



Appeal Decision

Site visit made on 23 June 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06 July 2021

Appeal Ref: APP/G2625/C/19/3233542

Land at 8 Marston Lane, and on the north east side of Marston Lane, Norwich NR4 6LZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Emma Stephens against an enforcement notice issued by Norwich City Council.
 - The enforcement notice, numbered 18/00149/ENF No. 1, was issued on 11 June 2019.
 - The breach of planning control as alleged in the notice is, without planning permission, the erection of a fence of more than 1m in height adjacent to a highway.
 - The requirements of the notice are:
 - a. Remove the boundary fence to the southeast boundary of the Land and as indicated by the dotted blue line on the plan attached to the notice.
 - b. Remove materials from the site.
 - c. Reinstate the grass verge.
 - The period for compliance with the requirements is two months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (d) and (g) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: the appeal is dismissed and the enforcement notice is upheld with variations as set out in the Formal Decision below.

Procedural matters

1. Before being enclosed by the fence now subject to the enforcement notice, the land was a mown grass highway verge that was maintained by Norwich City Council. Prior to issuing the enforcement notice, the Council undertook a Land Registry search which revealed that the land enclosed by the fence was not in the ownership of the appellant.
2. In response, the appellant has provided extracts from a Defective Title insurance policy provided to her by the previous owner when she bought the land in August 2018. I have not been provided with the full document but from the extract provided this document confirms in terms that the previous owner could not demonstrate evidence of title to this land. The appellant has provided no documentary evidence to demonstrate that she does own the land.
3. However, section 174(1) of the 1990 Act provides that 'a person having an interest in the land' to which an enforcement notice relates may appeal to the Secretary of State. In this case, the appellant confirms that she erected the fence and, since being enclosed, has been using the land as part of her garden. I am therefore satisfied that the appellant is a person having an interest in the land to which the enforcement notice relates and therefore that, pursuant to Section 174(1) of the 1990 Act, she has the right of appeal.

4. The requirements at paragraph 5 of the notice include (a) to remove the boundary fence and (b) to remove materials from the site. By reading the two requirements together, it is reasonably clear that requirement (b) is intended to relate to the materials resulting from the removal of the boundary fence in requirement (a). But both could have been more clearly expressed: for example, there may be materials on the land not associated with the boundary fence which the notice cannot require to be removed. Furthermore, the 'fence' alleged in paragraph 3 of the notice actually comprises fencing panels together with a concrete base and concrete support posts. Neither the requirement at paragraph 5(a) nor that at 5(b) of the notice make reference to those various components.
5. The appellant has not queried this and it is obvious that she has understood what needs to be done to comply with the notice. I am therefore satisfied that I can vary the notice to make requirements (a) and (b) clearer without causing injustice.

6. The appeal on ground (c)

7. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control. An appeal on this ground is one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.
8. The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is permitted by Class A, Part 2, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), subject to the limitations at Class A.1. Other than in relation to a school, the limitations at Class A.1 include that 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 1 metre above ground level.
9. The fence subject to the enforcement notice is adjacent to Marston Lane, a highway used by vehicular traffic. It encloses a dwellinghouse, such that the limitation in Class A.1 applies in this case. The Council has measured the fence as being 1.79 metres above ground level. The appellant disputes that measurement, but accepts that the fence is 1.5 metres above ground level. The exact measurement matters not; by the appellant's own admission, the fence exceeds 1 metre above ground level and I noted during my site visit that this is evidently the case. Consequently, the fence does not accord with the limitations at Class A.1 and therefore is not permitted by Class A, Part 2, Schedule 2 of the GPDO. It follows that express planning permission is required for the fence. No such planning permission is in place.
10. In relation to this ground of appeal, the appellant comments that the fence does not obscure the view of the corner of Marston Lane in any way and that without the fence there will be no privacy in her garden. Those matters are not relevant to an appeal on ground (c), more properly falling to be considered under an appeal on ground (a).

11. I conclude that the matters stated in the notice do constitute a breach of planning control. Accordingly, the appeal on ground (c) fails.

