
Appeal Decisions

Inquiry Held on 1 November 2022

Site visit made on 2 November 2022

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 15 November 2022

Appeal Ref: APP/B0230/C/22/3297997 ('Appeal A') **121 Dorrington Close, Luton LU3 1XP**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Kiran Ayub ('the first appellant') against an enforcement notice issued by Luton Council.
- The enforcement notice was issued on 7 April 2022.
- The breach of planning control as alleged in the notice is *Without planning permission the erection of a wooden fence with concrete pillars and base in excess of one metre in height around the front curtilage of the property on the Land, in the approximate position shown edged blue on the attached plan reference 02 ("the Unauthorised Development")*.
- The requirements of the notice are to (i) remove the Unauthorised Development from the Land; and (ii) remove all associated building materials and rubble and waste materials arising from compliance with step (i) above from the Land.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c) and (d) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal is dismissed and the enforcement notice upheld.

Appeal Ref: APP/B0230/C/22/3297998 ('Appeal B') **121 Dorrington Close, Luton LU3 1XP**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Gulshan Ayub against an enforcement notice issued by Luton Council.
- The appeal is made against the same enforcement notice and on the same grounds as Appeal A.

Summary Decision: The appeal is dismissed and the enforcement notice upheld.

Costs applications

1. Applications for costs were made by the Council and the first appellant against each other. These are the subject of separate decisions.
2. These applications were made and considered in writing following the close of the Inquiry.

Preliminary Matters

3. A pre-Inquiry Note was issued by me on 7 October 2022 to which an annotated copy was promptly circulated in return by the appellants. A number of matters were raised.

4. Amongst other matters was a requirement that the Council's Proof of Evidence be 'struck out'; an assertion that my request for a copy of a planning permission referred to in the Council's Statement of Case was unfair; and a contention that my stated intention, given the grounds of appeal being raised, not to consider either the planning merits of the fence or the merits of the Council's decision that it was expedient to issue the enforcement notice was unfair, referring to 'Article 14 of the Human Rights Act' (an apparent reference to Schedule 1 of that Act).

The Council's Proof of Evidence

5. In relation to the first issue, the appellants' complaint appeared to be that the Council in its Statement of Case averred that the parking area immediately adjoining the fence constitutes a highway; whereas at the time of the Proof of Evidence, this position was somewhat hedged by the proposition that the parking area itself might not be a highway but that nonetheless the accessway to it is, and that the fence was still adjacent to that.
6. The parties were informed in early August that I wished to explore the extent of the highway. It should have been no surprise to any party that the linear and lateral extents of the highway were therefore matters for consideration. It is not unexpected that parties will seek to respond to the other party's case and to address a range of scenarios: in this case, that the highway extends to Dorrington Close; to the additional accessway; or to the entirety of the parking area. My preliminary view was that there were no reasonable grounds to refuse to admit the Council's evidence on this issue, on which I specifically sought to be informed, and which was submitted in good time.

The 1985 planning permission

7. The planning permission in question had been referred to in the Council's Statement of Case, and was said to contain a planning condition with potential application to the facts of the case. As the questions before me are legal ones, including whether the alleged development constitutes a breach of planning control, it is necessary that I am informed fully as to the position. The potential need to consider the correctness of the allegation was brought to the parties' attention well in advance of the Inquiry, again early in August. I requested a copy of the planning permission soon after receiving the Council's Proof of Evidence to which it was not (despite the reference to it in their Statement of Case, and again in their Proof) appended.

Human Rights and the Council's decision to enforce

8. As to the issue of human rights and potential discrimination, the Planning Practice Guidance advises that the provisions of the European Convention, as incorporated into the Human Rights Act 1998, are relevant to a local planning authority when deciding whether to take enforcement action. However, any challenge as to whether it is 'expedient' for a local planning authority to issue a notice, which may include a review of their application of Convention rights, must be pursued by way of judicial review.
9. As explained in my pre-Inquiry notes and again at the Inquiry, I have no jurisdiction to determine whether or not the Council complied with section 172 of the 1990 Act: *Britannia Assets v SSCLG & Medway Council* [2011] EWHC 1908 (Admin).

