



Appeal Decision

Site visit made on 21 October 2020

by K Stephens BSc (Hons) MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 November 2020

Appeal Ref: APP/B0230/C/20/3250421

18 Liston Close, Luton. Bedfordshire LU4 9HA

- 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 Luigi De Angelis against an enforcement notice issued by Luton Council.
 - The enforcement notice was issued on 11 March 2020.
 - The breach of planning control as alleged in the notice is: *Without planning permission the erection of a boundary fence on the Land between 18 and 20 Liston Close comprised of large fence panels, with concrete fence post and gravel board structure.*
 - The requirements of the notice are:
 - i. Remove the fence from the Land.
 - ii. Remove all associated building materials and rubble and waste materials arising from compliance with step (i) above from the Land.
 - The period for compliance with the requirements is one calendar month.
 - The appeal is proceeding on the grounds set out in section 174(2)(f) of the Town and Country Planning Act 1990 as amended (the 'Act').
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Decision

1. The appeal is dismissed and the enforcement notice upheld.

Preliminary Matters

2. There is no appeal on ground (a). As such there is no deemed planning application to consider. Consequently I cannot take account of any matters of planning merit, such as the fence being a 'temporary' hoarding structure for health and safety reasons during demolition and construction works at the property, or affecting outlook and light to the neighbouring property at No.20 Liston Close.
3. The appeal was lodged on ground (f) only. However arguments made by the appellant raise issues pertinent to grounds (b), (c) and (g) as well, which I must deal with in the interests of natural justice. The Council was invited to comment and so no prejudice arises from my consideration of these matters as hidden grounds of appeal.
4. On my site visit I saw another timber fence and gates across the front of the site and parallel to the back edge of the pavement. This is not identified as part of the alleged breach so it does not fall to be considered through this appeal.

The Appeal on Ground (b)

5. An appeal on ground (b) asserts that the matters alleged in the enforcement notice have not occurred. To succeed on this ground it would be necessary for the appellant to show, on the balance of probabilities, that there has not been "the erection of a boundary fence on the land between 18 and 20 Liston Close comprised of large fence panels with a concrete fence post and gravel board structure".
6. The appellant claims that the fence has been erected as a 'temporary structure' to secure the site and 'provide Health and Safety during the demolition/construction' being undertaken at No. 18. On my site visit I saw the fence had been erected on the land between 18 and 20 Liston Close, as described in the alleged breach. Therefore, it cannot be said that the alleged breach has not, as a matter of fact, taken place. Whether the breach requires planning permission is a matter for the ground (c) appeal. The appeal on ground (b) therefore fails.

The Appeal on Ground (c)

7. Ground (c) is that the matters alleged in the notice do not constitute a breach of planning control. It is a legal ground of appeal, distinct from any planning merits, and the burden of proof lies with the appellant.
8. The key questions are whether 'development' has taken place which requires planning permission and, if so, whether planning permission is granted or the development is otherwise deemed to be lawful.
9. The appellant contends the fence is a temporary safety hoarding around the site that does not require planning during the construction phase, and hence no breach of planning control has occurred. Once the works to the property are completed the fence would be reduced to an appropriate scale and cut down.
10. Under s55(1) of the Act, development is defined as "*carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land*". The erection of a fence is an operation amounting to development and does not fall under any of the exclusions of development set out in section 55(2) of the Act. Section 57(1) of the Act states that planning permission is required to carry out any development of land. There is no evidence before me that express planning permission exists for the fence that has been erected.
11. The Town and Country (General Permitted Development) (England) Order 2015 (the 'GPDO') grants planning permission for certain types of development as "permitted development" (PD) which does not need the express grant of planning permission.
12. Class A of Part 2 of Schedule 2 of the GPDO grants planning permission for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. However, limitation A.1(a)(ii) states that such development is not permitted 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 1 metre above ground level. Under limitation A.1(b) a fence that is not adjacent to the highway should not exceed 2 metres in height above ground level. I

have not been provided with any evidence or plans that demonstrate that the fence exceeds 2 metres in height.