The appeal on ground (d)

12. The appeal on this ground is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters. It is not, as the appellant contends, simply a matter of the fence already having been erected at the time that the enforcement notice was issued. Rather, it is a question as to whether the fence had by that time gained immunity from enforcement action through the passage of time.
13. In order to succeed on this ground, the appellant must show that the fence was substantially complete on the date four years before the notice was issued. In this case, the relevant date is therefore 11 June 2015. The test in this regard is the balance of probability and the burden of proof is again on the appellant.
14. As part of its evidence, the Council has provided photographs of the site taken on 6 October 2015. This is some four months after the latest date on which the fence would have had to been in situ in order to now be immune from enforcement action. These photographs show that the area now enclosed by the fence as a grass verge. The boundary to the dwelling is set some distance from the highway and ran diagonally across the grass verge. The boundary treatment comprises a tall hedge behind a low brick wall. One of the photographs does show a section of fence, but that section of fencing is not subject to the enforcement notice. The section of fence that is subject to the enforcement notice does not appear in these photographs.
15. The photographs submitted by the Council are compelling evidence that the fence subject to the enforcement notice was not in situ on the relevant date of 11 June 2015. Consequently, at the date on which the enforcement notice was issued, the Council was in a position to take enforcement action against this fence.
16. Accordingly, the appeal on ground (d) fails.

The appeal on ground (a) and the deemed planning application

17. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. Although referred to by the appellant in her grounds of appeal, it is no part of the Council's case that the fence interrupts sight lines at the junction of Marston Lane or gives rise to issues of highway safety. The Council has stated one substantive reason for issuing the enforcement notice, from which the main issue raised is the effect of the development on the character and appearance of the area.
18. Photographs appended to the Council's evidence, together with those provided by a local resident, show that the land now enclosed by the fence was an open grass verge on which stood two small trees. Behind that grass verge, the boundary of the appeal property was marked by a low wall behind which was a tall hedge. The combination of the grass verge, the two trees and the hedge gave his prominent corner an open and verdant appearance which made a significant contribution to the character and appearance of the area.

19. By contrast, the fence subject to the enforcement notice substantially erodes the openness of this prominent corner. The previous verdant appearance resulting from the grass verge, the two trees and the hedge is now replaced by the stark, harsh appearance of the fence and its supporting concrete base/posts. The retention of the two trees behind the fence does nothing to offset the harm to the character and appearance of the area resulting from the enclosure of the previously open corner by the fence.
20. I conclude that the erection of the fence has unacceptably harmed the character and appearance of the area. I therefore conclude that the breach of planning control that has taken place is contrary to Policy DM3 of the Norwich Local Plan: Development management policies plan (Local Plan). This policy indicates, amongst other things, that development should respect, enhance and respond to the character and local distinctiveness of the area.
21. Although not cited in the reasons of issuing the notice, in its evidence the Council has also referred to Policy DM12 of the Local Plan. However, on my reading, Policy DM12 relates to new residential development. The enforcement notice does not allege a material change of use of the land, and the only operational development attacked by the notice is the fence. For those reasons, I consider that Policy DM12 is not directly relevant to the matters before me.

Other considerations

22. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. For the reasons set out above, the breach of planning control alleged in the notice is contrary to the development plan. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.
23. The appellant points out that her house faces onto Marston Lane at an angle, such that the land enclosed by the fence comprises her whole garden. It is therefore the appellant's view that, without the fence, there would be no privacy in her garden. The appellant goes on to explain that she does not have a front garden or a back garden, such that the only garden available to her is the land now enclosed by the fence. For security reasons, the appellant does not want this garden area to be exposed to the road. The appellant also considers that the fence is necessary to prevent her dog from escaping onto the street.
24. I do not dismiss the appellant's concerns lightly. However, three points flow from the above.
25. Firstly, I am not persuaded that the appellant's description of the garden area available to her is entirely accurate. I note from the site plan enclosed at Appendix C of the Council's evidence that there is a relatively large area to the west side of the house, away from the road. I acknowledge that the appellant's property is close to the bus stop. Nevertheless, as the Council points out, the outbuilding to the front of the property already provides a good level of screening for that part of the garden.

