



Appeal Decision

Site visit made on 15 August 2022

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 24 October 2022

Appeal Ref: APP/X1355/C/22/3300452

24 Leander Avenue, Chester le Street DH3 4BH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (TCPA90) as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr A Finn against an enforcement notice issued by Durham County Council.
 - The enforcement notice is dated 10 May 2022.
 - The breach of planning control as alleged in the notice is: Without planning permission operational development consisting of the erection of a wooden boundary fence. The overall height of the boundary treatment is between 1.86 & 1.9m.
 - The requirements of the notice are: a) Reduce the height of the wooden boundary fence as shown marked between points A-B on the plan attached to the notice to the heights as approved by proposed plans 315-PL-01B of planning approval DM/20/00989/FPA. Proposed plans 315-PL-01B attached to the notice.
b) Permanently remove the remainder of the wooden boundary fence as shown marked between points C – D and E – F on the plan attached to the notice. To avoid doubt the removal of the wooden fence includes all posts rails, boards and cappings.
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f), and (g) 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 amended by the deletion of all the text in the requirements section and its substitution with the text: '1) Permanently remove the wooden boundary fence, including all posts, rails, boards and cappings, as shown marked between points C – D and E – F on the photographs attached to the notice; or 2) Reduce the wooden boundary fence, including all posts, rails, boards and cappings, between points C – D and E – F to a height not exceeding 1m.'
2. Subject to these amendments, the appeal is dismissed, the deemed planning application is refused, and the enforcement notice is upheld.

The appeal on ground (c)

3. Ground (c) is that the matters alleged in the notice do not constitute a breach of planning control. This is a legal ground which relates only to the facts of the case and the relevant legal context, and the onus of proof lies on the appellant.
4. The property at 24 Leander Avenue occupies a corner plot in a predominantly residential area. The enforcement notice attacks a wooden boundary fence that has been erected around the garden area of the house. For clarity, I will

use the references for the sections of the fence given in the annotated photographs attached to the notice.

5. The unauthorised development includes section A-B, which runs from the pavement back to the corner of the house, and comprises timber fencing only. Section C-D runs along the edge of the pavement and comprises a dwarf brick boundary wall with fencing above. Section E-F also comprises a dwarf wall and fencing, and runs from the pavement back along a drive which accesses the main road. Along all sides, the fencing reaches a height of up to 1.9m. The appeal on ground (c) relates only to sections A-B and E-F.
6. Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) relates to the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. In a residential context, development is not permitted by Class A if 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, exceed 1m above ground level. The height of any other gate, fence, wall or means of enclosure erected or constructed should not exceed 2m above ground level.
7. The appellant's case is that section A-B abuts his private driveway, and that section E-F abuts the private drive of a neighbouring dwelling. On that basis, he argues that these two sections of the fence are not constructed adjacent to a highway used by vehicular traffic and are therefore permitted development within Class A.
8. In the case of section A-B, this fence is set at right angles to the highway and adjacent to the private parking area in front of the garage belonging to No 24. I therefore agree that it is not adjacent to a highway.
9. Conversely, Section E-F is adjacent to a drive that is passed along by vehicles to access other property. The question in relation to this stretch of drive is less clear cut when assessed against the limitations of Class A.
10. S336(1) of the TCPA90 provides that, for the purposes of the TCPA90, 'highway' has the same meaning as in s328 of the Highways Act 1980. It states that, except where the context requires, 'highway' means the whole or any part of a highway other than a ferry or waterway and that where such a highway passes over a bridge or through a tunnel, that bridge or tunnel is to be taken to be part of the highway.
11. Common law has established that a highway is a defined route over which the public can pass and repass without hindrance or charge. The use must be "as of right", meaning without force, secrecy or permission. The public right to pass and repass as of right may be limited to a particular class of user or mode of transport. In this particular case, it is clear that the stretch of drive in question carries vehicular traffic to and from neighbouring property. In the absence of any contrary statutory definition, a privately-owned or maintained or an unmaintained way may be a highway if the public can use it "as of right".
12. As noted above, the onus of proof is on the appellant to show that there has not been a breach of planning control. However, he produces little evidence regarding the status of this drive, and whether or not it may be classed as a highway in light of the above definitions. With regard to Section E-F, I

conclude that the appellant has not convincingly demonstrated that the unauthorised boundary fencing falls within permitted development limits under Class A.