10. Any Convention right upon which Article 14 might have been contingent was not identified by the appellants. Before me are legal grounds of appeal only. Duties arising under the Human Rights Act 1998 and other duties arising such as the Public Sector Equality Duty will apply in the exercise of a discretion. They do not come into effect where the substantive questions are whether or not, as a matter of fact and law, the matters alleged have occurred, are in breach of planning control, or are immune from enforcement action. These are not discretionary questions.
11. These matters were set out by my second pre-Inquiry Note dated 25 October sent with covering correspondence to the effect that I would be unable to consider any further communications until shortly before opening the Inquiry. A further issue raised by then was the appellants' request that I recuse myself from the Inquiry on the grounds of apparent bias.
12. This request was repeated by the appellants in correspondence sent in response to my second pre-Inquiry Note, in which I had indicated my intention to hear any such applications at the Inquiry.

The recusal application

13. The recusal application, which was neither pursued nor expressly withdrawn at the Inquiry, largely arose from the matters discussed above. It was contended by the appellants that I had pre-determined the appeals by stating in my first pre-Inquiry Note that I did not intend to consider the merits of the Council's decision to issue the notice. I had not responded to the appellants' annotated copy of that Note, asserting that Article 14 was engaged. I had accepted new evidence, both in the form of the Council's Proof of Evidence with its 'changed' case in relation to the extent of the highway, and in the form of the 1985 planning permission that I had specifically requested be supplied. I had indicated my intention to deal with the appellants' 'strike out' application in my opening remarks to the Inquiry and not before then. All this, it was suggested, resulted in a real possibility that I was biased and it was said that the appellant (which one was not specified) had no confidence in me.
14. The test is, as correctly identified by the appellants, that established in *Porter v Magill* [2001] UKHL 67: whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias.
15. The facts, of which the fair minded observer would be informed, include that the appellants are professionally represented by a solicitor. My statement that the planning merits of the fence would not be considered, and nor would the merits of the Council's decision to enforce, should have been uncontroversial to any professional representative for the reasons I have given.
16. As to the Council's 'changed' case, I had made no decision about that at the time the recusal application was submitted, or before the Inquiry opened. I should need to hear from the Council about it and that was best done at the Inquiry when after hearing from both parties I reached a concluded view on the matter.
17. As I pointed out in my second pre-Inquiry Note, whether this fence lies adjacent to the highway admits of a range of potential factual possibilities, irrespective of whether they are alighted upon by the Council.

18. It should not have been a surprise to the appellants that they were expected to prove, to the standard of probability, the whereabouts of the highway used by vehicular traffic. In any event the Council's Proof of Evidence was submitted timeously, giving the appellants an adequate opportunity to consider the document.
19. As to the planning condition, I accept that it is uncommon for an Inspector specifically to request documents that neither party has seen fit to produce, although anyone familiar with the relevant Inquiry Rules will know that the Inspector may ask any party to provide such further information about the matters contained in that party's Statement of Case as the Inspector may require. In this case, there was a clear reference by the Council's Statement of Case to a planning condition said to have been imposed by a 1985 permission (in terms that could not possibly have been right, apparently withdrawing permitted development rights conferred by a 1995 Order). The parties were told in early August that I wished to be informed about it. Thus I could detect no unfairness arising from my request that it be produced, or why its appearance might result in my biased consideration of the appeals.
20. The planning permission is a matter of public record and furthermore a restriction in similar terms appears on the property's deeds, about which I would expect the appellants to have been informed when purchasing the property. There were no surprises here. As set out above, when faced with legal grounds of appeal it is rather important; some might say fundamental, that an Inspector is able to apprise herself of the correct legal position. This may involve, as here, obtaining copies of public documents to which one or other party has adverted in their Statement of Case.
21. The final matter upon which I appeared to be biased was that the appellants had requested that I make a direction that the Council be obliged to provide a TV monitor and HDMI cable for use at the Inquiry, and I had not done so. It should be of no surprise to anyone that directions are unlikely to be made except on matters of controversy. The Inspectorate approached the Council to enquire as to the possibility of meeting the appellants' request, and they agreed. I would expect such a simple matter to have been settled by the parties without recourse to the resources of the Inspectorate.
22. Consequently the appellants' request that I recuse myself from the proceedings appeared to me without merit and I declined to do so. The application was not actively pursued at the Inquiry.

