



Appeal Decisions

Site visit made on 3 November 2021

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 February 2022

Appeal A Ref: APP/K5600/C/21/3276308

Appeal B Ref: APP/K5600/C/21/3276309

Land at ground floor flat, 113 Clarendon Road, London, W11 4JG

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended (the 1990 Act).
 - The appeals are made by Mr Amarjit Kamboh (Appeal A) and Mrs Santosh Kamboh (Appeal B) against an enforcement notice issued by Royal Borough of Kensington and Chelsea.
 - The enforcement notice, numbered ENF/20/06963, was issued on 22 April 2021.
 - The breach of planning control as alleged in the notice is, without planning permission, the installation of wooden fencing to both sides of the flat roof to the front of the property at first floor level.
 - The requirements of the notice are to:
 - i) Fully remove the timber fences and all fence posts;
 - ii) Remove from the land any resultant debris.
 - The period for compliance with the requirements is one month.
 - The appeals are proceeding on the grounds set out in section 174(2)(b), (c), (d) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act have lapsed.
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Decisions

Appeals A and B

1. It is directed that the enforcement notice is varied by the deletion of 'one calendar month' and the substitution of 'three calendar months' as the time for compliance.
2. Subject to the variation the appeals are dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The appeals were initially made under grounds (a), (b) and (g). However, the appellants have raised issues which amount to hidden appeals on ground (c) and (d). The Council has had an opportunity to consider and to respond to the representations made by the appellants and has offered no objection to the appeals proceeding on the additional grounds.
4. The appellants have sought to draw my attention to the design of the alleged fencing as well as other fences in the parade. Submissions are also made on matters including privacy and outlook. However, I am unable to consider matters relating to the planning merits because the prescribed fees have not been paid and the appeals on ground (a) and the applications for planning

permission deemed to have been made under section 177(5) of the 1990 Act have lapsed. I will therefore determine the appeal as proceeding on grounds (b), (c), (d) and (g).

5. The appellants requested that I write to the neighbouring residents at No 111 Clarendon Road to confirm details relating to the fence. However, for appeals under grounds (b), (c) and (d), the evidential burden lies firmly with the appellants to make their case on the balance of probabilities.
6. Nevertheless, I sought clarification from the parties as to whether it was intended to submit Google Street View images referred to in evidence but not provided. I subsequently received images from the Council but not from the appellants. The appellants were offered opportunity to comment on the images submitted by the Council. No response was received.

The Appeals on Ground (b)

7. A ground (b) appeal is that the breach of control alleged in the enforcement notice has not occurred as a matter of fact. However, the appellants state that work carried out in 2019, prior to the enforcement notice being issued, involved replacing a damaged fence. The appellants also provide photographs of the alleged wooden fencing in place on both sides of the first floor roof terrace.
8. Thus, the appellants have not demonstrated that the matters alleged in the notice did not occur. I find that the alleged development did occur on the balance of probabilities and the appeals fail on ground (b).

The Appeals on Ground (c)

9. An appeal on ground (c) is that the matters alleged in the notice do not constitute a breach of planning control.
10. The alleged fencing sits either side of a flat roof at first floor level, over a commercial ground floor use which extends forward of the main building line of the upper floor flats. Subject to limitations, Article 3 and Class A of Part 2 of Schedule 2 of the GPDO¹ (hereafter referred to as Class A) grant planning permission for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. Limitation A.1.(b) is that development is not permitted by Class A if *'the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2 metres above ground level'*.
11. The appellants argue that the fence is under 1m in height and a picture is provided with a tape measure alongside it. However, the height should be properly measured from ground level, which in this case is the pavement immediately adjacent to the extension upon which the fence had been erected. On that basis, the first floor fencing is clearly in excess of 2 metres and in breach of limitation A.1.(b).
12. Limitation A.1.(c) is that development is not permitted if the height of any fence maintained, improved or altered would, as a result of the development, exceed its former height or two meters if erected or constructed, whichever is the greater.