26. Secondly, it seems to me that all of the appellant's concerns in these respects could all be overcome by the erection of new boundary treatment along the line of the former low wall/hedge or elsewhere within the residential curtilage of the appellant's dwelling as delineated before the fence was erected. I therefore consider that issues relating to privacy and security, or the safety of the appellant's pet, do not provide overriding justification for retaining the fence in its present position.
27. The final point relates to the lawful planning use of the land now enclosed by the fence. Although used by the appellant as part of her garden, the Council confirms that planning permission has not been granted for the incorporation of this former highway verge into the residential curtilage of the appeal property. The appellant explains that she was assured by the previous owner that the Defective Title insurance policy referred to above showed continuous use of this corner piece of land, and that it would allow her to treat that land as her own garden. That is not correct: that type of document cannot grant planning permission for the use of land. Planning permission for a material change in the use of that land to form part of the appellant's garden can only be obtained on application to the local planning authority in the first instance.
28. The enforcement notice does not allege a material change in the use of the land now enclosed by the fence. It is therefore no part of my remit to determine whether or not the use of the land subject to the enforcement notice as a garden in association with the appellant's dwelling is lawful in planning terms and, if not, whether planning permission ought to be granted for that use. The salient point is that, in the absence of a documented planning permission for the use of the land now enclosed by the fence as garden for 8 Marston Lane, I attach only limited weight to the argument made by the appellant in terms of any loss of privacy associated with the use of that land as a garden.
29. From the representations received, I recognise that there is some local support for the retention of the fence. The views expressed in these representations include that the previous hedge was an eyesore that offered no privacy for the occupiers of the appeal property, and that the materials used in the construction of the fence are of good quality. These representations clearly weigh in support of the appellant's case. However, this support must be balanced against other representations that object to the fence, essentially on the same grounds cited in the reasons for issuing the enforcement notice.

Conclusion on the appeal on ground (a) and the deemed planning application

30. For the reasons set out above, the breach of planning control alleged in the notice is contrary to the development plan. I have not been advised of any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan. I therefore conclude that planning permission ought not to be granted for the breach of planning control stated in the notice.

The appeal on ground (g)

31. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is two months.

32. The essence of the appellant's case on this ground of appeal is that the fence is already in place and that, without the fence, her privacy and security would be compromised. The appellant also explains that she has spent the last of her savings on the fence. The appellant therefore seeks an extension to the period for compliance, albeit no specific time period has been requested.
33. I am satisfied that the compliance period of two months stated in the notice would be sufficient to physically carry out the requirements of the notice. However, I do take the appellant's point concerning the resultant lack of privacy and security once the fence is removed. In the long term, those issues could be entirely overcome by the erection of new boundary treatment. But I fully recognise that it may take some time to agree and erect new boundary treatment, as well as to secure the funds necessary to carry out the work. In my opinion, the compliance period of two months would not be sufficient to accomplish that, particularly if planning permission was required for that new boundary treatment.
34. The Council has indicated that it would be prepared to extend the period of compliance period through the provisions of section 176(a)(b) of the 1990 Act, should that prove to be necessary. However, that would not provide the appellant with any degree of certainty. I shall therefore vary the notice to extend the period for compliance to six months. I am satisfied that this would then be a proportionate response to the breach of planning control that has taken place. The appeal on ground (g) succeeds to that extent.

Conclusion

35. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decision

36. It is directed that the enforcement notice be varied by:
- in paragraph 5(a) of the notice, after the words "Remove the boundary fence" insert the words "in its entirety, including the fencing panels, the concrete base and the concrete support posts," .
 - in paragraph 5(b) of the notice, delete the words "Remove materials from the site" and substitute there the words "Remove from the site all materials resulting from the removal of the boundary fence, including the fencing panels, the concrete base and the concrete support posts".
 - in paragraph 6 of the notice, delete the words "two months" and replace with "six months".
37. Subject to those variations, the appeal is dismissed and the enforcement notice is upheld.

Paul Freer
INSPECTOR