Other applications

23. At the Inquiry I heard applications by the appellants to strike out the Council's Proof of Evidence as well as to admit several further documents of their own, including two produced on the morning of the Inquiry. Although I did not consider that exceptional circumstances existed to justify the admission of these late documents, I admitted them for reasons of efficiency. The Council, who were ably represented and who objected only to those documents appearing on the morning of the Inquiry itself, did not appear to me unable to deal with the matters raised.
24. I refused the strike out application, having heard submissions at the Inquiry, largely for the reasons explained above, no new matters of substance being raised in relation to it in the appellants' oral submissions. I considered that the

appellants had by then had sufficient time to consider the Council's position (the Proof of Evidence having been supplied four weeks previously) and I was mindful of the burden of proof upon the appellants to satisfy me as to the position of the highway in any event.

Main Issues

25. The appellants contend that the matters alleged in the notice have not occurred because they say that the fence has been constructed to surround the property's rear curtilage, rather than the front curtilage as alleged. The main issue for consideration under ground (b) is whether the matters alleged in the notice have occurred as a matter of fact.
26. The appeals on ground (c) raise the question whether the fence benefits from the planning permission conferred by article 3 of and Schedule 2, Part 2 Class A to the Town & Country Planning (General Permitted Development) (England) Order 2015 ('the 2015 Order'). There are two potential ways in which it might not. First, development is not permitted by Class A if the height of any fence erected or constructed adjacent to a highway would exceed 1 metre above ground level. Secondly, article 3(4) of the Order sets out that nothing in the Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the 1990 Act.
27. On ground (d), whereas the Council allege the erection of a new fence, the appellants contend that its present appearance results from works of maintenance or improvement to a fence of long standing. The main issue arising under ground (d) is whether the fence has existed for a period of at least four years prior to the issuing of the enforcement notice.
28. At the Inquiry, and not before, the appellants sought to make new points. The first was that the notice is null or invalid. The second, raised after the evidence had concluded and shortly before the close of the Inquiry, was to ask me to consider an appeal under ground (f): that is, that the requirements of the notice exceed what is needed to achieve the purposes of the notice (in this case, to remedy the identified breach of planning control).

Reasons

Ground (b): whether the matters have occurred

29. The allegation in the notice is that a wooden fence with concrete pillars and base in excess of one metre in height has been erected. I saw that that was indisputably the case.
30. The allegation goes on to state that the fence has been erected 'around the front curtilage of the property on the Land' in the approximate position marked on an accompanying plan.
31. The appellants dispute that the fence lies to the front of the property. The design of the estate is one of confused legibility; generally it is 'open plan' with car parking spaces in communal areas away from the houses. The general pattern of the houses is of three to be comprised in a single building with gable ends and a pitched roof.
32. The relevant section of the house at no. 121 has a gable wall facing approximately west, with a projecting porch area in the middle housing the

only entrance door to the property. To the right of the door is the kitchen window and below that, externally, a small planting area and an electricity box. To the left of it the waste bins are stored. Above it lies a bathroom window and above right a bedroom window.

33. The appellants point out that the footway taken to reach the house leads to this elevation, and the car parking space allocated to the property faces this elevation. They suggest that this is the front elevation of the house.
34. The disputed fence encloses land lying approximately north of the property, and is described as 'the Garden' in the property deeds. This elevation of the house has a pitched roof with chimney flue, a bedroom window, and below that a large bay window to the main living room of the house. Although the entrance door does not sit within it, I agree with the Council that this elevation contains architectural features commensurate with it being the front of the property. The fact of accessing the property from a different aspect and a few plants next to the porch does not alter my assessment. Therefore I conclude that the Council were right to allege that the fence has been constructed to the front of the property, and the notice requires no amendment in this regard.
35. The notice's reference to the accompanying plan puts the matter beyond doubt as to what is being alleged. That a fence has been erected in the approximate position marked on the accompanying plan is indisputable. The reference to the front curtilage is entirely superfluous and cannot put the recipient of the notice in any doubt as to the nature of the allegation, as was freely conceded by the first appellant under cross-examination.
36. Thus the appeals on ground (b) fail.

