
Appeal Decisions

Site visit made on 22 February 2021

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 March 2021

**Appeal Ref: APP/M3645/C/20/3257525 & APP/M3645/C/20/3257527
Frith Manor, Lingfield Road, East Grinstead, Surrey RH19 2JW**

- 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 Mr Alastair Harrison and Mrs Suzanne Harrison against an enforcement notice issued by Tandridge District Council.
 - The enforcement notice was issued on 20 July 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission the erection of a fence in the approximate position marked with a black line between A and B on the attached plan B.
 - The requirements of the notice are:
 - i. Either remove the fence panels and fence posts from the location marked with a black line between A and B on the attached plan B, or reduce them in height to one metre or less above the adjacent ground level; and
 - ii. Remove the material arising from compliance with (i) above to an authorised place of disposal.
 - The period for compliance with the requirements is 3 months.
 - The appeals are proceeding on the grounds set out in section 174(2) (c), (d) and (e) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decisions

1. The appeals are dismissed, and the enforcement notice is upheld.

Procedural Matters

2. Arguments relating to the planning merits of the development that has been undertaken (such as the impact of the development upon the character and appearance of the area and the security benefits and the improved visibility splays) can only be considered in an appeal made on ground (a). As the fee was not paid for the ground (a) appeal within the prescribed timeframe, the application for planning permission deemed to have been made have lapsed. Therefore, the planning merits arguments put forward in the appellants' case, including the existence of other fences, gates, and vegetation nearby, can play no part in my decision.
3. The appellants state that it is not clear which of the two fences the Notice relates to, or whether it is both. However, the breach of planning control as alleged in the Notice refers only to the "erection of a fence (my emphasis)". The first requirement of the notice states "*Either remove the fence panels and*

fence posts from the location marked with a black line between A and B on the attached plan B, or reduce them in height to one metre or less above the adjacent ground level (my emphasis)". Furthermore, the notice does not refer to an open post and rail fence of less than one metre in height. It is therefore clear that the notice relates to the timber close boarded fence over one metre in height and not the open post and rail fence under one metre in height. I will deal with the appeals on this basis.

The ground (e) appeal

4. This ground of appeal concerns whether the appellants have shown on the balance of probability that the notice was not served on everyone with an interest in the land, as required by section 172 of the 1990 Act as amended and, as a result, have been substantially prejudiced. The appellants state Mrs Suzanne Harrison is the sole owner of the land and was not properly served the Notice, and also that she was not contacted at any stage during the complaint prior to the issue of the notice.
5. In response to this the Council states that a Requisition for Information was served on both Mr and Mrs Harrison on 27 May 2020, which was completed on 9 July 2020 together with a covering letter stating Mrs Harrison has given Mr Harrison authority to act on her behalf. This is confirmed in the witness statement provided by the Planning Enforcement Officer dated 27 May 2020, a photograph showing proof of postage, and a copy of the completed Requisition for Information with the accompanying cover letter mentioned above.
6. The Council submits that two copies of the enforcement notice were served on Mrs Harrison on 20 July 2020. This is confirmed in a witness statement provided by the Planning Enforcement Officer dated 20 July 2020 and a photograph showing proof of postage. The Council also states that the Notice was also served on Mr Harrison and on the owner/occupier of the land.
7. Indeed, both Mr and Mrs Harrison have been able to lodge their appeal within the relevant timeframe. It cannot therefore be said that parties with an interest in the land have been substantially prejudiced.
7. Consequently, the appeals on ground (e) must fail.

The ground (c) appeal

8. In this ground of appeal, it is necessary to show that there has not been a breach of planning control. The onus of proof lies with the appellants, the relevant test of the evidence being the balance of probability.
9. Under this ground of appeal, it is argued that there has been no breach of planning control as the operations alleged in the notice are permitted development by Article 3, Schedule 2, Part 2, Class A of The Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), which allows for *"the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure"*.
10. However, limitation A.1 states that 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, one metre above ground level.