¹ The Town and Country Planning (General Permitted Development) (England) Order 2015 as amended

13. The appellants' pictures purported to be from 2013 show a pre-existing lattice style fence along part of the southern boundary. In contrast, the alleged fencing runs to the full length of both side boundaries, with each side comprising two timber waney edge lap panels and a more open timber panel. Such wholesale changes go beyond what can reasonably be described as an improvement or alteration for the purposes of limitation A.1.(c).
14. The alleged fencing was not therefore granted permission by Class A of the GPDO. Accordingly, the appellant has not demonstrated that the alleged development was not in breach of planning control on the balance of probabilities. The appeal on ground (c) fails.

The Appeals on Ground (d)

15. An appeal against an enforcement notice on ground (d) is a claim that the alleged breach of planning control is immune from enforcement action due to the passage of time. In order to succeed on ground (d), it is for the appellant to demonstrate (on the balance of probabilities) that the operational development was substantially completed four years before the date of the enforcement notice. The material date in this case being 22 April 2017².
16. The Google Street View images from 2008, 2012, 2014, 2015, 2017, 2018, 2019 and October 2020 show no wooden fencing to the northern boundary. The only fencing that does appear to exist on the southern side is the aforementioned lattice style fencing. The limited length of that fence can be clearly seen in the appellant's street view image, as well as in the 2014 Google Street View where it is seen against an open timber frame, that appears to be part of the neighbouring property.
17. That arrangement is still in place in October 2018 but by June 2019, the pre-existing fence appears to have been removed. That tallies with the appellants' evidence that works were carried out to the party wall in 2019. The October 2020 image shows no wooden fencing. The alleged fencing first appears in the August 2021 image.
18. The appellants have drawn my attention to photographs of cut wooden timber supports but those are undated and show no other detail, such as position or type of fencing being supported.
19. Pulling the above together, it is clear that there was no pre-existing timber fencing on the northern boundary and that the fence on the southern boundary run to only part of its length and was materially different in its design. In any case, it was removed some time prior to June 2019 due to storm damage. The Google Street View images point to the alleged fencing being erected sometime between October 2020 and August 2021. That time period tallies with the Council's enforcement report which refers to a complaint being received in December 2020, rather than 2019, as stated by the appellants.
20. In either scenario, the appellants have failed to demonstrate, on the balance of probabilities, that the alleged fencing was substantially complete by 22 April 2017, so as to have gained immunity from enforcement action through the passage of time. It follows that the appeal on ground (d) does not succeed.

² s171B(1) of the Town and Country Planning Act 1990

The Appeal on Ground (g)

21. An appeal on ground (g) is that the period specified in the notice falls short of what should reasonably be allowed.
22. Although relatively straight forward, the requirement to remove the fencing may need to be carried out by a builder. Because of the COVID-19 pandemic, securing the services of a builder may take longer than it previously might. In my view, it would be appropriate to extend the period of compliance to three months. That would strike a reasonable and proportionate balance between any difficulties the appellant may encounter and the public interest in this case.
23. I shall therefore vary the enforcement notice accordingly prior to upholding it. The appeal on ground (g) succeeds to that extent.

Other Matters

24. I understand that the appellants may feel unfairly treated having regard to the existence of other neighbouring fences that the Council confirm have not received planning permission, but are immune from enforcement action through the passage of time. However, in the absence of a ground (a) appeal I am unable to consider matters such as precedent and relative appearance.
25. I have noted the appellants' concerns regarding the manner of the Council's investigation and action, as well as the allegation of bias. However, those are not matters for these appeals which I have determined afresh and on the basis of the evidence before me.
26. I have been provided with emails which refer to party wall issues. Such matters are also beyond the scope of these appeals.
27. Although submissions are made in respect of the decking on the flat roof and the planters at the front edge of the same, those matters do not form part of the alleged development and I make no comment on them.

Conclusion

28. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with a variation.

Richard S Jones

INSPECTOR