Ground (c): whether the matters are in breach of planning control

37. There is no dispute that the construction (either before or after, as it may be, any works of maintenance or improvement to it) of the fence has amounted to development for which planning permission is required, having regard to Part 3 of the 1990 Act. The issue between the parties is whether it benefits from the planning permission conferred by the 2015 Order.

Schedule 2, Part 2, Class A

38. The question arising here is whether the fence, being greater in height than one metre, is adjacent to a highway used by vehicular traffic.
39. There is no dispute that the area immediately adjacent to the fence is used by vehicular traffic. As to whether it is a highway, I am satisfied that it is not.
40. The Council did not supply the List of Streets, although that in itself is not usually a guide to the lateral extent of the highway and is only usually a record of maintainable highways in any case. An extract, on plan, of the public record of adopted highways was submitted by the appellants on the morning of the Inquiry. The maintainable highway (by which I mean highway adopted by the Local Highway Authority to be maintainable at the public's expense) appears to extend no further than Dorrington Close, which lies some 10m or more away from the disputed fence.
41. There are no signs indicating that the land forming this accessway or parking area, which lies next to the fence, is private or otherwise seeking to prevent

access by the public. I was informed by the first appellant (and I observed) that some property owners on the estate have painted signs to indicate their own car parking spaces, although not in this particular area. I was told by the first appellant of some occasions when members of the public have been turned away from the estate as (vehicular) trespassers; the first appellant spoke of having sent away somebody who was attempting to use her own parking area to park on a football match day. It appears that estate occupiers have sometimes used the footway adjoining the appellants' property as a pedestrian shortcut to their own properties, and delivery drivers have also used the parking areas (and footways) when delivering to properties on the estate. Those deliveries may have included to properties other than those who are said in the property's deeds to benefit from the particular parking spaces being used by the delivery driver. The extent to which any of these users might be trespassers was not clear from the evidence; but by the general nature of the visits described (deliveries and visitors) I do not consider them to be such.

42. Despite the lack of any physical barriers to access, there appears no reason for the public at large to use the estate (which is itself a cul-de-sac) as a thoroughfare, or to use the particular parking/access area in question whether as a thoroughfare or as a dead end. The title deeds indicate that owners of properties each own allocated parking spaces and the adjoining part of the accessway, possessing rights over all other parts of the accessway in order to access the parking spaces. Maintenance fees are payable.
43. No intention to dedicate the accessways or the parking spaces to the public is revealed by those deeds, or otherwise. The accessways are in themselves vehicular dead ends, leading only to the car parking spaces and footways to the properties, and so do not appear to have the quality of being thoroughfares that would usually lend to any inference of dedication in the absence of express intention. Although the Council point out that the land in the accessways (and parking areas) is freely accessible to the public – a point contradicted in part by the first appellant's evidence to the Inquiry – there is no evidence that the public have actually used these areas to any sustained degree or length of time as of right without challenge that might give rise to any inference of dedication.
44. The land being in private ownership (as it undoubtedly is) is not determinative of its status as a highway, and the land in question has been laid out in its current configuration for over 30 years. Whilst there appears nothing, other than the occasional admonitions by estate occupants such as the first appellant, to prevent public use, there is no evidence before me to suggest that the public have in fact used it as of right, or used it as a 'way' to which section 31 of the Highways Act 1980 would apply even if they had. The only concrete example given of a vehicular trespasser using the accessways or parking areas in the estate (and not in the accessway/parking area in question) was itself an example of that person attempting to park there and having been ordered off the land by the first appellant.
45. Consequently, although mindful of where the burden of proof lies, I am far from satisfied that either the accessway or the parking area is a highway used by vehicular traffic for the purpose of the 2015 Order. Therefore I do not need to decide whether the fence lies adjacent to the accessway or to the parking area. Instead, the question arises whether the fence lies adjacent to Dorrington Close, which is (on the appellants' case, and on the Council's 'worst' case) the nearest highway used by vehicular traffic.

