



Appeal Decisions

Site visit made on 15 February 2023

by **L Douglas BSc (Hons) MSc MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 06 April 2023

Appeal A Ref: APP/F2605/C/21/3281132

Appeal B Ref: APP/F2605/C/21/3281133

8 Hale Road, Necton, Swaffham, Norfolk PE37 8EY

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). The appeals are made by Mrs Susan Mcfarlane (Appeal A) and Mr Keith Mcfarlane (Appeal B) against an enforcement notice issued by Breckland District Council.
- The notice was issued on 16 July 2021.
- The breach of planning control as alleged in the notice is: Without planning permission the erection of a fence of more than two (2) metres in height between the points marked A and B on the attached plan and shown on the photograph attached.
- The requirements of the notice are to: Permanently reduce the height of the fence (including posts) between the points marked A and B and shown on the photograph attached to two (2) metres and remove any resulting debris.
- The period for compliance with the requirements is: 28 days from the date that the notice takes effect.
- The appeals are proceeding on the grounds set out in sections 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act have lapsed.

Summary of Decisions: The appeals are dismissed and the enforcement notice is upheld with correction and variations in the terms set out below in the Formal Decision.

Preliminary Matters

1. The appellants did not lodge appeals under ground (c) on their appeal form, but the content of their submissions relates to appeals which would normally be assessed under this ground. I shall therefore consider appeals under that ground in addition to the ground (b) appeals lodged. The Council's comments address the relevant matters, and this would not cause injustice to any parties. Grounds (b) and (c) are legal grounds, which do not allow for consideration of the effect of my decision on individuals and their rights. This is because under those legal grounds my decision relies on questions of whether or not, as a matter of fact and law, particular matters have occurred.
2. The appellants lodged appeals under ground (a), advising that no fee should be required due to exemptions on account of them being disabled. I note the appellants' comments with regard to events which led to the development being carried out, but The Planning Inspectorate has concluded that the deemed planning applications under ground (a) would not be fee exempt in this instance. As no fee has been paid, there is no ground (a) appeal for me to consider and I am unable to take the planning merits of the development or the personal circumstances of the appellants into account. This includes any

matters which would otherwise be considered under the provisions of the Human Rights Act 1998 and the Equality Act 2010.

3. I was accompanied at the site visit by the appellant for Appeal A and a representative of the Council. The appellant did not agree to the representative of the Council entering the appeal site. I therefore carried out my site visit in the presence of the appellant while the representative of the Council waited outside the appeal site. I did not discuss any facts or merits of the case with either party.

The Enforcement Notice

4. Section 176(1) of the Act provides for me to correct any defect, error or misdescription in the enforcement notice or vary the terms of the enforcement notice if I am satisfied that doing so will not cause injustice to the main parties. It would also be necessary for any correction or variation of the enforcement notice to not cause any loss of natural justice to any other parties.
5. The breach of planning control alleged at Section 3 of the enforcement notice refers to the erection of a fence exceeding 2 metres in height. The reasons for serving the enforcement notice and the submissions of all parties explain that a fence has been extended upwards, rather than a fence being erected. This is an obvious error, referred to by the appellants throughout their submissions and I shall therefore correct the enforcement notice to more accurately describe the development which has taken place. This would not cause injustice to the main parties or any loss of natural justice to any other parties.
6. The enforcement notice requires the height of the fence between 2 specified points to be permanently reduced to 2 metres. It would not be reasonable to specify the height to which this part of the fence should be permanently reduced to, and I shall therefore vary this part of the enforcement notice to require the height of that part of the fence to be reduced to no more than 2 metres.

Ground (b)

7. To be successful under ground (b), the appellants would have to show that the breach of planning control alleged in the enforcement notice, as corrected, has not occurred.
8. I am aware that planning permission has previously been sought and refused for proposed works described as 'extend the height of boundary fence to the maximum of 2.5mtrs, using a frame of lattice work, horizontal timber'¹. The appellants have explained that those works were not carried out following the dismissal of an appeal against the refusal of that planning application.
9. The evidence shows that a fence has been extended upwards through the addition of a trellis and extensions to fence posts in the area indicated in the enforcement notice at some point prior to August 2018. Although the trellis is a separate addition to the fence, it now comprises part of the fence. It would therefore be appropriate to describe the trellis and the pre-existing fence as part of the same extended fence.

¹ The Council's ref: 3PL/2018/1285/HOU

10. The breach of planning control alleged in the enforcement notice, as corrected, has therefore taken place and the appeals under ground (b) must fail.