13. It was clear from my visit that the fence in this appeal is above 1 metre in height. The question therefore arises whether the fence is adjacent to a highway. The word 'adjacent' is not defined in the above Act or the GPDO. A normal everyday dictionary definition of adjacent is 'being near or close'. The courts have found that it is sufficient for the fence to be adjacent to the highway in order to trigger the 1 metre height limit. The assessment of what constitutes 'adjacent' must therefore amount to a question of fact and degree.
14. In this case the fence is almost touching the back edge of the pavement along Liston Close. The pavement forms part of the highway and Liston Close is a highway used by vehicular traffic. In my judgement the fence is adjacent to the highway, and as it exceeds 1 metre in height it breaches the limitation A.1(a)(ii) to Class A of Part 2 of Schedule 2 to the GPDO.
15. But from what I saw on site, not all the fence could be regarded as being adjacent to the highway and so some parts of it would be permitted to exceed 1 metre in height provided those parts do not exceed 2 metres in height. I do not have the views of the parties, or any plans or other clarifications, to indicate to me how far back the fence needs to be so as to no longer be adjacent to the highway.
16. I am not able, therefore, to conclude which part of the fence breaches the 1 metre height limitation and which part breaches the 2 metres height limitation. I have no evidence to suggest that the erection of the fence was not undertaken as a single operation and so any breach of control means that the appeal on ground (c) fails.

The Appeal on Ground (f)

17. An appeal on ground (f) is that the requirements of the notice exceed what is necessary to remedy any breach of planning control or injury to amenity, which has been caused by any such breach, as the case may be. It can be seen from the notice that the requirement to remove the entire fence aims to remedy the breach of planning control. That being the case, the requirement is not excessive.
18. Nevertheless, the appeal process is meant to be remedial and not punitive and I shall therefore consider whether there is any obvious alternative. The appellant contends that the fence is a temporary structure and that once the building works at the dwelling are completed, the fence will be 'reduced to an appropriate scale (cut down)'. But this would not see the fence removed.
19. Permitted development rights cannot be applied retrospectively to the development carried out. However, once the fence has been removed and the notice fully complied with, the appellant would have permitted development rights to erect another fence up to 1 metre high adjacent to the highway, and 2 metres high for the remainder. This
20. That being so, I have considered whether the notice could be varied to allow a reduction in the fence height as an alternative to complete demolition. However, if I were to attempt to vary the notice it would be uncertain how much of the fence is 'adjacent to the highway' to be reduced to 1 metre in height. Therefore, I am not satisfied in the circumstances that the

requirements of the notice could be varied with sufficient precision. There is no obvious alternative to complete demolition that can be achieved with the requisite degree of precision.

21. I conclude that the breach of planning control cannot be remedied by a lesser step. The ground (f) appeal therefore fails.

The Appeal on Ground (g)

22. Ground (g) is that the period specified for compliance with the notice falls short of what is reasonable. The Notice gives the appellant one calendar month from the date the notice comes into effect to remove the fence.
23. Due to the current Covid-19 pandemic, the appellant states that all construction works at the property are at a stand-still, and consequently he is unable to estimate when the fence could be reduced. Furthermore, he states that the 'notice effect' date of 15 April 2020 is not realistic or achievable due to the pandemic.
24. The 'notice effect' date is not when the works have to be done. The compliance period is one month after the notice takes effect. As the appellant has appealed, he would have one calendar month from the date of this decision to comply with the notice.
25. In all cases the test in a ground (g) appeal remains whether the compliance period is reasonable, which needs consideration of what must be done in practice to carry out the remedial steps and how much time is reasonable to allow for that purpose.
26. Removal of the fence would require the fence panels and the gravel boards to be slid out of the grooves in the concrete posts. The posts would also need to be removed from the ground. Installing and removing a fence is a common DIY job frequently undertaken at domestic properties by their owners/occupiers. The requirements of the notice are therefore relatively straightforward and would not require specialist equipment or labour.
27. I accept that the UK has been subject to various lockdown restrictions and social distancing measures to control the pandemic, and it is uncertain how long these will remain in place. Nonetheless, I find it unreasonable to extend the time period indefinitely, until after all lockdown measures have ceased and construction works have been completed at No.18.
28. I am satisfied that the compliance period of one calendar month strikes a proportionate and reasonable balance between the public and private interests in this case. The Council have powers under s173A(1)(b) to extend any period for compliance, a matter which is entirely at their discretion, without prejudicing their right to take further action. Therefore, the appeal on ground (g) must fail.

Conclusion

29. For the reasons given above I consider that the appeal should not succeed.

K. Stephens INSPECTOR