46. I am referred by the Council to a number of cases and appeal decisions concerning the meaning of 'adjacent' to a highway, the thrust of which is that a fence can be set back from a highway but nonetheless be 'adjacent' to it. The question of fact arises, as identified by the Inspector in a previous appeal decision referred to me by the Council¹, whether the enclosure defines the boundary of the property from the highway and is perceived to do so.
47. In this case it does not. It defines the boundary of the property from the car parking area and the properties to either side of it. It is also a bulwark against the accessway. However, its distance from Dorrington Close and the intervening features including the accessway means that I do not consider it is adjacent to the highway.
48. As the property faces Dorrington Close, the garden is enclosed by the disputed fence, which adjoins the car parking area, which itself (four or five spaces along) adjoins a further fence to the north, before an area of vegetation and a further fence adjoins the footway that adjoins the carriageway of the adopted Dorrington Close. These several intervening features between the fence and the footway mean I am unable to conclude that the fence is adjacent to the highway at that point.
49. Further round to the west, a high fence (of commensurate height with the one with which these appeals are concerned, rather like several others in the vicinity) surrounds the boundary of no. 125, directly adjacent to the footway of Dorrington Close. This obstructs the view of the 'appeal' fence from Dorrington Close and is thus an intervening feature between the appeal fence and the highway there. Behind that fence (whose planning status I do not know) there is a large tree which itself would interrupt the view of the appeal fence from Dorrington Close to some extent.
50. Between the two fences adjoining the footway, however, there is a clear diagonal view from Dorrington Close to the appeal fence across the accessway, and the fence is highly visible from the highway at that point. Again referred to the same previous Inspector's decision, it was decided there that the size and form of the particular enclosure was relevant to the decision about whether it was adjacent to the highway.
51. Article 3(6) provides (I paraphrase) that the 2015 Order does not authorise development which would create obstructions resulting in dangers to users of vehicular highways. Thus the purpose of the Order's restrictions in Schedule 2, Part 2 Class A as to the height limit of fences must be designed not merely to protect against such highway safety concerns, as these have this separate safeguard, but is concerned with the impacts on public vistas and the local environment more generally. I accept, therefore, that the appearance of any particular wall, fence or other enclosure might well affect one's judgement as to whether it lies, as a matter of fact and degree, 'adjacent' to the highway.
52. However here, no matter its conspicuousness, I do not find that the enclosure exists to define the property's boundary against the highway because there are too many intervening features and, at over 10m distant, it is in this context just too far away to be considered, in my view, adjacent to the highway.

¹ APP/L3625/X/16/3165616

53. To conclude on this point, I do not consider the fence to be adjacent to the highway and thus its construction is not contrary to the height limits found in the 2015 Order.

Planning conditions and article 3(4)

54. Nonetheless nothing in the 2015 Order permits development contrary to any condition imposed by any planning permission. The potentially relevant planning condition is attached to a permission dated 15 November 1985 for the development of land at Biscot Road (the main thoroughfare adjoining what is now Dorrington Close) in Luton for residential purposes. Condition 8 provides that:

Notwithstanding the provisions of the Town and Country Planning General Development Order, 1977, no fence, wall or other means of enclosure shall be erected or constructed in front of the forwardmost part of any dwelling without the prior permission of the district planning authority.

55. The reason given was to ensure a satisfactory standard of development and to safeguard the amenities of the surrounding area.
56. The question arising is whether the condition is enforceable and effective to remove permitted development rights. If it is, then the 2015 Order will not grant permission for the fence.
57. The Council rather disavowed any reliance on this condition at the Inquiry, alerting me in particular to its reference only to the 1977 Order (and not to any replacement Orders) and expressing some doubt as to its actual meaning in relation to the 'forwardmost part' of any dwelling (and what might be 'in front of' that). The Council agreed with the appellants in their Statement of Common Ground that permitted development rights conferred by the 2015 Order have not been withdrawn.

