit made on 4 August 2020

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5th November 2020

Appeal A: APP/Q0505/C/20/3245378
Appeal B: APP/Q0505/C/20/3245379
Land at 2 Darwin Drive, Cambridge, Cambridgeshire CB4 3HH

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Dr Dmitri Guskov (Appeal A) and Mrs Jane Guskova-Harrison (Appeal B) against an enforcement notice issued by Cambridge City Council.
- The enforcement notice, numbered EN/0015/19, was issued on 19 December 2019.
- The breach of planning control as alleged in the notice is, without planning permission, the unauthorised erection of a boundary fence structure adjacent to the highway in excess of parameters laid out within The Town and Country Planning (General Permitted Development) (England) Order 2015.
- The requirements of the notice are (1) either permanently remove the boundary fence structure where it is located within 1 metre to the adjacent highway in its entirety; or permanently reduce the height of the boundary fence structure where it is located within 1 metre to the adjacent highway, to no greater than 1 metre in height as per parameters as laid out in The Town and Country Planning (General Permitted Development) (England) Order 2015; and (2) permanently remove all resulting materials from the premises.
- The period for compliance with the requirements is 2 months from the date the notice comes into effect.
- The appeals are proceeding on the grounds set out in section 174(2)(b), (c), (e) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of decisions: The appeals succeed in part on ground (f) and the enforcement notice is upheld with variations in the terms set out below in the Formal Decision.

Preliminary matters

1. Some aspects of the appellants' case in the appeal on ground (b) relate to whether the notice is a nullity or invalid due to errors within the accompanying plan. If the notice were a nullity, it would have no effect and there would be no need to consider the appeals any further. It is therefore appropriate, and would not cause injustice, to first consider this question of nullity or invalidity. However, the specific question as to whether the notice is a nullity as a result of being issued without proper resolutions or authority is considered separately in the appeals on ground (e).

2. While the appellants disagree with the Council that it was expedient to issue the notice, consideration of those differing views, and whether the issue of the notice was a proportionate response to the breach of planning control, would require an assessment of the planning merits of the fence. Those merits, including development plan policies and other considerations such as crime and

health and safety, may only be considered in appeals on ground (a)[1], which have not been made.

3. Furthermore, while the appellants clearly believe there has been discrimination and there has evidently been a breakdown in relations with the Council, my consideration of the appeals may only extend to whether the statutory procedures for issuing and serving the notice were followed correctly.

The notice and the accompanying plan – nullity or invalidity

4. Section 173(1)(a) of the Town and Country Planning Act 1990 (the Act) requires an enforcement notice to state the matters which appear to the local planning authority to constitute the breach of planning control. A notice achieves this if it enables any person on whom a copy of it is served to know what those matters are. The appellants contend that the notice does not comply with these legislative requirements because of errors in the plan accompanying it.

5. The appropriate test for determining nullity is whether a notice is "hopelessly ambiguous and uncertain so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or … that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches"[2].

6. The requirements of the notice refer to sections of the fence outlined in blue on the accompanying plan to indicate where, in the Council's view, the fence is located within 1m of the adjacent highway[3]. There is no record before me of what the fence was like when the notice was served; however, the appellants point out that the blue outline includes errors and have provided a drawing with corrections. I saw at the time of my visit that the sections of fence marked A3 and A4 on the appellants' drawing did not exceed 1m in height and fence section B3, on the common boundary with 23 Akeman Street, did not exist. Furthermore, I noted that the part of the section marked C2 on the appellants' drawing that is adjacent to the footway and exceeds 1m in height had not been outlined in blue.

7. The appellants refer to the *Sarodia*[4] case and contend that any misdescription of a non-existing element of the fence, such as sections A4 and B3 on their drawing, means that the notice should be held invalid and that it cannot be corrected on appeal. However, I find a difference between *Sarodia* and this appeal. In *Sarodia*, the misdescription was fundamental, wrongly describing a single-storey side extension and a two-storey rear extension as a two-storey side extension and a single-storey rear extension respectively. In this appeal, the matter in dispute does not arise from the notice itself, but from the blue outline on the plan, which is stated to be for identification purposes only.

