



# Appeal Decision

Site Visit made on 24 May 2021

**by M Savage BSc (Hons) MCD MRTPI**

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

**Decision date: 23 June 2021**

**Appeal Ref: APP/J3720/X/20/3266080**

**7 Fordham Avenue, Stratford-Upon-Avon CV37 6XD**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr & Mrs John Westwood against the decision of Stratford-on-Avon District Council.
- The application ref 20/01929/LDP, dated 17 July 2020, was refused by notice dated 29 September 2020.
- 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 'erect a maximum 2m high garden fence.'

## Decision

1. The appeal is dismissed.

## Main Issue

2. The main issue is whether the Council's decision to refuse an LDC was well-founded. This will turn on whether the proposed development would constitute permitted development by virtue of the provisions of Article 3(1) and Part 2, Class A of Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)('the GPDO').

## Reasons

3. An application under S192(1) of the Town and Country Planning Act 1990 (as amended)(the 'Act') seeks to establish whether (a) any proposed use of buildings or other land; or (b) any operations proposed to be carried out in, on, over or under land, would be lawful. S192(2) sets out that if on application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect.
4. Planning merits form no part of the assessment of an application for a LDC under S192 of the Act. The proposed development must be considered in the light of the facts and the law.
5. The appeal site comprises a detached property, located on a corner plot, in a generally residential area characterised by open fronted gardens. The front and side garden of the appeal site is generally open with a variety of shrubs, trees and other vegetation. The rear garden, by contrast, is enclosed by fencing which extends out in line with the dwelling, parallel to Grange Park.

6. Part 2, Class A of the GPDO permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosures subject to certain conditions, including A.1.(a) 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, (ii) ...exceed 1 metre above ground level; (b) the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2 metres above ground level.

*Whether adjacent to a highway*

7. Both Fordham Avenue and Grange Park are highways which are used by vehicular traffic. The proposed fence would extend further towards Grange Park than the existing fence and would extend up to 2m in height. This appeal will therefore turn on whether the proposed fence would be adjacent to the highway. The term 'adjacent to a highway' is not defined in the GPDO. The Oxford English Dictionary defines 'adjacent' as 'next to or very near something else; neighbouring; boarding; contiguous; adjoining.' What constitutes 'adjacent to a highway' is a matter of fact and degree, depending on the circumstances of the case.
8. At its southern most point, the fence would be set back approximately 4.6m from Grange Park. The proposed fence line would taper towards the boundary with No.1 Grange Park, where this setback would be reduced to approximately 1.9m. Although there is some mature planting between the proposed fence line and the highway, it does not extend along its full length, with a lawned area towards the boundary with No 1 Grange Park.
9. Where the proposed fence would taper towards No. 1 Grange Park, existing low level planting would either need to be removed or would be incorporated into the rear garden. The appellants advise that it is intended to provide planting in front of the proposed fence, either through the relocation of existing planting or through the provision of new planting. However, it is not possible to secure planting through a LDC application. Furthermore, the fence would have a much greater prominence than the planting, particularly initially. Despite the setback, the proposed fence would therefore be perceived as a boundary fence separating the land from the highway. Consequently, I consider that, as a matter of fact and degree, the proposed fence would be adjacent to the highway.
10. The appellants have drawn my attention to an appeal decision relating to a site in Sissinghurst, Kent, appeal reference APP/K0425/C/06/2010722. This was an enforcement case, where the Inspector concluded that although the fence was close to the footway, it could not be considered to be adjacent because it was separated by a substantial feature, a planted bed. A Council report on the appeal decision confirms that '*the planted bed measures approximately 20 metres long by 1.7m wide (although at its northern end is about 2.5 metres wide)*'. Whilst I do not have full details of the appeal before me, I do not consider that the Sissinghurst case is comparable to the appeal site, since the proposed fence line would not be separated from the highway by a substantial feature along its full length.
11. The appellants have also drawn my attention to examples of fences over 1m in height being erected adjacent to a highway at 27 Blue Cap Road, 2 Shallow Close and 5 Swift Road. However, I do not have substantive details of these

examples and cannot be sure that they are comparable to the appeal scheme or that they were erected under permitted development rights.

*Material change of use*

12. The erection of the fence would result in some of the land to the side of the dwelling becoming private garden space, enlarging the rear garden. The Council allege that the land on which the proposed fence would be sited is amenity land and not domestic garden and the erection of a fence to enclose the land would therefore result in a change of use which is not permissible under the GPDO.
13. The appellants state that the front and side gardens have been maintained by the previous owner and themselves since its construction in 1970. The appellants have provided me with Title Deeds which show that the appeal site is in single ownership. The land appears well maintained and is easily accessible from the main dwelling. Although the strip of land which runs along Grange Park is not enclosed and is therefore not private garden, there is nothing on the Title Deeds which leads me to believe it forms part of a different planning unit to the house or that it is not used as residential garden.
14. The appellants have drawn my attention to planning consents granted at 1 and 9 Fordham Avenue and 32 Blackthorn Road for extensions and fencing on corner plots where, it is stated, there was no requirement for a change of use. This does not support the appellants' argument that the proposed fence would be permitted development, because planning permission was secured in these cases. Nevertheless, it does, in my view, support their contention that there would be no material change of use because, as pointed out by the appellants, had there been restrictive conditions regarding amenity strips, I would expect the conditions to apply to other sites forming part of the same estate.
15. I therefore conclude that the enclosure of the land would not result in a material change of use.
16. Whilst I have found that the enclosure of the land would not result in a material change of use, for the reasons given above, I conclude, as a matter of fact and degree, the fence would be adjacent to the highway. Since the proposed fence would exceed the 1m height limit at Class A paragraph (a)(ii), it is not granted planning permission by the GPDO and planning permission would be required.

**Conclusion**

17. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a 2m high garden fence was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

*M Savage*

INSPECTOR