



Appeal Decision

Site visit made on 25 May 2022

by Peter Willows BA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 July 2022

Appeal Ref: APP/R2520/C/21/3283669

Manor House, 10 West Street, Timberland, Lincoln LN4 3RX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
 - The appeal is made by Miss Sarah Jennings against an enforcement notice issued by North Kesteven District Council.
 - The notice was issued on 23 August 2021.
 - The breach of planning control as alleged in the notice is Without planning permission the carrying out of operational development on the Land, namely the creation of a vehicular access resulting from:
 - The removal of a section of boundary fencing along the Western boundary where it abuts Main Street;
 - The provision of a hardcore gravelled hardstanding; and
 - The installation of post and rail fencing to form a driveway splay and boundary treatment.
 - The requirements of the notice are:
 - (1) Remove all hardstanding and underlaid plastic lining from the area of land shown edged red in Annex C Photograph 1 attached to this notice;
 - (2) Remove all post and rail fencing and driveway splays shown in Annex C Photograph 1 attached to this notice;
 - (3) Upon completion of (1) and (2) above, level the area of land edged red so that it matches that surrounding it and lay to lawn using grass seed; and
 - (4) Reinstate the picket fencing along the entire width of the access, to the same specification as that shown in Annex C Photograph 2 attached to this notice.
 - The period for compliance with the requirements is 8 weeks.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. It is directed that the enforcement notice be corrected and varied by:
 - i) Deleting 171(A)(1) from section 1 of the notice and replacing it with 171A(1);
 - ii) Deleting the words 'using grass seed' from section 5 ('What you are required to do').
2. Subject to those changes, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary matter

3. The enforcement notice refers to section 171(A)(1) of the Act. In fact it is correctly expressed as section 171A(1). This can be corrected without affecting the substance of the notice in any way.

Ground (b)

4. An appeal on ground (b) is brought on the basis that the matters stated in the enforcement notice have not occurred. The burden of proof falls on the appellant and the standard of proof is the balance of probability.
5. The allegation in the notice refers to the creation of a vehicular access and then goes on to list specific works that have been carried out. It is a matter of fact that those works have been carried out. The works are all shown on photographs and were all still in place on the site when I viewed it. Photograph 2 attached to the notice, which shows the site before the works were carried out, illustrates the change that has taken place.
6. Do the works as a whole add up to the overarching allegation of 'the creation of a vehicular access'? In visual terms, that is the impression that has been created. The gap that has been formed in the fencing, the introduction of fencing to form a splay and the formation of a loose-surfaced area combine to give the very clear impression of a vehicular access.
7. When I viewed the site, a single wooden post had been placed in the centre of the gap, possibly serving to inhibit use as an access. Additionally, a small strip of grassed verge has been left in place so that the new surfacing does not quite reach the road surface. The appellant also advises that the site is not used as an access.
8. Be that as it may, viewed as a whole the works are properly described as an access. They appear to have been carried out at around the same time in May/June 2021 and result in something that looks like an access and is plainly capable of operating as such with minor works to complete the connection to the road. It is also clearly the appellant's wish to have an access here, as illustrated by her application for one. While it may be true that the surfaced area can be used for car parking, its shape and positioning lead me to the view that it was created to serve as an access.
9. The appellant suggests that additional fencing could be installed to form a physical barrier and prevent use of the access. I have considered that suggestion in relation to the appeal on ground (f), but it has no bearing on my view regarding what had been created at the site at the point when the notice was issued.
10. The allegation in the notice refers to the removal of fencing. The appellant argues that it should refer instead to the removal of a wall. The boundary to Main Street is primarily secured by a wall, but a section of this was removed and replaced with picket fencing in 2020. The Council takes the view that the wall had already been replaced by the fence prior to the access being formed and that the notice is therefore correct in its reference to the removal of the fence (and not the wall) as part of the works necessary to form the access.
11. It appears that the wall was removed in about June 2020 and a photograph supplied by the Council shows that the picket fencing had been installed in the

gap by 10 September 2020. The works now targeted by the notice took place significantly later, around May/June 2021. Moreover, the Council says that it was informed that the 2020 works were carried out to address a section of damaged wall. Consequently, those works can be regarded as separate works which were carried out prior to the formation of the access rather than as a part of it. The allegation in the notice is not, therefore, incorrect in its reference to the removal of a section of fencing rather than referring back to the pre-existing wall.

