



Appeal Decision

Site visit made on 25 May 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 June 2021

Appeal Ref: APP/B1740/C/21/3268255

Land at The Old Cottage, Chapel Lane, Bransgore BH23 8BN

- 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 G Beehag against an enforcement notice issued by New Forest District Council.
- The enforcement notice was issued on 11 January 2021.
- The breach of planning control as alleged in the notice is without planning permission, erection of a means of enclosure comprising a timber fence, posts and gate in excess of 1 metre high, adjacent to a highway, in the approximate position between points marked A-B on the attached plan.
- The requirements of the notice are: (i) Remove the means of enclosure comprising fence, posts and gate including all associated supports and fixings between points marked A-B on the attached plan. (ii) Following compliance with step (i) above, infill all holes and level the land with topsoil and reseed these areas with grass seed. (iii) Following compliance with (i) and (ii) above remove all resultant debris from the land.
- The period for compliance with the requirements is one 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. 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.

Summary of Decision: The appeal succeeds in part and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

Background

1. The appeal site contains a detached thatched cottage set behind a street frontage boundary consisting mostly of a brick wall and hedge.
2. The means of enclosure attacked by the enforcement notice consists of a fence, including the supporting posts and a gate, which forms a continuation of the site frontage enclosing the cottage's side garden. I am given to understand that the fence was erected to replace a collapsed section of wall. An appeal following the refusal of planning permission for the fence was dismissed in August 2020¹.

Ground (f) appeal

3. The ground of appeal is that the requirements of the notice are excessive for its purpose. Planning merits considerations are not relevant to this ground of appeal.

¹ Appeal Ref: APP/B1740/W/20/3252498.

4. The two purposes that an enforcement notice can seek to achieve are set out in s173(4) of the Act. Firstly, the notice can remedy the breach of planning control that has occurred, including by restoring the land to its condition before the breach took place. Secondly, the notice can remedy any injury to amenity caused by the breach. The Council did not specify which of those purposes it sought to achieve in the notice. However, total removal of the fence is required as opposed to lesser steps, such as a reduction in its height. Therefore, the purpose of the notice must be to remedy the breach of planning control by restoring the land to its condition before the breach took place.
5. The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) at Article 3, Schedule 2, Part 2, Class A, paragraph A.1 (a) (ii) grants planning permission for the erection of a gate, fence, wall or other means of enclosure up to 1 m high where it is adjacent to a highway used by vehicular traffic. At around 2 m high, the fence exceeds the permitted height limit. Relevant case law makes it clear that in such instances the whole development is unauthorised, not just that part in excess of the GPDO limits². As a result, reducing the fence to no more than 1 m high would not restore the site to its condition before the breach took place; part of the fence comprised in the breach would remain in situ. It follows that requiring total removal of the fence in the notice is reasonable for the purpose of remedying the breach.
6. Nevertheless, given the limits in the GPDO Part 2, Class A set out above, a replacement means of enclosure up to 1 m high could be erected with planning permission in a similar position to that of the fence, more or less immediately following removal of the latter. It is not unreasonable to assume that the appellant would wish to have some form of means of enclosure along the relevant part of the site frontage, to provide a physical boundary with the street. The overall height aside, it is unlikely that a replacement means of enclosure would be much different in terms of its design or materials to the fence. Consequently, erection of a similar means of enclosure at 1 m high represents a realistic fallback position after removal of the fence.
7. At s173(4), the Act also provides for remedying the breach by making development comply with the terms, including conditions and limitations, of any planning permission granted in respect of the land. This includes where planning permission is granted by the GPDO. The height aside, there are no other relevant limitations or conditions in the GPDO Part 2, Class A applicable to a means of enclosure. Therefore, reducing the fence height to no more than 1 m would bring it within the limit of what would otherwise be granted planning permission by the GPDO Part 2, Class A.
8. The appellant explained how the reduction in height could be achieved and there would appear to be no practical impediment to doing so. It would be possible to accurately measure the extent to which the fence has to be reduced in height; Article 2 (2) of the GPDO prescribes how the height above ground level is to be measured. Consequently, requiring reduction of the fence to no more than 1 m high would be sufficiently precise. Requiring reduction in the height of the fence as set out above as an alternative to removal would also be sufficiently clear. As a result, there would be no uncertainty as to what must be done to comply with the notice.

² *Garland v MHLG* [1968] 20 P&CR 93.

9. Having regard to the fallback of what could be achieved as permitted development, reducing the fence to no more than 1 m high therefore represents an obvious alternative which would overcome the planning difficulties at less cost and disruption than total removal. In this respect, I am mindful that the enforcement process is intended to be remedial, not punitive.
10. For the above reasons, whilst I find that the requirements are not excessive, I shall vary the notice as set out above as an alternative remedy to the breach and the ground (f) appeal succeeds to that extent.

Formal Decision

11. It is directed that the enforcement notice be varied by inserting the following requirements after (iii) in paragraph 5:

"OR:

- iv. *Reduce the height of the means of enclosure comprising a fence, posts and gate including all associated supports and fixings between the points marked A-B on the plan attached to the enforcement notice to not exceeding one metre above ground level, to make the development comply with the terms of the planning permission granted by the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) at Article 3, Schedule 2, Part 2, Class A, paragraph A.1 (a) (ii), and;*
- v. *Remove any demolition materials arising from step iv from the land."*

Subject to this variation the enforcement notice is upheld.

Stephen Hawkins

INSPECTOR