



Appeal Decision

Site visit made on 12 August 2022

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 September 2022

Appeal Ref: APP/A1530/C/22/3293824

Land known as Newfoundland Lodge, Boxhouse Lane, Dedham, Colchester CO7 6HZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Shane Stubbs against an enforcement notice issued by Colchester Borough Council.
 - The notice was issued on 4 February 2022.
 - The breach of planning control as alleged in the notice is without the benefit of planning permission, the erection of a brick wall, brick piers, and wooden gates over 1 metre in height adjacent to a highway. ("Activity").
 - The requirements of the notice are to:
 - i. Demolish/dismantle/remove the brick wall, brick piers, and wooden gates from the land. (for the avoidance of doubt this is the section of brick wall, brick piers, and wooden gates, outline [sic] in red on the attached photograph).
 - ii. Replant the privet/Ligustrum ovalifolium hedge to match the existing hedge to the north of the access point, all building materials and detritus, including wall footings will be removed from site, the ground will be decompacted and the area back filled with a high grade topsoil and cultivated. The boundary will be planted up with privet/Ligustrum ovalifolium [sic] and any damaged verge seeded with grass-seed. The hedge will be planted out at 90-120cm and spacing, suitably protected, supported and mulched and maintained sufficient to allow them to establish and thrive. During the establishment period failed/failing stock will be replaced and the hedge maintained in situ through to maturity. It will be planted out in accordance with the relevant British Standards and planted out in line with paragraph 6 time for compliance below.
 - iii. Leave the land in a clean and tidy condition.
 - The period for compliance with the requirements is: Six calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (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 is corrected and varied by:
 - At section 3 of the notice, delete the word 'wooden' so that it reads 'Without the benefit of planning permission, the erection of a brick wall, brick piers, and gates over 1 metre in height adjacent to a highway.'
 - At section 5i. of the notice, delete the word 'wooden' and the full stop '.', insert 'd' after 'outline' and insert ';and' after 'attached photograph)' so that it reads 'Demolish/dismantle/remove the brick wall, piers, and gates from the land (for the avoidance of doubt this is the section of brick wall, brick piers, and gates, outlined in red on the attached photograph); and'.
 - At section 5ii. Of the notice, delete the word 'ovalifilum' and replace it with 'ovalifolium'.

- At section 5ii, after the words 'planted out in line with paragraph 6 time for compliance below,' insert ';Or'.
 - At section 5iii of the notice, delete 'Leave the land in a clean and tidy condition' and insert 'Reduce the height of the wall, piers and gates to no more than 1m in height above ground level at any point along their length.'
2. Subject to the corrections and variations above, 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 Matters

3. The enforcement notice refers to the Local Plan Core Strategy and Development Policies document adopted 2008 and 2010 (with selected policies revised July 2014). Since the issue of the enforcement notice, the Colchester Borough Local Plan (2017-2033) Section 2 was adopted in July 2022)(LPS2). It has also come to my attention that the Colchester Borough Local Plan 2013-2033 Section 1 was adopted in February 2021 (LPS1). Together, these documents form the statutory development plan for the area. The Council has provided those policies it considers of relevance to the appeal scheme before me and the appellant has been given the opportunity to comment on these policies through the appeal process. I shall therefore consider the appeal on the basis of these policies.
4. The appellant states that the gates are constructed of aluminium, not wood. Since it is not necessary to specify the material that the gates are constructed from, I shall delete the word 'wooden' from the allegation. Since it is clear from the four corners of the notice which gates the notice is attacking, I consider such a correction can be made without causing injustice to either party.

Ground (c)

5. An appeal under ground (c) is made on the basis that the matters stated in the notice, if they occurred, do not constitute a breach of planning control. The main thrust of the appellant's case under this ground is that the development is permitted by the Town and Country (General Permitted Development) (England) Order 2015 (as amended)('the GPDO').
6. Part 2, Class A of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(the GPDO) permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosures subject to certain conditions, including A.1.(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 the carrying out of the development, (ii) ...exceed 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.

Whether adjacent to a highway

7. The appeal site is located off Boxhouse Lane, which is a highway used by vehicular traffic. It is not disputed that the walls, brick piers and gates erected exceed 1m in height. This ground of appeal will therefore turn on whether the

structures are adjacent to the highway. The term 'adjacent to a highway' is not defined in the GPDO. The Oxford English Dictionary defines 'adjacent' as 'next to or very near something else; neighbouring; boarding; contiguous; adjoining.' What constitutes 'adjacent to a highway' is a matter of fact and degree, depending on the circumstances of the case.

8. The Council has drawn my attention to an appeal decision, reference APP/Q3115/X/16/3150593, where the Inspector considered whether a brick wall and gates would be adjacent to the highway. The Inspector advised 'the position established by the courts is that the word 'adjacent' does not necessarily mean that the fence has to be abutting or touching the highway.' He went on to state 'the thrust of Case Law and other appeal decisions is that a wall or fence 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 to define the boundary of the property concerned from the highway and is perceived to do so.
9. I saw that verges along the appeal side of the highway are generally substantial. The walls, piers and gates which have been erected continue the enclosure line established by hedgerows and together, in my view, define the boundary of the property from the highway. While the appellant has planted a hedge between the highway and the walls, the plants are relatively immature and as a result do not define the boundary of the property from the highway. Consequently, as a matter of fact and degree, I find the walls, piers and gates are adjacent to the highway.
10. Furthermore, although the wall and gates are no higher than 2m in height, the brick piers do exceed 2m in height and so the structure as a whole fails to comply with the limitations of the GPDO.
11. Thus, for the reasons given above, I find that the appeal scheme is not development which is permitted by the GPDO and planning permission is required. The appeal under ground (c) must therefore fail.