13. However, with regard to Section A-B, I am satisfied that this part of the fence is development permitted by Schedule 2, Part 2, Class A of the GPDO. With regard to planning permission DM/20/00989/FPA, it is for the appellant to implement the version proposed in that scheme if he wishes to do so.
14. To that extent, the appeal succeeds on ground (c). I direct that the enforcement notice be corrected accordingly.

Ground (a) and the deemed planning application

Main Issue

15. In view of the success of the appeal on ground (c) in relation to section A-B of the fencing, my consideration under ground (a) is limited to sections C-D and E-F. The main issue is the effect of those unauthorised elements of the development on the character and appearance of the surrounding area.

Reasons

16. The Council's document entitled 'County Durham Plan - Residential Amenity Standards Supplementary Planning Document' (SPD) sets out guidelines for domestic development. It states at paragraph 2.22 that 'The design and detailing of boundary gates, walls and fences, particularly on highway frontages, plays an important role in defining the character of all residential areas. Means of enclosure can be very prominent in the street scene, and can have a high visual impact. It is therefore important to ensure that the style and materials match or complement the existing style of the boundary treatment in the surrounding area or, where appropriate, the dwelling itself.'
17. In the surrounding area, the prevailing form of boundary treatment around the front gardens is low brick walls, and some hedging and planting. These walls are similar in character to those at the appeal site. There are some fences, but these tend to be set back from the main boundaries of the properties. I did not see any other examples of high fencing of the type installed at No 24, and there is no evidence that this is a built form characteristic of the area in the vicinity of the appeal site.
18. No 24 occupies a corner plot, and so the fencing along Sections C-D and E-F is clearly visible within the surrounding area. It is excessive in height in comparison to the surrounding boundary treatments. It employs a combination of materials that is not typical of the built form in the area, and the close boarded character of the fencing has a solid, impermeable appearance that contrasts with the other properties. Due to those attributes, it dominates the streetscape and appears markedly out of character.
19. I therefore conclude that the development unacceptably harms the character and appearance of the surrounding area, contrary to Policy 29 of the County Durham Plan, insofar as it requires development to contribute positively to an area's character, and the requirements of the SPD.
20. As an alternative to the unauthorised development, the appellant puts forward revised plans which would reduce the height of section C-D to 1.5m. He

contends that this revision would address the Council's objection, whilst providing an acceptable level of privacy within the property. This proposal would result in section C–D comprising a low boundary wall of a height of 0.7m, topped with a boundary fence reaching 0.8m in height.

21. As this proposal can be taken to form part of those matters alleged by the notice, I have considered it. However, from my observations on my visit, it was clear that this proposed arrangement would not be characteristic of the area either. It has therefore not led me to a different conclusion on this main issue.

Conclusion

22. The appeal on ground (a) fails and the deemed planning application is refused.

Appeal on ground (f)

23. Ground (f) is that the steps required to comply with the requirements of the notice are excessive.
24. The appellant suggests that the breach of planning control could be remedied by reducing the height of the fences at Sections C–D and E–F so that the total height of the boundary along these stretched would be 1.0m. This new boundary would comprise the brick wall, which stands at 0.7m, with a fence of 0.3m above.
25. The purpose of the notice is to remedy the breach of planning control. To reduce the boundary fence to a height that would fall within the permitted development rights available at the property would also, by definition, remedy the breach as no permission would be needed for a fence modified in this way.
26. To that extent, the appeal on ground (f) succeeds, and I direct that the notice be varied accordingly.

Appeal on ground (g)

27. Ground (g) is that the time given to comply with the notice, in this case one month, is too short. The appellant does not suggest an alternative period of time that he considers more acceptable.
28. Nonetheless, the key question for ground (g) is a matter of judgement as to what is reasonable. The fencing is lightweight and its removal or modification should not be complex or time consuming. There is no evidence that any specialist skills will be required for this operation.
29. That being the case, it seems to me that one month should be sufficient and therefore reasonable for the carrying out of the requirements of the notice.
30. The appeal on ground (g) therefore fails.

Conclusion

31. For the reasons above, the appeal is dismissed, the deemed planning application is refused, and the enforcement notice, as varied, is upheld.

Elaine Gray

INSPECTOR