In front of the forwardmost part

58. Having discussed above whether or not I consider the fence to have been erected in the front garden of the property, it follows that I do consider that it has been mostly constructed in front of the forwardmost part of the dwelling, however that is interpreted. At the least I find the condition must prohibit fences that lie in front of the most 'forward' part of the front elevation of a dwelling. Here, most of the fence lies forward of the bay window that I have found to be at the front of the dwelling.
59. However, whether or not the fence lies in the property's front garden, I would still find it to have been (largely) constructed in front of the forwardmost part of the dwelling. The condition appears to me to allow fences that would 'fill in' the property's footprint adjacent to the existing projections (for example, it would allow a fence surrounding the 'planting area' adjacent to the property's porch), but not to construct a fence forward of those projections, irrespective of the particular elevation.
60. On this issue, whilst accepting that there may be some difficulties of interpretation in particular situations, in this case because of my finding that the fence is in the front garden, I find that the meaning of the condition's restriction as applied to the facts of the case is entirely straightforward.

The 1977 Order

61. The condition bears no reference to any proximity to or relationship with any highway. Although referring to the 1977 General Development Order only, without reference to any future development Orders made under what is now Part 3 of the 1990 Act (as most modern such planning conditions provide for) I nonetheless find it to be a clear and unequivocal withdrawal of permitted development rights to construct fences such as this one.
62. In this I was not referred to any particular cases by the Council (or by the appellants, save in the first appellant's post-Inquiry costs application) but the Council's general point in opening was that the condition's express exclusion of the 1977 Order only, without making provision for any future replacements of that Order, means that it is not clear whether it extends to the exclusion of future replacement provisions (such as the 2015 Order). The Council make the point that the 1977 Order was revoked and replaced by the 1988 Order.
63. The 1988 Order has since metamorphosed via a 1995 Order into the 2015 Order, again with amendments.
64. My understanding is that, although revoking and replacing it, the 1988 Order consolidated the 1977 Order (and subsequent amendments) with amendments, save for the provisions relating to planning applications that then found their own home in the 1988 Applications Regulations (SI 1988/1812). Subsequent development Orders, in 1995 and culminating in the 2015 Order, have, as confirmed by their Explanatory Notes, each successively consolidated and amended the previous such Order.
65. All such Orders have been made under what is now section 59 et seq of the 1990 Act, itself a consolidation of the 1971 Act that was in force when the relevant planning permission was granted. The 1977 Order substantively survives, consolidated and amended in form: replaced, but not rescinded. Although conscious of the need to exercise great restraint in implying words into a planning condition that are not actually there, by this process of consolidation I consider reference to the 2015 Order to be implied into the relevant condition here.
66. Obviously the reasonable reader of the permission might not have the same understanding of the position: this is all background information not generally at the fingertips of the class of reader to whom the permission is addressed. I also do not need to go so far as to imply the 2015 Order into the wording of the condition, because I find it to be plain and effective on its face.
67. Having regard to all the principles set out by Mrs Justice Patterson as endorsed by the Court of Appeal in *Dunnett Investments Limited v (1) SSCLG and (2) East Dorset DC* [2016] EWHC 534 (Admin); [2017] EWCA Civ 192 (a case concerning permitted development rights where the relevant condition made no reference to any General Permitted Development Order at all) I consider that the condition operates to exclude permitted development rights to construct the fence found here, and moreover I think that the reasonable reader of the permission would reach the same conclusion.
68. The condition expressly excludes the right to erect or construct a fence without the prior permission of the district planning authority. It refers, expressly, to the relevant development Order operative at the time the permission was

granted. In terms, it does not say 'fences permitted by the 1977 Order may not be constructed'; it says 'notwithstanding the 1977 Order, fences may not be constructed'. That is in my view an unequivocal withdrawal of any permitted development right to construct fences (subject to the 'forwardmost part' point).

Prior permission

69. Although not a point raised by any party, I have considered the condition's reference to requiring the 'prior permission' of the district planning authority to construct any fence. Whilst in terms it does not require the 'express' permission of the local planning authority, I do not think the requirement for prior permission can reasonably be read as incorporating any permission otherwise granted by a development Order made pursuant to section 59(2)(a) of the 1990 Act.
70. Such Orders are not made by the district (or local) planning authority, and the first part of the condition reads as to exclude any permission granted by such an Order (or at least the 1977 version). Therefore I do not think that the permission otherwise granted by later development Orders could amount to the 'prior permission' required by the condition.

