



Appeal Decision

Site visit made on 22 October 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 25 November 2020

Appeal Ref: APP/C3620/X/20/3248826

High Bank, Mill Hill Lane, Brockham, Betchworth RH3 7LS

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mrs Beryl Higgins against the decision of Mole Valley District Council.
 - The application Ref MO/2019/2284PCL is dated 26 December 2019.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described as *'Erection of 1.2m high boundary fence and hedge on party boundary'*.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The relevant date for the determination of lawfulness is the date of the LDC application, ie 26 December 2019. The matter to be decided upon is whether the development, if carried out at the date, would have been lawful. The determination is to be made against the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended) as subsisted at the time of the application and which, hereafter, I shall refer to as "the GPDO".
3. In an appeal under s195 of the Act against the refusal of a LDC the planning merits and/or impacts of the matter applied for do not fall to be considered. Instead, the decision is based strictly on the evidential facts and on case law. The burden of proof is on the appellant, and I shall reach my decision on the various evidence before me and also the observations at my site visit.

Main Issue

4. The main issue is whether the Council's decision to refuse to grant a LDC was well-founded.

Reasons

5. The legislation under Schedule 2, Part 2, Class A of the GPDO grants planning permission for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure adjacent to a highway used by vehicular traffic, subject to certain provisos.

6. Paragraph A.1. thereof states that such development is not permitted by Class A if the height of the enclosure adjacent to a highway used by vehicular traffic would, after carrying out the development, exceed one metre above ground level.
7. The submitted plan (drawing ref HBX 01A, dated 25 December 2019) shows the existing timber, close-boarded fence which, at my site visit, I noted runs almost up to the concrete kerbstone and the telegraph pole. The plan appears to propose that a section of 1.2m high fence extend this fencing to a point 0.7m from – as the appellant terms it – the ‘road edge’. However, bearing in mind that the intention is apparently for this to enclose the grassed verge fronting the hedge bounding the property’s garden, it is not clear, given that the verge abuts the ‘road’s edge and the plan shows the new fencing extending significantly beyond the telegraph pole, how this could be achieved. In fact, from my site visit observations, it would seem that the said plan does not actually reflect the reality of the situation.
8. Nonetheless, leaving the practicalities of the proposal aside, the status of the ‘road’ is an important factor when deciding the proposal’s lawfulness in cases such as this. The Council, in its representations, indicates that advice was sought from Surrey County Council (SCC) in this regard. Firstly, it is obvious that the thoroughfare is, at this point, unadopted highway, and both SCC (the local highway authority), and the appellant have confirmed that it is also a public bridleway. Views differ, though, between the parties regarding the implications of the Land Registry having apparently recently included the said grassed verge within High Bank’s title. The appellant is of the opinion that, as a result, the verge does not fall within the width of the historic bridleway. Instead, the Council makes the point that the land is inalienable, given that the public have a legal right over the bridleway, and that the back edge of the verge, where the telegraph pole is positioned, marks the bridleway’s extent. This being a common arrangement, and the individual physical factors involved here, would suggest that this is the case.
9. SCC points out that, as a public bridleway, it would not be possible to enclose any part of it or place any structure to obstruct passage by means of foot, horse or cycle. The authority also takes issue with the fact that the appellant, on her application form, terms herself as the owner of the land ringed red on the plan submitted with the application form, and says that it is not possible to gain title through usage of the bridleway.
10. Having established from the evidence that the bridleway is also highway land, it is now necessary to assess whether the proposal would satisfy the provisions and limitations of the GPDO.
11. The question to be determined is whether the fence, as proposed, would be adjacent to the highway. Drawing ref HBX 01A would suggest a set back in this regard. There is no definition of the word “adjacent” within the GPDO but it is defined in the dictionary as meaning ‘being near or close to, next to, or contiguous.’ Contiguous is defined in the dictionary as ‘sharing a boundary or touching each other physically, or continuous.’ However, case law shows that the meaning of ‘adjacent’ in the context of the GPDO does not equate to ‘contiguous’ or ‘abutting’. The assessment of what constitutes ‘adjacent’ must therefore amount to a question of fact and degree, to be assessed in relation to the particular circumstances involved.

12. The thrust of case law, including the judgement of *Simmons v SSE and Rochdale* [1981], and also appeal decisions on the matter, is that fences and walls etc can be set back from a highway but still be 'adjacent' to it. Being a matter of fact and degree it is also providing that the enclosure is clearly to define the boundary of the property concerned from the highway and, moreover, is perceived to do so.
13. In the context of the current appeal the perception, even to a casual observer, is that the proposed fence would form a distinct boundary between the highway and the appellant's property. I therefore conclude, based on fact and degree in this particular instance, that the fence would be adjacent to the highway and, being in excess of the maximum height specified, would not benefit from the planning permission granted by the GPDO. As such, its erection would constitute a breach of planning control.
14. I note the appellant's comments regarding visibility splays and the redevelopment of 'The Hollies' but, in the contextual parameters of the development at appeal, such matters are of no relevance. The question here, is merely whether or not the proposal, as put forward, is permissible under the GPDO. If not, then for the proposal to lawfully proceed, it would require the benefit of planning permission.

Conclusion

15. For the reasons given above I conclude, on the evidence available, that the Council's refusal to grant a LDC was well founded, and the appeal does not succeed. I will exercise, accordingly, the powers transferred to me in section 195(3) of the 1990 Act as amended.

Timothy C King

INSPECTOR