
Appeal Decision

by Anthony J Wharton BArch RIBA RIAS MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 December 2021

Appeal Ref: APP/H5960/X/21/3280104

49 Basement Flat, Taybridge Road, London SW11 5PR

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Suraj Vithlani against the decision made by the Council of the London Borough of Wandsworth.
 - The application Ref 2021/1165, dated 4 May 2021, was refused by notice dated 24 June 2021.
 - The application was made under section 191(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 a: *Close-boarded fence enclosure to front lightwell to protect residents from passer-by rubbish.*
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Decision

1. The appeal is dismissed. See Formal Decision below.

Matters of clarification

2. The appellant initially requested that I visited the site and the immediate surrounding area. However, following an exchange of e-mails between the Planning Inspectorate Case Officer, the appellant and the LPA, I have concluded that a site visit is not necessary.
3. This is because the planning merits of the case cannot be considered. This was clearly explained to the appellant and, in answer to my queries, further information and photographs of the appeal fence have been submitted. From all of the information and in the context of a LDC appeal, I am satisfied that there would be nothing gained from an inspection of the site and the surrounding area. In dealing with this appeal without a site visit I am satisfied that no injustice will be caused either to the appellant or the Council.
4. The appeal fence is as described above. It is a close-boarded, solid-looking timber fence. The appellant has confirmed that this is the fence which is the subject of the LDC application and as shown on the submitted application drawings. Thus, this is the fence which I must consider in this appeal.
5. An appeal relating to a Certificate of Lawful Use or Development (LDC) is confined to the narrow remit of reviewing the Local Planning Authority's (LPA) reason for refusal and then deciding whether the reasons are well founded. As referred to above, the planning merits of the case do not fall to be considered and the relevant test, relating to the submitted evidence, is '*the balance of probability*'.

6. National Planning Practice Guidance (PPG) indicates that an applicant is responsible for providing sufficient information to support a LDC application and that, without sufficient, precise and unambiguous information (my underlining), a LPA may be justified in refusing to grant a certificate. However, PPG also indicates that if an LPA has no contrary evidence itself and there is none from others to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application.

Background information and the enforcement action

7. The appeal site is a three storey, mid-terraced property located on the eastern side of Taybridge Road. The property has been subdivided into flats and the LDC application relates to the timber close-boarded fence and gate to the frontage of the property and related to the basement flat. These enclose the lower level lightwell area of the basement flat. The property is not within a conservation area and its surroundings are predominately residential, comprising similarly styled terraced properties.

8. An earlier timber and cane/bamboo fence had been erected some time before November 2016 and this was shown on the Estate Agent's sales information. This previous fence was a much lighter structure and was semi-translucent. Both the LPA and the appellant have submitted photographs to show that the cane/bamboo fence was in place in July 2016. On 17 January 2017 the LPA contacted the appellant to indicate that this fence was not acceptable and recommended a more solid structure in keeping with the character of the area.

9. However the LPA e-mail also indicated that any new fence over 1m in height would not constitute permitted development and would require planning permission. The appellant stated that an application would be submitted, but I have not been provided with any details of such an application.

10. On 29 April 2019 the LPA issued an enforcement notice against the timber cane/bamboo fence. There is some dispute regarding the serving of this notice but it was not appealed and came into effect on 29 June 2019. Although the Council and the appellant have made submissions relating to this notice, I am not empowered to deal with it, and nor can I adjudicate with regard to the disputed facts between the parties.

11. If the appellant is still questioning the legality of the first notice then that is a matter between him and the Council. In any case, irrespective of the validity of this first notice it does not affect what I am empowered to deal with: that is, whether or not the close-boarded fence and gate, which were in position on the date of the LDC application (4 May 2021), were lawful for planning purposes on that date.

12. With regard to the second 'notice', which is set out in the form of a letter dated 2 March 2021, I agree with the appellant that this is not a formal notice. Although referred to as an 'Enforcement Notice' by the Council it does not comply with all of the necessary sub-sections of section 173 of the Act. If it had been meant to be a formal notice it would, in my view, have been found to be a nullity.

13. Nevertheless, the letter did set out the breach of control (the erection of the close-boarded fence); what the appellant was required to do (reduce it in height to 1m or remove it completely) and a compliance period (one month). It was clear therefore that, despite the appellant's contention that he had erected the close-boarded fence on the earlier advice of a Council Officer, that enforcement action against the gate and fence was in place. The earlier e-mail of January 2017 had

also referred to the requirement of a fence not exceeding 1m in height. However, again I am not empowered to deal this second 'notice'.

Reasons

14. I now turn to the LDC application which the LPA has refused. That is, the application for a LDC for the timber close-boarded fence which has been erected in place of the lighter cane/bamboo fence. To clarify matters again, I can only consider whether the application fence was lawful on the date of the application. It is a fact that the cane/bamboo cladding has been replaced with the more solid close-boarded cladding, even if some of the structural components of the earlier fence remain.

15. The appellant's case is that the appeal fence has been in place for at least 4 years prior to the date of the LDC application. In effect that means it would have had to have been in place on 4 May 2017.

16. I acknowledge that the cane/bamboo structure has been in place since at least July 2016. If that fence had been the subject of the LDC application and if the enforcement notice had not been served then, on the balance of probability I consider that it would have been lawful by virtue of it having been in place for the required 4-year period. However, as outlined above this is not the fence which is the subject of the application.

17. In his arguments in support of the 4-year period, the appellant considers that in using the structure of the cane/bamboo fence, to take the close-boarded cladding, the resulting operational development is to all intents and purposes the same. I disagree. The two fences are, as a matter of fact and degree, completely different in character and construction. The earlier one was a lightweight semi-translucent screen, whereas the appeal fence is a solid timber construction.

18. In any case, I must consider exactly what was there and what was applied for on 4 May 2021. I must do that irrespective of whether or not the first enforcement notice was validly served and I am not empowered to change or alter what was applied for and what was considered by the LPA.

19. In my view the information submitted for the LDC was neither precise nor unambiguous. In essence the appellant's argument conflated, or blended together, the design and construction of two different fences. Although it is stated that the two fences have the same structure, the submitted drawing (49A_TR_060) indicates 5 No uprights (on plan and in elevation) to which the timber boarding above the rendered wall is fixed. Photographs of the translucent cane/Bamboo fence show only 3 structural upright timber sections.

20. Even if the exact structure of the first fence has been used to support the solid timber board, this does not alter the fact that the two structures are different and the LDC application was made in respect of the second fence.

21. There is no precise and unambiguous evidence that this second fence has been in position for the required 4 year period. The photographic evidence from both parties shows clearly that the cane/bamboo fence was still in place in 2016 and 2017 and that the first enforcement notice (whatever its legal status) was issued in April 2019 against the *'timber and cane fence'*. It was not issued in relation to the close-boarded timber application fence. This fence was only referred to in the enforcement letter of 2 March 2021.

22. On the balance of probability, therefore and based on all of the submissions I do not consider that the appellant has demonstrated that the timber close-boarded

fence which was in position on 4 May 2021 had been exactly as it was for the necessary 4 year period, back to 4 May 2017.

23. It follows that the appeal must fail and that I consider the Council's decision not to issue a LDC in relation to this fence was sound.

Formal Decision

24. The appeal is dismissed and a Lawful Development Certificate for the '*Close-boarded fence enclosure to front lightwell to protect residents from passer-by rubbish*' is not issued.

Anthony J Wharton

Inspector