Conclusions on the condition

71. It is most unlikely, in my view, that the reasonable reader of this condition would conclude that the local planning authority had intended its controls to be lost, or a permission to build fences to be granted, upon the revocation and replacement of one development Order with another; or that that has in fact resulted. The condition, read as a whole, clearly evinces an intention to withdraw such permitted development rights notwithstanding its reference only to the development Order then in force.
72. As Mrs Justice Patterson said, planning conditions need to be construed in the context of the permission; in a common sense way; not narrowly or strictly (although a relatively cautious approach must be taken); and (amongst other matters) in conjunction with the reasons for their imposition.
73. Construing it in the context of the permission and in a common sense way, I find that it was imposed at a time when the 1977 Order applied but it is plainly designed for continuous operation. The reason for it is obvious, on a residential estate designed to be 'open plan', where some properties' front windows are designed to overlook other properties' front gardens, as is the case here in the relationship with no. 119. The condition's requirement that the prior permission of the district planning authority be obtained for any (forwardmost etc.) fence is sufficiently clear and unequivocal in itself; a position only augmented by the express reference to the then-operative development Order. That the 1977 Order has since been superseded does not in my opinion detract from that, whether or not a reference to the 2015 Order is implied into the wording.
74. I also find that, for the purposes of article 3(4) of the 2015 Order, the condition was deemed to have been imposed by Part 3 of the 1990 Act. This is because the 1990 Act was consolidating legislation, deriving principally from the 1971 Act under which the relevant permission was granted. Therefore I find that article 3(4) of the 2015 Order applies to it.
75. Although small sections of the fence may not lie in front of the forwardmost part of the dwelling, the construction has been undertaken as a whole,

comprising a single building operation. Taking that whole, permission is not conferred by the 2015 Order because the development is contrary to a condition imposed by a planning permission granted or deemed to have been granted under Part 3 of the 1990 Act.

76. Therefore the appeals on ground (c) fail.

77. I have explained this point at length because the Council largely disclaimed any reliance on the condition and I find myself in the position of disagreeing with both parties; or at least of supplying reasoning on matters not advanced to me. The appellants, whilst protesting against my request for and receipt of the 1985 planning permission, did not advance any alternative explanation as to its proper interpretation.

The relevant paragraph of section 171A(1)

78. By way of further explanation, although the ground (c) appeals fail on the 'condition 8' point and not on the 'highway' point, I do not consider that the allegation requires amendment, and I consider that the reference to paragraph (a) of section 171A(1) in the notice is correct.

79. Article 3(4) of the 2015 Order says that it does not confer permission for any development that is contrary to any condition imposed on a planning permission. Thus although the erection of the fence is prohibited by condition 8, this does not mean that its construction is in 'breach of condition'. Rather, the effect of the condition, read with article 3(4) of the 2015 Order, is to mean that no permission exists.

80. Put another way, if there were a ground (a) appeal, the deemed application would have to seek retrospective permission for the fence. Merely seeking retrospective permission to carry out the 1985 development without complying with condition 8 would not result in a permission for the development already carried out in the form of the construction of the fence. Alleging a breach of condition, pursuant to section 171A(1)(b), would have resulted in any deemed planning application on ground (a) comprising an application merely for the construction of the residential estate without complying with condition 8. This could not in itself have the effect of retrospectively authorising the fence, which would not have constituted permitted development at the time of its construction and such rights cannot be claimed retrospectively².

81. Therefore, although much was made in the appellants' closing submissions about whether the notice identified the correct paragraph of section 171A(1), I have no reason to find that it did not, whether the breach arises out of the 2015 Order Schedule 2 Part 2 Class A paragraph A.1 or out of article 3(4) by reference to the 1985 planning condition. In either case the proper allegation is of development without planning permission. In any event identifying the wrong paragraph under section 171A(1) would be unlikely in itself to result in sufficient prejudice to a party so as to invalidate a notice.

Ground (d): whether immune from enforcement action

82. It is plain from the Council's evidence including dated photographic images that the appearance of the fence now in situ has changed considerably, and has done so less than four years before the issuing of the notice.