12. I have noted the suggestion that the works carried out are permitted development, but that has no bearing on whether the matters occurred and is a matter I consider under ground (c).
13. The appellant refers to works carried out at a site on Martin Road, where enforcement action was not taken. However, the information provided in relation to that case does not show that the matter stated in the notice has not occurred in this case.
14. The appellant says that the Highway Authority does not consider that a new access has been created, but I have no firm evidence to substantiate that claim.
15. For these reasons I conclude that the matters stated in the notice have occurred. Accordingly, the appeal on ground (b) fails.

Ground (c)

16. Appeals on ground (c) are concerned with whether or not the matter stated in the notice is a breach of planning control. As with ground (b), the burden of proof falls on the appellant and the standard of proof is the balance of probability. Here it is argued that individual elements of the access can be regarded as development permitted by various parts of Schedule 2 of *The Town and Country Planning (General Permitted Development) (England) Order 2015* (the GPDO).
17. However, the overarching allegation concerns the creation of a vehicular access, and I have already concluded that this is a proper description of what has occurred. While the GPDO makes provision for the formation of a hardstanding incidental to the enjoyment of a dwellinghouse (Part 1, Class F), that is not what has occurred here, viewing the development as a whole. The fact that the surfaced area that has been created could be repurposed as a parking area does not alter my view that it was actually created as part of a vehicular access. Similarly, the removal of the pre-existing boundary treatment and installation of new fencing are part and parcel of the creation of the access. Thus, permitted development rights relating to the removal and erection of boundary treatments do not mean that the works carried out in this instance did not need planning permission.
18. In September 2021, the Council introduced an Article 4 Direction that affects part of the appeal property and removes the right to create a hardstanding under the provisions of Schedule 2, Part 1, Class F of the GPDO. The appellant questions the Council's motives for this and argues that it shows that a hardstanding at the site was previously permitted development. Nevertheless, it does not alter my view that, in this instance, the works were part and parcel of an access, and so not permitted development.

19. For these reasons I conclude that the development carried out is a breach of planning control. I have taken account of the emails relating to 53 Church Lane that I have been provided with, but nothing within them alters my conclusion. Accordingly, the appeal on ground (c) fails.

Ground (a)

Main issues

20. The main issues are the effect of the development on:

- The character and appearance of the area, with particular regard to protected trees and the setting of the Manor House; and
- Living conditions at 5 Main Street.

Character, appearance and trees

21. The appeal property is a characterful old building set in a large garden. The garden has a lengthy frontage to Main Street. A blockwork wall runs along much of the frontage, but a section of the wall was removed and replaced with picket fencing in 2020, allowing views into the garden. That fencing was changed when the access was created. The Council states that the house is a non-designated heritage asset, while the garden is designated an Important Open Space by the Central Lincolnshire Local Plan. Local plan policy LP23 states that an area identified as an Important Open Space is safeguarded from development unless it can be demonstrated that there are no significant detrimental impacts on the character and appearance of the surrounding area, ecology and any heritage assets.
22. The garden of the house contains a number of trees. The Council's concerns relate to a Holm Oak (T1 in the appellant's evidence) and a Lime (T4), both of which are subject to tree preservation orders (TPOs). The trees contribute positively to the setting of the Manor House and the street scene and appear to be in good health. This is consistent with the findings of my colleague in relation to a previous appeal relating to the access¹.
23. A circle has been formed around the trunk of T1 using stones and the surfaced area does not intrude inside the circle. However, I have no reason to suppose that this exclusion area corresponds to an appropriate root protection area (RPA). Indeed, it seems doubtful that it does, the stone circle being much smaller than the canopy of the tree. Thus, it appears that the surfaced area has been constructed over a significant proportion of the roots of the tree.
24. The Council has not provided technical information to quantify what that means for the tree in terms of potential harm. However, the laying of surfacing and the compaction caused by cars has the potential to damage the roots, inhibit their growth and affect the aeration of the soil, with consequent implications for the health of the tree. Consequently, the Council's concerns are justified. I am told that the works were carried out before the preservation order was created, but that does not alter my view regarding the likely effect of the works on the tree or the visual contribution it makes to its surroundings.
25. The appellant says that a cellular confinement system is used but the evidence before me does not demonstrate that the system will provide sufficient

¹ Ref APP/R2520/D/21/3267359

protection to prevent harm to the tree. While excavation is said to be required only to a depth of 135mm, the evidence before me does not show that that is not harmful in this instance, or that the system adequately prevents harm arising from the development.

