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## Appeal Decision

Site visit made on 1 December 2020

**by S A Hanson BA (Hons) BTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 15 January 2021**

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**Appeal Ref: APP/T3725/C/19/3240031**

**41 Clemens Street, Royal Leamington Spa, Warwickshire CV31 2DP**

- 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 Haralabos (aka Harry) Angelidis against an enforcement notice issued by Warwick District Council.
  - The enforcement notice, numbered ACT/565/18, was issued on 16 September 2019.
  - The breach of planning control as alleged in the notice is: without planning permission, the erection of fencing, trellis, fixed furniture and planters on the Land.
  - The requirements of the notice are: [i] Permanently remove from the Land the unauthorised fencing, trellis, furniture and planters in their entirety (as shown in photographs 1 & 2 in Appendix A attached to this Notice). [ii] Permanently remove from the Land all resulting waste and materials.
  - The period for compliance with the requirements is one calendar month.
  - The appeal is proceeding on the grounds set out in section 174(2) (b), (c) and (f) of the Town and Country Planning Act 1990 as amended (the 1990 Act)
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### Decision

1. It is directed that the enforcement notice be corrected by amending paragraph 5 'What you are required to do' to read:  
  
"(i) Reduce the height of the fence so that no part exceeds 1 metre in height.  
(ii) Permanently remove from the Land the furniture in its entirety  
(iii) Permanently remove from the Land all resulting waste and materials."
2. Subject to these corrections the appeal is dismissed and the enforcement notice is upheld.

### Preliminary matter

3. The Council has provided that at the time the notice was served the height of trellis and posts was 1.38m. Since issuing the notice and the appeal being lodged the height of the trellis and fence posts has been reduced to 0.7 metres. The Council therefore concedes that planning permission is no longer required for the trellis and fence (the means of enclosure).

### The appeal on ground (b)

4. An appeal on ground (b) is a legal ground of appeal and is a claim that the matters alleged at Section 3 of the enforcement notice have not occurred as a matter of fact. The appellant must therefore demonstrate that there has not been operational development on the land by the way of the erection of the furniture and planters on the Land.

5. The appeal on ground (b) concerns the circumstances leading up to, and at the time of the issuing of the enforcement notice. The burden of proof in appeals on ground (b) falls to the appellant to show that the matters which appear to constitute the breach of planning control, have not occurred. The test of the evidence is on the balance of probability. The planning merits of the matter alleged do not fall to be considered.
6. It was evident at my site visit and from the Council's evidence that the development as alleged had occurred. I note that the appellant says that the trellis and fence posts were reduced in height prior to the service of the notice, however, without any further evidence<sup>1</sup> to substantiate that fact, I find that on the balance of probability, the matters alleged have occurred.
7. Therefore, the appeal on ground (b) fails.

### **The appeal on ground (c)**

8. Factors relating to the how the structure appears in the context of the street scene, or whether it provides a useful facility for local residents, are not relevant to an appeal made on ground (c). Those factors are more relevant as to whether planning permission should be granted. However, no appeal is made on ground (a) that planning permission should be granted, and so I cannot take them into account in reaching my decision.
9. The appeal on ground (c) is a claim that the development does not constitute a breach of planning control. The onus of proof rests with the appellant and the level of proof is on the balance of probability. The breach of planning control refers to the development which was alleged when the notice was issued and not any subsequent altered development.
10. A breach of planning control comprises the carrying out of development without the required planning permission. Section 55(1) of the 1990 Act defines development as the carrying out of building, engineering, mining or other operations in, on, over or under land and section 336 of the 1990 Act defines a "building" as including "any structure or erection".
11. Turning firstly to the fence structure, it seems to me that the trellis and planters form part of the fence which provides a physical barrier and encompasses the seating area. The planters, which are bolted together with the posts and trellis, together form part of the fence or 'means of enclosure'. However, this means of enclosure would not have been permitted under the provisions of Schedule 2, Part 1, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) because its height exceeded 1 metre above ground level at the time the notice.
12. Regarding the furniture, the seating is of solid construction being made of pieces of wood screwed together to form individual 'L' shaped benches. Although the furniture is not permanently fixed to the ground, a bolt mechanism has been positioned into the ground to enable the structures to be secured when required. The appellant provides that the furniture has been moved in the period since the notice was issued, 'though not frequently'. Furthermore, the appellant in his statement suggests that the intention is 'to

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<sup>1</sup> The appellant referred to photographs which showed the fence reduced in height prior to the issuing of the notice, however these were not supplied.

move them regularly in and out, once storage space becomes available again inside' but in his final comments he submits 'the intention is not to move them in/out on a daily basis'.

13. The bulk and mass of the furniture with the option to securely fix it to the ground give it a degree of permanence. It is evident from the size and design of the furniture that it cannot easily be moved and taken inside, and there is no evidence to suggest that happens. To my mind these factors indicate a characteristic of permanence rather than a temporary or portable nature. Established case law<sup>2</sup>, as cited by the Council, identified three primary factors as decisive of what was a building: (a) size (b) permanence (c) physical attachment. The Courts have made it clear that no one test is conclusive, but the degree of permanence may, in itself, tilt the balance when weighed with other factors. It is the Council's case that the furniture has a degree of permanence and I see no reason to disagree. Consequently, I find that the furniture does constitute a breach of planning control and express planning permission is required for its retention.
14. The appeal on ground (c) therefore fails.

### **The appeal on ground (f)**

15. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to remedy the breach of planning control. S173(3) of the 1990 Act requires that an enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to remedy the alleged breach of planning control set out in section 3 of the notice.
16. The enforcement notice refers to the development representing 'an incongruous feature and clutter within the street scene' which 'neither harmonises nor enhances the area' failing 'to adopt appropriate materials' and not respecting the architectural or historical distinctiveness of the building or its surroundings'.
17. The appellant offers alternative suggestions for the painting and extension of the fence enclosure, but no alternative options concerning the furniture, maintaining that these are not permanent fixtures. The amendment to the requirements of the notice would allow for the retention of the fence no higher than 1 metre and, as that is what the appellant has done, I consider alternative options to be unnecessary. However, as I have considered that the furniture does constitute development and would require planning consent, and as there is no appeal on ground (a), I find that the requirements go no further than simply requiring the appellant to undo what has been done, by removing the furniture and all resulting materials and debris from the land. The requirements self-evidently cannot exceed what is necessary to fully remedy the breach of planning control. Allowing the furniture to remain, would not fully remedy the breach.
18. For the reasons above, the appeal on ground (f) fails.

*S A Hanson* INSPECTOR

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<sup>2</sup> Skerrits of Nottingham Ltd v SSETR (No 2) [2000] 2 PLR 102