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## Appeal Decisions

Site visits made on 7 December 2021 and 15 February 2022

**by Paul Freer BA (Hons) LLM PhD MRTPI**

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

**Decision date: 25 February 2022**

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**Appeal Ref: APP/A2335/C/21/3268602 & 3268603.**

**Land north of 1 Melling Hall, Melling Road, Carnforth, Lancashire LA6 2RA**

- The appeals are 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 appeals are made by Mr & Mrs Julie and Guy Vass against an enforcement notice issued by Lancaster City Council.
  - The enforcement notice was issued on 10 January 2021.
  - The breach of planning control as alleged in the notice is, without planning permission, the erection of a fence and attached gate.
  - The requirements of the notice are:
    - (i) Remove all the fencing, attached gate and the associated posts.
    - (ii) Reinstate the Land to its former condition removing any resultant materials and debris and make good any damage caused to the Land
  - The period for compliance with the requirements is three months.
  - The appeals are proceeding on the grounds set out in section 174(2) (c) and (f) of the Town and Country Planning Act 1990 as amended.
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**Summary Decisions: the appeals are dismissed and the enforcement notice is upheld**

### **Procedural matters**

1. I carried out an unaccompanied site visit on 7 December 2021. However, the appellants specifically requested that I undertook an accompanied site visit, which I carried out 15 February 2022. A representative from the City Council attended that site visit.
2. In their appeal statement, the appellants contend that the fence and gate do not impact upon the character or appearance of the Melling Conservation Area or harm the setting Melling Hall, a Grade II Listed Building. Similarly, the remnants of a close boarded fence at Melling Hall were pointed out to me at the site visit. Those comments go to the planning merits of the development subject to the enforcement notice, and would fall to be considered under ground (a) as set out set in section 174(2) of the 1990 Act: namely 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.
3. However, in an email dated 21 February 2021, the appellants confirmed that they did not wish to pursue an appeal on ground (a). Furthermore, the requisite fee for an appeal under ground (a) has not been paid. The planning application that would have been deemed to have been made with an appeal on ground (a) therefore does not fall to be considered. I am therefore unable to consider the planning merits of the development subject to the enforcement notice, or whether planning permission should be granted for it.

4. In that context, I have received a representation from the occupier of a property in Vicar Lane, Melling, supporting the development. The points made all relate to the planning merits of the fence and gate, matters that again would fall to be considered under an appeal on ground (a) if one had been made. In the absence of an appeal on ground (a) in this case, I am unable to take the points raised into account.

### **The appeals on ground (c)**

5. 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.
6. The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is permitted under Class A, Part 2, Schedule 2, Article 3 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO), subject to the limitations at Class A.1. The latter provides that the erection of a gate, fence, wall or other means of enclosure is permitted development unless:
- (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 carrying out the development, exceed-
    - (i) for a school, 2 metres above ground level, provided that any part of the gate, fence, wall or means of enclosure which is more than 1 metre above ground level does not create an obstruction to the view of persons using the highway as to be likely to cause danger to such persons;
    - (ii) in any other case, 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;
  - (c) the height of any gate, fence, wall or other means of enclosure maintained, improved or altered would, as a result of the development, exceed its former height or the height referred to in paragraph (a) or (b) as the height appropriate to it if erected or constructed whichever is the greater.
  - (d) it would involve development within the curtilage of, or to a gate, fence, wall or other means of enclosure surrounding a listed building.
7. The appellants do not claim that the fence and gate are an improvement or alteration of existing fences or gates, such that the limitation at A.1 (c) is of no relevance. The site is not a school and therefore the limitation at A1 (a)(i) is also not relevant. There is no dispute that the fence and gate exceed 1 metre in height above ground level but do not exceed 2 metres in height. The issues in dispute are therefore whether:
- (i) the fence and gate are adjacent to a highway used by vehicular traffic (A.1(a)(ii)), and
  - (ii) whether the fence and gate are within the curtilage of Melling Hall, a Grade II Listed Building (A.1(d)).