Ground (a)

Main Issue

12. The main issue of the ground (a) appeal is the effect of the appeal scheme on the character and appearance of the area.

Reasons

13. The appeal site is located within the Dedham Vale Area of Outstanding Natural Beauty, along Boxhouse Lane, a generally rural lane which is characterised by wide verges planted with hedgerows. While I saw a number of properties have erected fencing or walls around their properties, the use of hedgerows to define the boundary of properties from the highway is a common feature, which gives the area a verdant character.
14. The wall is set back from the edge of the highway at a distance of approximately 3.7m. While existing hedgerows and the geometry of the road limit long distant views of the site, it appears a prominent feature along Boxhouse Lane which diminishes the verdant character of the area. I saw that a hedgerow has been planted between the appeal structure and the highway, however, at the time of my visit the plants were immature and did little to

mitigate the urbanising effect of the appeal scheme. Furthermore, the planting, even at maturity, is unlikely to mitigate the visual effect of the pillars and gates on the area.

15. Whilst I don't doubt the walls, piers and gates erected been built to a high standard, they appear an incongruous feature along this rural lane. Although the structures ensure that the appellant's horses do not have a means of exit from the Land, the structures which have been erected are not the only means of securing the site. Consequently, I afford this matter very limited weight.
16. The appellant points out that, if the structures are considered to be adjacent to a highway used by vehicular traffic, a wall/piers and gate could be erected up to a height of 1 metre under permitted development rights. Although this matter is advanced under ground (f), it is relevant to consider this as a fallback, in the event the notice is upheld. Although a wall of similar design and style could be erected up to 1m in height, it would appear a much less prominent feature by virtue of its lower height. Furthermore, it would be easier to screen using planting.
17. The appellant has drawn my attention to instances of close boarded fences, picket fences and low brick walls along Boxhouse Lane. However, these are generally more limited in extent and height. Although a brick wall has been constructed at Kiddles Farm, adjacent to the appeal site, it is less prominent due to its limited height and extent. I saw that brick walls and fences up to around 2m in height have been erected towards the end of the lane, where it passes beneath the A12, however, I don't have full details of the circumstances around their construction. Furthermore, their visual effect on the character of the area is particularly localised due to the curvature of the road. They do not therefore weigh in support of the appeal scheme.
18. Thus, for the reasons given above, I find the appeal scheme is a dominant, incongruous feature which diminishes the verdant character of the area, contrary to policies SP7 of the LPS1 and DM15 of the LPS2, which both seek to ensure that new development responds positively to local character and context and policy ENV4 of the LPS2 which seeks to ensure that development makes a positive contribution to the natural beauty and special qualities of the AONB and the National Planning Policy Framework (2021)('the Framework'), seeks well-designed places.

Ground (f)

19. An appeal under ground (f) is made on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
20. Section 173(4) sets out the purpose of a notice are (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place. Given the wording of the requirements, it is clear that the purpose of the notice is to remedy the breach by restoring the land to its condition before the breach took place.

21. The appellant asserts that the requirement to completely demolish the development exceeds what is necessary to remedy any breach of planning control and suggests that the development is reduced in height to 1m to fall within the limitations of the GPDO. The enforcement procedure is intended to be remedial rather than punitive. I shall therefore consider if there is an obvious alternative which would overcome the planning difficulties at less cost and disruption than total removal.
22. Although the GPDO does not grant retrospective planning permission, since this would accord with the limitations of the GPDO, I consider this is an obvious alternative which would overcome the planning difficulties at less cost and disruption than total removal. Since this forms part of the appellant's case and simply gives the appellant the option of reducing the wall, piers and gates, I consider such a variation would not cause injustice.
23. Furthermore, the Council states it has no objections to remedy the breach of planning control by reducing the height of the wall, piers and gate to a height not exceeding 1 metre. I shall therefore vary the notice to give the recipient of the notice the choice of removing the structures and replanting the hedge, or reducing the structures to no more than 1m above ground level.
24. The appellant suggests that the requirement to plant a hedge is unreasonable as the removal of the hedge did not require planning permission. However, section 173(4) of the Act provides that a notice may remedy a breach by restoring the land to its condition before the breach took place. The appellant suggests the hedge needed to be removed to allow a mobile home to be brought into the site. However, the extent of hedgerow which has been removed seems excessive if this were the reason for removing it and so I consider it highly likely that the hedgerow was removed to facilitate the erection of the wall. Consequently, it is not unreasonable or excessive to require that a hedgerow is replanted.
25. Requirements should not be based on potentially subjective judgements. Requirement (iii), to leave the land in a clean and tidy condition is open to interpretation and shall therefore be deleted. Since this would not expand the requirements, I consider I can make this correction without causing injustice.
26. Thus, the appeal under ground (f) succeeds to the extent set out above.

Conclusion

27. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and 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.

M Savage

INSPECTOR