8. In response, the Council contends that it is plain to see what the notice relates to and why. It further states that any differences between the blue outline, drawn for information purposes, and the erected fence where it exceeds the

[1] That in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted [or as the case may be, the condition or limitation concerned ought to be discharged].
[2] Miller-Mead v MHLG [1963] 2 WLR 225
[3] Whether the fence is adjacent to the highway is considered in the appeals on ground (c).
[4] Sarodia v Redbridge LBC, [2017] EWHC 2347 (Admin).

parameters of permitted development are *de minimis* and minor. It therefore considers that those differences do not have a material effect on the understanding, the purpose or the validity of the notice.

9. The notice clearly identifies the alleged breach of planning control and its requirements are clear and understandable, notwithstanding the differences between the blue outline and the fence as I saw it. There can be no uncertainty that non-existent fence section B3 does not need to be removed or reduced in height. It is equally clear that fence sections A3 and A4 are not in breach of the notice because they do not exceed 1m in height and therefore do not conflict with its requirements.

10. Viewed in this light, it is clear what needs to be done to comply with the notice and any uncertainty arising from the blue outline on the accompanying plan does not render the notice a nullity. Section 176 of the Act allows that any defect, error or misdescription in an enforcement notice may be corrected, or any term of the notice may be varied, on appeal. I am satisfied that the requirements of the notice can be varied to omit reference to the blue outline and to make it clear that the notice has no effect on any part of the fence that does not exceed 1m in height without causing injustice.

Appeals A and B - ground (e)

11. Section 172(2)(a) of the Act requires that copies of an enforcement notice shall be served on the owner and occupier of the land to which it relates, and any other person having an interest in the land, including mortgagees, tenants and sub-tenants, if they are materially affected. The appellants' criticism is not that those required to be served with copies of the notice were not served. It is rather that the Council did not follow its own procedures correctly in deciding to issue the notice and that the service of the notice did not comply with the requirements of section 172(1)(b) of the Act.

12. A notice issued without proper resolutions or authority should be considered a nullity. The appellants refer to the Council's enforcement policy and contend that, because there was no emergency, the authority to serve the notice should have come from a resolution of the Council's Planning Committee. In response, the Council has provided an updated Planning Enforcement Policy and evidence that the Planning Committee had agreed to changes in the authorisation arrangements for enforcement work, which were included in the Council's constitution at the time that the notice was served. Accordingly, it appears that the enforcement policy quoted by the appellants is out of date and it has not been demonstrated that the notice is a nullity in this respect.

13. The appellants believe the notice was prepared and issued singlehandedly by an officer who did not have authority to do so, involving apparent forgery of a senior officer's signature. No evidence has been presented in support of this belief. The Act does not state that a notice must be signed by hand and in my experience the use of a facsimile signature, as in this case, is common practice. Consequently, it has not been demonstrated that the notice is a nullity or is invalid in this respect.

14. The power to serve an enforcement notice is discretionary and must be exercised with regard to any material planning considerations. The appellants contend that it was not expedient to serve the notice and refer to this as a requirement of subsection 172(1). However, the section only requires that it

must appear expedient to the local planning authority (my emphasis) to issue the notice. Section 1 of the notice clearly states this, and it therefore has not been demonstrated that the notice is a nullity or is invalid in this respect.

15. For these reasons I find that the notice was issued and served correctly and the appeals on ground (e) should not succeed.

Appeals A and B - ground (b)

16. The appellants state they have not erected a new fence as alleged in the notice but have improved a pre-existing fence. The representation of the fence in the notice and plan has already been considered.

17. I saw that most of the fence, where it adjoins the footway, comprises new panels approximately 1.8m high. The section on the common boundary with 4 Darwin Drive, while clearly in excess of 1m in height, appears to have been formed in part by re-using sections of an older picket fence, which is consistent with the appellants' description of the previous fence.

18. This leads me to conclude that the new fence panels, being significantly taller than the former picket fence, must be supported by equally new posts. Accordingly, the fence in situ is materially different and the notice is correct in its allegation that a fence has been erected. In reaching this view I am mindful that a small section of fence, marked A3 and A4 on the appellants' drawing, may be older. However, as this section does not exceed 1m in height, the notice cannot have any effect on it.