Ground (c)

11. This ground of appeal is that the matters alleged in the enforcement notice, as corrected, do not constitute a breach of planning control. A breach of planning control comprises the carrying out of development without the required planning permission. Under a ground (c) appeal, the onus of proof is on the appellant to show that there has not been a breach of planning control.
12. Section 55 of the Act provides the meaning of 'development', which includes the carrying out of building or other operations in, on or over land, and explains that 'building operations' includes additions to buildings. Section 57(1) states that, subject to the provisions of that section, planning permission is required for the carrying out of any development of land. Section 336(1) provides the definition of the word 'building' for the purposes of the Act, which includes any structure or erection and any part of a building, as so defined.
13. The fence the subject of the enforcement notice therefore comprises a building, for the purposes of the Act, and its extension as described above comprises development requiring planning permission.
14. The Council has not granted express planning permission for the development. However, planning permission is granted for the erection, construction, maintenance, improvement or alteration of a fence by Article 3(1) and Class A, Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), subject to limitations. Paragraph A.1(b) of that Class confirms that such development is not permitted if the height of any fence erected or constructed which is not adjacent to a highway exceeds 2 metres above ground level. Paragraph A.1(c) confirms that such development is not permitted if the height of any fence maintained, improved or altered exceeds its former height or 2 metres above ground level, whichever is the greater.
15. I have not been provided with accurate measurements of the fence between the points marked A and B on the plan attached to the enforcement notice. If any parts of the fence between these points, including fence posts, exceed the former height of the fence or 2 metres in height from ground level, whichever is the greater, then the development will be in breach of planning control.
16. It has not been suggested by any parties that the addition of the trellis to the fence has resulted in development which does not exceed the former height of the fence. Indeed, the evidence indicates that the fence has been extended upwards, exceeding its former height.
17. The Council has suggested that 'a standard 6 ft (or 1.98 metre) fence' has been 'extended upwards by approximately 50 cm'. I do not accept that 6 feet equates to 1.98 metres, but I have not been provided with any detailed evidence from the appellants which leads me to consider the highest part of the extended fence may be no more than 2 metres in height from ground level. As it has not been demonstrated that the extended fence measures no more than 2 metres in height from ground level, I cannot conclude that the extended fence is not in breach of planning control.

18. The appellants have referred to a letter² (Letter A) sent to Mr Mcfarlane by the Council following a request for personal information held by the Council. The letter states:

'The Council recently had cause to investigate concerns regarding your property at 8 Hale Road, and an investigation was undertaken under reference ENF/18/18/PAR... I can advise that following our assessment we found that there had not been a breach of planning control at your property and therefore there was no need to contact you in order to request any corrective works. The complainant has been advised that the Council is satisfied and that we do not propose any further action...'

19. A subsequent letter³ (Letter B) sent to the appellants from the Council confirms that there was a previous planning enforcement investigation into the development that forms the subject of the enforcement notice. However, Letter B makes clear that the Council's previous planning enforcement investigation had the reference number ENF/265/18/PAR. This is different to the planning enforcement investigation reference number referred to in Letter A. There is no information as to why no action was taken as part of the Council's planning enforcement investigation reference number ENF/265/18/PAR.
20. Letter A appears to have been issued after the upward extension of the fence was carried out, and the Council's planning enforcement investigation reference number ENF/18/18/PAR is claimed by the appellant to have related to that development. That may be the case, but there is no clear and unambiguous evidence which demonstrates this.
21. I note the appellants' photograph dated 1 August 2018, prior to Letter A being issued, which appears to show the upward extension of the fence I saw during my site visit; however, this does not confirm that Letter A referred to that development. Even if it did, Letter A would not confirm the lawfulness of any development which is in fact unlawful.
22. I have sympathy with the appellants' position, which relies to some extent on the Council being open and transparent about its previous planning enforcement investigations. If the Council has previously concluded that the upward extension of the fence did not constitute a breach of planning control, it is not clear what circumstances, if any, may have changed since. If the Council has previously advised the appellants that no further action would be taken in respect of the upward extension of the fence, it would be a matter for the appellants to seek an explanation from the Council as to why it subsequently served the enforcement notice. In any case, the onus in these appeals is on the appellants to demonstrate that the upward extension of the fence does not constitute a breach of planning control and Letters A and B do not achieve this.
23. It has not been demonstrated that the breach of planning control alleged in the enforcement notice, as corrected, does not constitute a breach of planning control, and the appeals under ground (c) must therefore fail.

Conclusion

24. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with a correction and variations.

² Dated 29 August 2018, the Council's ref: BSAR-005494

³ Dated 28 January 2020, the Council's ref: BSAR-008274

Formal Decision

25. It is directed that the enforcement notice is corrected and varied by:

(a) deletion of the text 'erection of a fence of more than two (2) metres in height' at Section 3 and its substitution with the text 'alteration of a fence resulting in its height exceeding 2 metres'.

(b) deletion of the text 'permanently' at Section 5.

(c) deletion of the text 'two (2) metres' at Section 5 and its substitution with the text 'no more than 2 metres'.

26. Subject to the correction and variations, the appeals are dismissed and the enforcement notice is upheld.

L Douglas

INSPECTOR