² *R (Watts) v SSETR and Hammersmith & Fulham LBC* [2002] JPL 1473

83. Clearly 'a' fence has existed for some time. There is no indication before me that any fence has received the permission of the Council, although I am not informed exactly what was permitted by the 1985 permission or the matters reserved by it. I am supplied with a photograph of the remnants of a fence at the property before the works resulting in the present fence took place (appellants' 'Reply to LPA's Statement of Case', Schedule 4). That photograph shows a picket fence of some vintage to have been in situ, although almost completely destroyed at the boundary alongside the car parking area and otherwise in poor condition. A statement from a former owner of the property confirms that a fence was in place at the property between 2014 and 2018.
84. The planning condition prohibits the erection or construction of fences, but it does not prohibit the maintenance or improvement of existing fences even where such works amount to operational development requiring planning permission. Any such maintenance or improvement would however be subject to the restrictions of Class A of the 2015 Order.
85. The condition does however serve to prohibit the erection of a new fence.
86. The fence in the photograph supplied by the appellants differs significantly from the fence now seen at the property, which has concrete bases and posts and is otherwise wooden but, unlike the former picket fence, close-boarded. It appears to be in the same position, but it uses no materials from the former fence and is of a completely different height. It is plainly a new creation.
87. As much was conceded by the first appellant at the Inquiry, who agreed that nothing of the previous fence remained, and also explained that she had engaged a professional builder at considerable expense to replace the fence.
88. Irrespective of the length of standing of the former fence, I find that the fence presently in situ at the property is a new fence constructed less than four years before the enforcement notice was issued. The question of maintenance or improvement does not arise.
89. Therefore the appeals on ground (d) must fail.

Nullity or Invalidity

90. For the reasons set out above I do not find the notice to be null or invalid. The recipient of the notice is clearly apprised of what is alleged and what needs to be done. No corrections to the notice are required.

Ground (f)

91. This ground was raised at a very late stage by the appellants and I indicated that it was unfair on the Council for them to have to respond to it. The appellants did not expressly pursue it in their closing submissions.
92. However, for the sake of completeness, and given that I have a discretion to consider appeals on this ground whether or not raised by any party, I shall deal with it. The case put by the appellants is, essentially, that the notice unreasonably requires the complete removal of the fence, whereas requiring its reduction in height to 1m would achieve the purposes of the notice.
93. The appellants' contention presupposes that I find that the fence lies adjacent to the highway, and that the height restriction found in Schedule 2, Part 2, Class A of the 2015 Order is the only impediment.

94. Accepting for the moment these presuppositions, the requirements of the notice are plainly to achieve the purpose of remedying the identified breach of planning control. The allegation is that the development is unauthorised in its entirety, which I have found it to be, and would have done so even had I agreed that it fell foul of Class A of the 2015 Order.
95. Had I found differently on the 'highway' point, although permitted development rights may (but for my findings as to the condition) exist to construct a fence up to 1m in height, that is not the fence that has been constructed. Therefore it would be commensurate with the allegation to require its complete removal. That would (if permission were otherwise conferred by the 2015 Order) not prevent the erection of a different fence. It would not however mean that lopping off part of the height of the existing fence would achieve that outcome, because the development would be (by exceeding the height limit of the 2015 Order if adjacent to the highway) unauthorised in its entirety and only the complete removal of the fence would alleviate that breach.
96. In any event this is academic because I have found the erection of the fence to be wholly unauthorised irrespective of its particular height and irrespective of its relationship with the highway. This is because the condition in question prohibits the erection or construction of any fences (of a particular description, which I have found applies here) of any height, no matter where located in relation to the highway, without the prior permission of the local planning authority. Thus the removal of the fence is required to remedy the breach alleged.
97. Therefore any appeal on ground (f) would be bound to fail (and, for the avoidance of doubt, does so).

Conclusion

98. For the reasons given above I consider that the appeals should not succeed.

Formal Decisions

99. The appeals are dismissed and the enforcement notice upheld.

Laura Renaudon

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Ayub Sadiq, Solicitor

He called: Kiran Ayub, appellant

FOR THE LOCAL PLANNING AUTHORITY:

Georgina Fenton, of Counsel

She called: Gary Dunne, Planning Enforcement Team Leader

DOCUMENTS RECEIVED AT THE INQUIRY

1. Council's opening submissions
2. Appellants' copy e.mail correspondence of April 2019
3. Appellants' copy (plan) of adopted highways in the area
4. Council's closing submissions
5. Appellants' closing submissions