19. For these reasons the appeals on ground (b) must fail.

Appeals A and B - ground (c)

20. The issue at dispute in the appeal in this ground is whether parts of the fence which the notice requires to be either removed or reduced in height to not more than 1 metre are adjacent to a highway used by vehicular traffic. The term "a highway used by vehicular traffic" and "adjacent" are not defined in the Act or in secondary legislation. However, section 336(1) of the Act provides that "highway" has the same meaning as in section 328 of the Highways Act 1980, which "is the whole or any part of a highway".

21. Common law has established that a highway is a defined route over which the public can pass and repass without hindrance or charge. There is no question that the public can do so on the footway adjacent to the fence and, in keeping with section 336(1), it is reasonable to view the whole highway of Darwin Drive as comprising the carriageway and the footway on either side. Therefore, while there may not be a right for vehicular traffic to pass and repass on the footway, it forms part of a highway where that right exists. Accordingly, the erection of any section of fence that is over 1 metre in height and adjacent to the footway is development requiring planning permission.

22. It is widely understood that "adjacent" does not mean the fence must touch the highway. The Council considers that a fence set back less than 1 metre from a highway used by vehicular traffic cannot be more than 1 metre in height without the benefit of planning permission. This is reflected in the way the breach of planning control and the requirements of the notice are framed and is

consistent with the position taken by the court in the *Simmonds*[5] case cited by the appellants. I find that to be a reasonable approach.

23. While the appellants have referred to similar fences in Cambridge, I do not have details of their planning status and am therefore unable to afford them weight. Nevertheless, even if those details were available, they would not alter the fact that the fence the subject of the notice is adjacent to a highway used by vehicular traffic.

24. For these reasons, the parts of the fence which the notice requires to be either removed or reduced in height are development requiring an express grant of planning permission and the appeals on ground (c) should not succeed.

Appeals A and B - ground (f)

25. For the appeals to succeed on this ground, the appellants need to demonstrate that the steps required by the notice exceed what is necessary to remedy the breach of planning control the notice alleges. The appellants consider that the requirements of the notice aim to remedy the harm it alleges, set out in the reasons for issuing the notice. Notwithstanding this, and the Council's comments in response, the steps required by the notice are clearly framed to address the breach of planning control it alleges.

26. This is stated to be "[the] erection of a boundary fence structure adjacent to the highway in excess of parameters laid out within The Town and Country Planning (General Permitted Development) (England) Order 2015" (the Order). While no lesser steps have been suggested, any that might be identified would not remedy that breach in full if they would result in any part of the fence within 1 metre of the footway remaining over 1 metre in height.

27. While the appellants have explained the importance of the fence to them in terms of their safety, having regard to crime in the area, this is a planning merit that could only be considered if an appeal on ground (a) had also been made. Nevertheless, the requirements of the notice do not prevent a fence with the same security benefits being erected in a position where it is permitted by the Order, or the parts of the fence that are not permitted by the Order being repositioned where the Order does permit them.

28. While it is not of itself excessive, requirement (ii) refers to "the Premises", which is not defined in the notice. I am satisfied the Council meant the land edged red on the enforcement notice plan and it is therefore necessary to vary this requirement of the notice for clarity, to refer to "the Land" in keeping with the definition in section 2 of the notice. This clarification does not make the requirement any more onerous than first issued and therefore the variation would not cause injustice to the appellants.

29. For these reasons, while the requirements of the notice are not excessive, the appeals on ground (f) succeed to the extent of the variation identified in the previous paragraph and the 2 variations identified in paragraph 10 above.

[5] Simmonds v SSE and Rochdale MDC [1980] 40 P&CR 432

Conclusions

30. For the reasons given above, I conclude that the appeals on grounds (e), (b) and (c) should not succeed and that the appeals on ground (f) should succeed. I shall uphold the enforcement notice with variations.

Formal decisions – Appeals A and B

31. The appeals are allowed on ground (f) and it is directed that the enforcement notice is varied by:

- The replacement of both instances of the words "the boundary fence structure" with the words "any part of the boundary fence structure in excess of 1 metre in height" in section 5(i);
- The deletion of both instances of the words "(outlined blue on attached plan for identification purposes only)" in section 5(i); and
- The replacement of the words "the Premises" with the words "the Land" in section 5(ii).

32. Subject to these variations, the appeals are dismissed and the enforcement notice is upheld.

Mark Harbottle

INSPECTOR