26. The appellant argues that the cellular confinement system does not, in itself, amount to 'works to a tree' that require approval, but that does not mean that it can prevent the tree from being harmed by the works carried out at the site. It is also argued that the area was already in use for car parking on the bare earth before the surfacing was carried out. However, it seems to me that the surfacing of the area and its inclusion as part of an access will increase its use by vehicles throughout the year, with the consequential potential to cause harm to the tree. While it may be that some harm to the tree has already been caused due to the works carried out, I have no evidence to show that removal of the surfacing would cause further harm and, in my judgement, it is likely to be in the interests of the long-term health of the tree.
27. The lime tree (T4) is further from the surfacing and is consequently less likely to be harmed in my view. Nevertheless, there is likely to be some effect on the RPA for this tree, the appellant suggesting that 4sqm (2.2%) would be affected by the completed works. This adds, to a small degree, to my concerns regarding the effect of the development on trees. In the absence of any expert view, I cannot be sure that the tree is not harmed by the development.
28. Overall, I consider that the Council's concerns are justified and it has not been demonstrated that measures are in place to adequately protect the trees. I have noted the references to British Standards relating to trees, but there is no detailed assessment before me to clearly demonstrate compliance with relevant standards. The information before me does not indicate that the trees could be protected with planning conditions. The likely harm to the trees arising from the development gives rise to conflict with local plan policies LP17 and LP26 which, among other things, seek to retain existing features which contribute positively to the landscape and townscape, including trees.
29. Since I have found that the trees contribute positively to the street scene, it follows that harm to them will have a harmful visual effect on the designated Important Open Space, giving rise to conflict with Policy LP23. The appellant argues that the importance of this designation is reduced by the loss of a large and ancient tree that previously existed there, but the designation remains and the policies of the development plan apply accordingly. The setting of the Manor House is also harmed, causing conflict with Policy L25, which seeks to protect heritage assets and their setting.
30. The Council regards the surfacing and fencing that has been introduced as incongruous. However, surfacing of this kind is a common enough material to use in an access serving a traditional dwelling in a village location and does not appear out of place in my view. As to the fencing, the position immediately before the breach of planning control was that a section of wall had already been removed and replaced with fencing. Although the fencing now introduced is different, the overall impression of simple wooden fencing in a gap in the wall is similar. Consequently, the new fencing is not visually harmful in itself and does not add to my concerns regarding the scheme.
31. Overall on this issue, I conclude that the development is harmful to the protected trees, with consequential harm to the character and appearance of

the area, the Important Open Space and the setting of the Manor House, contrary to the policies highlighted above.

Living conditions

32. The access is located opposite 5 Main Street, a dwelling which fronts directly onto the footway of Main Street. Given this positioning, the headlights of vehicles leaving the appeal property at night would shine towards the front elevation of No 5 at close range. The inspector who determined the previous appeal concerning this access² concluded that living conditions at No 5 would be harmed by this. The inspector considered that the ground floor windows were likely to be particularly affected, but did not quantify the effect on first floor windows. That decision is an important material consideration in this case.
33. Nevertheless, the evidence available to me suggests that the extent of harm arising from headlight glare would be limited. The access would serve only a single dwelling. Thus, vehicle movements during the hours of darkness would be quite limited. Movements during late hours, when there is potential for sleep to be disturbed, would be more limited still. Clearly, this is something the previous inspector would have been aware of.
34. However, the appellant has now provided photographs showing a car parked on the appeal site with its dipped headlights pointing towards No 5. The photographs suggest that the beam of lights would fall below the ground floor windows. The Council has not queried the validity of this evidence. Nevertheless, it needs to be treated with caution; the effect of the headlights is bound to vary depending on factors such as the type of car, what it is carrying and where it is positioned on the site. The shots do not show either how the beam would move as vehicles leave the site and move onto the road. In my judgement it is likely that headlights would shine on the ground floor windows at times.
35. Nevertheless, the photographs suggest to me that the effect on ground floor windows may be somewhat more limited than judged by the previous inspector. Moreover, they indicate that it is very unlikely that there would be any material effect on the upper floor windows, and I have no evidence to show that any bedroom would be affected by headlight glare. I also accept that modifications to the fencing at the point of access could minimise glare, as the appellant suggests.
36. Taking all of these matters into account, including the previous inspector's decision, I find that the effect on No 5 arising from headlamp glare would be very limited. Consequently, there would be no material harm to living conditions at No 5. No further conflict with Local Plan Policy LP26, which seeks to protect the amenities of existing occupants, arises from this issue.