*Whether the fence gates and gate are adjacent to a highway used by vehicular traffic*

8. The fence and gate are situated roughly parallel to the A683 road, a highway used by vehicular traffic. The fence and gate are erected on the top of a steep grass bank, such that the ground level on which the fence and gate are erected is itself some 2 metres above the road surface. The fence is set back over 2 metres from the edge of the highway. The gate is located at the northern end of the fence and is sited perpendicular to the highway, such that the distance of the gate from the highway varies from approximately 2.5 metres to approximately 6 metres.
9. There is no definition of 'adjacent' in the GPDO itself. The Oxford English Dictionary (OED) defines 'adjacent' as being near or next to something else, and I note that several of the Inspectors for the appeals referred to by the City Council have relied upon that definition. I also note, as does at least one of the Inspectors in those cases, that there is nothing in the GPDO or case law to support the view that provided a fence/gate is positioned a minimum distance for the highway, it would cease to be regarded as being 'adjacent' to that highway for the purposes of the GPDO. Rather, the thrust of case law and appeal decisions on this issue is that a wall, fence or gate can be set back from a highway but still be 'adjacent' to it, as a matter of fact and degree, provided that the enclosure is clearly intended to define the boundary of the property concerned from the highway and is perceived to do so.
10. In this case, the appellants explain that the fence and gates have been erected to provide protection for a newly planted hedge, and to provide privacy and security to the property. They therefore contend that the purpose of erecting the fence and gate was not to delineate the boundary or form an enclosure of any sort. In that regard, the appellants confirm that the grass bank on which the fence/gate is located is not part of the highway verge but is included in the registered deeds for the property.
11. I recognise that the alignment of the fence is not at the absolute limit of the land ownership. However, given that the land beyond the fence (to the west) is a steeply sloping grass bank, for practical purposes the alignment of the fence can be taken as representing the boundary of the property and the fence as extending that boundary in the vertical plane. Consequently, the fence (and to a lesser extent the gate) do define the boundary between the property and the highway, and are clearly perceived as doing so.
12. Although set back from the highway and raised above the road surface, there are no intervening structures between the fence/gate and the highway. At the time of my site visits, there was a hedge on the outside (west side) of the fence that had become well established. However, that hedge was planted and is not a natural feature. That hedge is not afforded any statutory protection and must be regarded as being a temporary feature which could be removed at any time. For that reason, the presence of that hedge does not prevent the fence from being considered as adjacent to the highway.
13. I therefore conclude that, as a matter of fact and degree, the fence and gate are adjacent to a highway that is used by vehicular traffic. Consequently, the wall and gate do not accord with provisions in Class A.1(ii), Part 2, Schedule 2 of the GPDO.

*Whether the fence and gate are within the curtilage of Melling Hall*

14. Because the wall and gate do not accord with provisions in Class A.1(ii), Part 2, Schedule 2 of the GPDO, they cannot constitute permitted development in any event. There is therefore no need for me to consider whether fence and gate are within the curtilage of a listed building for the purposes of Class A.1 (d).

*Conclusion on ground (c)*

15. I have found that the wall and gate do not accord with the provisions in Class A.1, Part 2, Schedule 2 of the GPDO, when read as a whole. It follows that the fence and gate require express planning permission. No such express planning permission has been granted. Consequently, the matters stated in the enforcement notice do constitute a breach of planning control and, accordingly, the appeals on ground (c) fail.

**The appeals on ground (f)**

16. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the Town and Country Planning Act 1990 sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place or (b) remedying any injury to amenity which has been caused by the breach. In this case, the requirements of notice include removing the fence and gate, and reinstating the land to its former condition. The purpose of the notice must therefore be to remedy the breach of planning control that has occurred.
17. The appellants' appeal on this ground is that a hedge has been planted that substantially covers the fence, and that they would be prepared to paint the fence and gate to reduce their visibility. The difficulty is that neither of those suggested courses of action remedies the breach of planning control that has taken place. The fence/gate would still remain, albeit painted a different colour and/or behind a hedge. The lesser steps proposed by the appellants therefore do not/would not achieve the purpose of the notice.
18. I have considered whether there are any other suitable alternatives to the requirements stated in the notice which would achieve the purpose of the notice with less cost or disruption to the appellants, but none are obvious to me. I therefore conclude that the requirements of the notice are not excessive. Accordingly, the appeals on ground (f) fail.

**Conclusion**

19. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice.

**Formal Decision**

20. The appeals are dismissed and the enforcement notice is upheld.

*Paul Freer*

INSPECTOR