



Appeal Decision

Site visit made on 19 September 2023

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29th September 2023

Appeal Ref: APP/A5270/C/23/3314629

6 Kirchen Road, West Ealing, London, W13 0TY

- 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 Ms Darien Jumaa against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice was issued on 1 December 2022.
 - The breach of planning control as alleged in the notice is: Without planning permission: The erection of timber fencing and trellising to the front and rear of the property.
 - The requirements of the notice are:
 1. Remove the fencing, trellising and posts to the front and rear of the property; and
 2. Remove all resultant debris. OR
 3. Reduce the height of the fencing, trellising and posts at the front to no more than 1m high;
 4. Reduce the height of the fencing, trellising and posts at the rear to no more than 2m high; and
 5. Remove all resultant debris.
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) 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:
 - varied by deleting the words "two months" within section 5 (what you are required to do) and its replacement with "four months".
2. Subject to this variation, the appeal is dismissed, and 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.

Procedural Matters

3. The Appeal has only been lodged under grounds (a) and (g). However, it is clear from the substance of their appeal submissions that the appellant is also seeking to appeal under ground (c), in so far as they consider that the side boundaries of the front fence benefit from permitted development as they are less than 2m in height and are not adjacent to the highway. As the Council have provided detailed comments on the appellant's statement, I am satisfied that neither party would be prejudiced by the inclusion of this. I have therefore determined the appeal on this basis.

The ground (c) appeal

4. In this ground of appeal, it is necessary to show that there has not been a breach of planning control. The onus of proof lies with the appellant, the relevant test of the evidence being the balance of probability.
5. Under this ground of appeal, it is argued that there has been no breach of planning control as the side boundaries of the front garden fence are permitted development by Article 3, Schedule 2, Part 2, Class A of The Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), which allows for *"the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure"*.
6. However, limitation A.1 states that such 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 in all cases, with the exception of schools, one metre above ground level.
7. There is no dispute between the parties that the fence and trellis is above one metre in height. I also observed that the fence encloses part of the front garden of this property. Kirchen Road is a highway used by vehicular traffic with a footway adjacent to the appeal property which forms part of the highway. Indeed, common law has established that a highway is a defined route over which the public at large can pass and repass as frequently as they wish, without hindrance and without charge. Therefore, the question to be determined is whether the side parts of the fence is "adjacent" to a highway.
8. The fence does not have to touch the edge of a highway to be considered adjacent. There may be some distance between a highway edge and a fence serving a property, yet it may still be close enough to have the perceived function of forming a boundary to the highway. Whether a fence, in such circumstances, is adjacent to the highway is a matter of fact and degree in each case.
9. In this case, given the modest size of the front gardens along Kirchen Road, the side parts of the fence and trellis is positioned close to the back edge of the pavement along Kirchen Road. Its closeness falls well within the scope of being adjacent to the highway. As such, and as a matter of fact and degree, I consider it has been erected adjacent to the highway. The fence and trellis in the front garden forms one means of enclosure erected in a single operation and any part of that being adjacent to the highway takes the whole enclosure outside the permission granted by the GPDO.
10. The means of enclosure is operational development for which planning permission is required. It exceeds 1m in height, in breach of limitation A.1(a)(ii) to Class A of Part 2 of Schedule 2 of Article 3 to the GPDO. Planning permission has thus not been granted for its erection by the GPDO or expressly by a planning application submitted to the local planning authority. As such there has been a breach of planning control.
11. The ground (c) appeal must fail.

Ground (a) and the Deemed Planning Application

Main Issues

12. The main issues are the effect of the development upon:

- the character and appearance of the area; and
- the living conditions for the occupiers of Nos 5a and 7 Kirchen Road, with particular regard to daylight, sunlight, overshadowing and outlook.

Reasons

Character and appearance

13. The appeal site relates to a two storey plus mansard terraced property located within a predominantly residential area. The appeal site forms part of a small terrace (Nos 5 to 9 Kirchen Road) of similar two storey plus mansard properties, characterised by ground floor bay windows, mansard roofs and low front boundary treatments. These positive features provide a uniform layout, scale and design to the terrace.

14. However, given its overall height, length and prominence, the new front boundary fence and trellis forms a large, obtrusive and incongruous feature in the street scene which is at odds with the prevailing character of the terrace. Similarly, given the overall height and scale of the fence and trellis in the rear garden it forms a long and tall, incongruous feature in the rear garden, along the boundaries with both neighbouring properties on Kirchen Road and the residential property to the rear on Bedford Road. This is at odds with the residential character of the area, which predominantly comprises more modest fences and boundary treatments between neighbouring rear gardens.

15. I appreciate the appellant's frustration that there are a small number of other tall fences, gates and walls in the road. However, the existence of these does not justify further harm. The tall fencing on the opposite side of the road relates to an area surrounding off-street parking area and therefore does not relate to a very modest front garden of a mid-terraced property. Reference is also made to the fact that there was a pre-existing fence in the front and rear garden, and also that under permitted development, the appellant could install a close boarded fence up to 2m high in the rear garden. However, the evidence submitted indicates that the pre-existing fence was lower and not harmful to the character and appearance of the area. Similarly, the as built fence and trellis rises well above 2m and consequently results in greater harm.