11. There is no dispute between the parties that the close boarded fence is above one metre in height. I also observed that the fence encloses part of the front garden of this property. Lingfield Road is a highway used by vehicular traffic with a footway adjacent appeal property which forms part of the highway. Indeed, common law has established that a highway is a defined route over which the public at large can pass and repass as frequently as they wish, without hindrance and without charge. Therefore, the question to be determined is whether the fence is "adjacent" to a highway.
12. The fence does not have to touch the edge of a highway to be considered adjacent. There may be some distance between a highway edge and a fence serving a property, yet it may still be close enough to have the perceived function of forming a boundary to the highway. Whether a fence, in such circumstances, is adjacent to the highway is a matter of fact and degree in each case.
13. In this case, the close boarded fence is positioned close to the back edge of the pavement along Lingfield Road, with the nearest part of the fence being approximately 1.25m away from the pavement¹, which is part of the highway. Whilst I note that the fence is set back behind a newly planted hedge, and an open post and rail fence of less than 1m in height, its closeness falls well within the scope of being adjacent to the highway. In addition, when viewed along the street from both directions, it would be perceived as a boundary treatment separating the highway from the appellants' garden. As such, and as a matter of fact and degree, I consider it has been erected adjacent to the highway. The close boarded fence forms one means of enclosure erected in a single operation and any part of that being adjacent to the highway takes the whole enclosure outside the permission granted by the GPDO.
14. I appreciate the appellants' frustration regarding the time taken by the Council to deal with a previous application and the telephone advice they received from the Council regarding the new/replacement fence. However, these have no bearing on the issue of whether there has been a breach of planning control.
15. Although the appellants state that the new fence replaced a pre-existing fence in the same position, very limited evidence of this pre-existing fence has been submitted. Conversely the Council has provided photograph within their appeal statement taken from Google street view in May 2019 which does not appear to show any pre-existing fence in this same location. Any fence which may or may not have been in this location previously has since been removed. As such, based on the evidence before me, the fence is a new fence, and it is not an improvement or alteration of an existing fence.
16. The means of enclosure is operational development for which planning permission is required. It exceeds 1m in height, in breach of limitation A.1(a)(ii) to Class A of Part 2 of Schedule 2 of Article 3 to the GPDO. Planning permission has thus not been granted for its erection by the GPDO or expressly by a planning application submitted to the local planning authority. As such there has been a breach of planning control.
17. The ground (c) appeals must fail.

¹ Measurements taken from the Council's Statement of Case.

The ground (d) appeal

18. The onus is on the appellants under ground (d) to make the case that, at the time the enforcement notice was issued, it was too late to take action against the matters stated in the notice. The enforcement notice is directed at the alleged erection of a fence in the approximate position marked with a black line between A and B on the attached plan B. Consequently, the appellants need to show that the matters alleged in the notice occurred at least 4 years before it was issued (which was 20 July 2020). If the Council has no evidence of its own, or from others, to contradict or otherwise make the version of events less than probable, there is no good reason to dismiss the appeal, provided the appellants evidence alone is, on the balance of probability, sufficiently precise and unambiguous.
19. The appellants stance is that at the time the Notice was issued in July 2020 the Council failed to take into account the existing situation at the time in so far as the close boarded timber fence in excess of 1m and the open post and rail fence, under 1m in height and the deciduous hedge had been implemented. However, the Notice does not refer to either the open post and rail fence and the deciduous hedge and therefore the Council are not attacking these elements.
20. The Council's state that they received a complaint regarding the alleged development on 12 January 2020 and viewed the new fence on 17 January 2020. The Enforcement Notice was served on 20 July 2020. The Council have also provided a photographic image taken from Google street view which shows that the fence was not in existence in May 2019. On the contrary no firm evidence has been put forward to demonstrate the fence, over 1m in height existed for more than four years.
21. It is well established in planning law that the onus rests with the appellants to make out his or her case. However, on the evidence before me, I find that burden has not been satisfactorily discharged in this particular case. Therefore, on the balance of probability, I conclude that at the time the notice was issued it was not too late to take enforcement action against the alleged breach of planning control.
22. Consequently, the appeals on ground (d) must fail.

Conclusion

23. For the reasons given above I conclude that the appeals should not succeed. I shall uphold the enforcement notice.

R Satheesan

INSPECTOR