Other considerations

37. The appellant argues that there is a need for the development due to inadequacies of the existing access, which is in need of costly resurfacing. The appellant has advised of a particular need to ensure vehicular access to the front door of the property. I accept that the new access is much shorter than the existing one and may result in a significant cost saving in meeting that important need. On the other hand, I do not know what options have been

² Ref APP/R2520/D/21/3267359

looked at in terms of resurfacing or repairing the existing access, or how significant the additional costs are. Consequently, I cannot rule out repair of the existing access as unfeasible. Taking all of the above into account, meeting the appellant's need for the access weighs to a small extent in favour of the development.

38. I do not agree that the works carried out result in any material improvement in the appearance of the site. As set out above, I regard the visual impact of the fencing and surfacing as broadly neutral, while any harm to the trees as a result of the works would cause significant visual harm. Accordingly, I do not accept that there is any justification for the scheme based on its appearance. I have noted the support of some local residents for the scheme, but that does not alter my view that it would be harmful, for the reasons I have given.
39. I have been referred to various other developments that have been permitted in the area. My concerns in this case relate primarily to the effect of the development on two protected trees on the site, and some of the cases identified are not comparable in that respect. Nevertheless, I understand that a new dwelling proposed at The Farmyard, Manor Farm involved excavation close to two protected trees and the use of a cellular confinement system. To that extent, the scheme is comparable with this development at 10 West Street. A separate residential development at Manor Farm involves a no-dig driveway construction close to a tree and I am also told that a driveway at Fen Road was adjacent to trees.
40. However, the effect of a development such as this on trees is highly dependent on individual circumstances, including the species, age and health of the trees, the proximity of the development, existing features and the details of how the works are to be carried out. In this instance, for the reasons I have given, it is likely that the development at 10 West Street will cause harm to the protected trees, with consequent harm to the setting of a non-designated heritage asset. The information before me does not show how the trees at the other sites will be affected by those developments. Consequently, the fact that the tree officer did not object to the above schemes is not a reason to allow the development before me.
41. In view of the restrictions placed by the Article 4 Direction, I am not persuaded that there is any 'fallback' option available to the appellant that would lead me to any different conclusion on the planning merits of the development.

Conclusion - ground (a)

42. While I have not found conflict with all the policies drawn to my attention, the harm I have found leads me to conclude that there is conflict with the development plan as a whole. The harm arising from the development is not outweighed by other considerations. Accordingly, the appeal on ground (a) fails.

Ground (f)

43. The appellant proposes that a physical boundary feature could be erected and maintained in order to prevent the access from being used. Solid fencing would prevent any issues arising from headlight glare. With that in place, it is argued, the surfacing and the fencing that forms a splay should remain.

44. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first (s173(4)(a)) is to remedy the breach of planning control which has occurred. The second (s173(4)(b)) is to remedy any injury to amenity which has been caused by the breach. In this case, the notice requires the removal of the works in their entirety. This is consistent with the purpose of remedying the breach of planning control in accordance with s173(4)(a). Consequently, I do not regard the requirements as excessive.
45. That said, the enforcement regime is intended to be remedial rather than punitive, and I have considered the proposal put forward by the appellant with that in mind. However, the proposal would leave the hardstanding in place and would not, therefore, address the harm to the trees. Consequently, while I accept that solid fencing could prevent glare from headlights affecting the house opposite, the effectiveness of the notice would nevertheless be compromised to an unacceptable degree.
46. Notwithstanding the above, I have made one very minor change to Requirement 3, which includes a requirement to 'lay to lawn using grass seed'. Since a lawn can be created by turfing as well as seeding, the reference to using grass seed is unduly restrictive and I shall remove it. This change has no bearing on the overall effect of the notice and can be made without causing injustice to either party. In all other respects the requirements of the notice remain unaltered and the appeal on ground (f) fails.

Conclusion

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

Peter Willows

INSPECTOR