16. I conclude that the development harms the character and appearance of the area, in conflict with Policy D3 of the London Plan, 2021 (London Plan) and Policies 7.4 and 7B of the London Borough of Ealing Development Management Development Plan Document, 2013 (DMDP), and the National Planning Policy Framework, 2023 (the Framework). In combination, these require that development proposals ensure a positive visual impact, as a result of good architecture and layout, enhance local context by delivering buildings and spaces that positively respond to local distinctiveness through their layout, orientation, scale, appearance and shape.

Living conditions for the occupiers of living conditions for the occupiers of Nos 5a and 7 Kirchen Road – daylight, sunlight, overshadowing and outlook

17. Owing to its single storey height, I am satisfied that the fence and trellis does not result in any overshadowing and loss of daylight and sunlight to neighbouring occupiers of Nos 5a and 7 Kirchen Road.
18. With regard to outlook, the appellant argues that the fencing above 1.8m is trellis which allows both light and views. Nevertheless, the tall, boarded fence and trellis above extends for a considerable length of the rear garden along the boundaries with both adjacent properties of Nos 5a and 7, resulting in a dominant and overbearing form of development when viewed from these neighbouring gardens. During my site visit I observed that outlook from Nos 5a and 7 would be severely restricted by this development resulting in an increased sense of enclosure to occupiers of this property, thereby harming their living conditions.
19. Therefore, whilst I find no harm in relation to loss of daylight, sunlight and overshadowing, I consider that the development fails to provide acceptable living conditions for occupiers of 5a and 7 Kirchen Road with regard to outlook. Accordingly, the development is contrary to Policy D3 of the London Plan and Policy 7B of the DMDP. Amongst other things, these state that new development must achieve a high standard of amenity for adjacent users and should deliver appropriate outlook. Furthermore, the development is contrary to the Framework which seeks to ensure all developments creates places with a high standard of amenity for existing and future user.

Other considerations

20. The appellant suggests that the front boundary fence could be stained in a dark colour to lessen the impact fence on the street scene. They also suggest that they would be agreeable to a condition which ensures that the any fencing above permitted development height, would remain trellis fencing in perpetuity. However, I am not convinced that either of these would be sufficient to overcome the harms identified above, since it is the overall height and scale of the fence and trellis which is excessive and results in harm.
21. The appellant further states that the posts to the front boundary could be cut to align with the trellis panels. However, no revised drawings have been submitted, and therefore I am unable to determine what this proposal would look like, or whether it would form part of the development alleged. Indeed, it is open to the appellant to submit a planning application to the Council for this revised scheme if they so wish.
22. The appellant advises that the fences installed is specific to the needs of the appellant who resides in the ground floor flat and is registered disabled. It stated that cold callers bang on the ground floor window to gain access to the property and therefore the taller fencing was installed as a security measure to prevent this. In light of the requirements of the enforcement notice, I recognise that the failure of this appeal would result in either the removal of the fencing or reduction in its height to comply with permitted development rights. This would represent an interference with their rights under Article 8 of the European Convention on Human Rights, as incorporated by the Human Rights Act 1998.

23. I have considerable sympathy with the appellant's personal circumstances and can fully appreciate why they would wish to retain the fencing as installed. Nevertheless, I have not been provided with any substantive evidence to explain why a lower boundary treatment at the front and rear of the property would not achieve the same purpose. Furthermore, there are alternative options which could be explored which may achieve the same purpose.
24. Due to the above factors, there is limited evidence before me to suggest that the removal of or the reduction in height of the fence to comply with permitted development legislation would have a disproportionate effect on the appellant when weighed against the planning harm set out above. As a result, I can only give the appellant's personal circumstances modest weight in my decision.

Planning balance and conclusion on ground (a) and the Deemed Planning Application

25. I have found that the development results in harm to the character and appearance of the area and to the living condition of neighbouring occupiers with regard to loss of outlook.
26. In exercising my function on behalf of a public authority, I have had due regard to the Public Sector Equality Duty (PSED) contained in the Equality Act 2010 (EA). The EA sets out the relevant protected characteristics which includes disability. Since there is the potential for my decision to affect persons with a protected characteristic, I have had due regard to the three equality principles set out in Section 149 of the EA. Nevertheless, having regard to the legitimate and well-established planning policy aims to protect the character and appearance of the area, and the living conditions for neighbouring occupiers, in this case I consider that greater weight attaches to the public interest. Dismissal of the appeal is therefore necessary and proportionate, and it would not result in a violation of the human rights of the appellant.
27. For the reasons given and with regard to all other matters raised, I conclude that the appeal on ground (a) should fail, and the deemed planning application should be refused.

The appeal on Ground (g)

28. The appeal on this ground is that any period specified in the notice falls short of what should reasonably be allowed. The appellant ask that the time for compliance is extended from 2 to 5 months, given that the appellant would need to appoint professional workers, who are in high demand in London, to carry out the remedial works.
29. The time for completing the requirements should be what is reasonably considered necessary to complete the requirements. There is nothing before to suggest that the work is overly complex. Nevertheless, in my view, 4 months would strike a more reasonable and proportionate balance to carry out the remedial works. I shall therefore extend the period from 2 to 4 months.
30. To this extent, the ground (g) appeal succeeds, and I will vary the notice accordingly.

Conclusion

31. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with 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.

R Satheesan

INSPECTOR