



Appeal Decision

Site visit made on 10 October 2023

by D Hartley BA (Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1ST NOVEMBER 2023

Appeal Ref: APP/E2340/C/23/3325495

Land at 59 Marsden Hall Road, Nelson BB9 9PA

- 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 Deborah Dawson against an enforcement notice issued by Pendle Borough Council.
 - The enforcement notice was issued on 24 May 2023.
 - The breach of planning control as alleged in the notice is without planning permission and within the last 4 years, the erection of a fence to the side and rear of the land.
 - The requirement of the notice is to remove the side facing fence.
 - The period for compliance with the requirements is two months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (e), (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 varied by 1) deleting all of the words in section 5 and replacing them with '*the removal of the side facing fence as shown in the approximate position marked in a black pecked line on the plan attached to the notice*' and 2) corrected by the substitution of the plan annexed to this decision letter for the plan attached to the enforcement notice. Subject to the variation and correction 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.

The Notice

2. The breach of planning control relates to the '*erection of a fence to the side and rear of the land*'. It is clear from the evidence that this is a fence that has been erected as one single building operation running alongside Hallam Road and angling back to side elevation of the dwellinghouse.
3. The requirement of notice is to remove the '*side facing fence*'. I sought clarification from the local planning authority (LPA) as part of this appeal in terms of what was meant by '*rear*' and '*side facing*' fence. The LPA confirmed that they had decided to underenforce and, accordingly, that the notice required the removal of only the '*side facing*' fence which is positioned directly adjacent to Hallam Road. In the interests of precision, I shall correct/vary the notice without injustice being caused to the main parties by 1) deleting all of the words in section 5 and replacing them with '*the removal of the side facing*

fence as shown in the approximate position marked in a black pecked line on the plan attached to the notice' and, 2) substituting the plan annexed to this decision letter for the plan attached to the enforcement notice.

Reasons

Ground (b) appeal

4. The appeal made on ground (b) is on the basis that the matters comprising the alleged breach of planning control have not occurred.
5. The appellant's claim under ground (b) is that they did not know that planning permission was needed for the fence and she has '*reduced it by 1 ft*'. This is not a ground (b) appeal matter and falls to be considered as part of the ground (c) appeal below. The evidence indicates that when the notice was issued, the breach of planning control had occurred on the land.
6. I therefore conclude that the ground (b) appeal fails.

Ground (c) appeal

7. The appeal made on ground (c) is that the matters alleged do not constitute a breach of planning control.
8. The appellant's claim under ground (c) is that they did not know that planning permission was required for the fence as it is not a building. Section 55(1) of the Act states that development means '*the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land*'. Section 336 of the Act defines a building as including '*any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building*'. The appeal fence is a structure and hence it is, by definition, a building. It therefore constitutes development.
9. The fence has been erected above a boundary wall and is adjacent to a highway used by vehicular traffic. Development is not permitted by Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) 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 carrying out the development, exceed 1 metre above ground level.
10. The evidence is that when the notice was issued, it had been erected on top of an existing boundary wall. The claim made by the local planning authority (LPA) that its height was about 2.9 metres above ground level has not been disputed by the appellant. The appellant states that she has '*reduced it by 1 ft*'. However, the ground (c) appeal relates to the breach of planning control that existed on the land when the notice was issued. The evidence is that the appeal fence is not permitted development based on Class A of Part 2 of Schedule 2 of the GPDO and hence planning permission is required for it. Therefore, I conclude that the ground (c) appeal fails.

Ground (e) appeal

11. The appeal made on ground (e) is that copies of the enforcement notice were not properly served on everyone with an interest in the land as required by section 172 of the Act.

12. The claim made by the appellant is that she did not receive a copy of the notice until 3 July 2023. This does not correspond with the paperwork retained by the LPA which includes a certificate of service dated 24 May 2023 and a record made that the appellant left a voice message on 19 June 2023 indicating an intention to appeal the notice. The evidence before me does not therefore indicate that a copy of the notice was not properly served on everyone with an interest in the land, including the appellant, as required by section 172 of the Act.
13. Even if for some reason the appellant did not receive a copy of the notice, it is evident that she is fully aware of it as an appeal has been lodged. Therefore, it could not be argued that any injustice has been caused to the appellant arising out of any alleged claim that a copy of the notice had not been properly served upon them. I therefore conclude that the ground (e) appeal fails.

Ground (a) appeal and the deemed planning application

14. The appeal is made under ground (a) which is that planning permission ought to be granted in respect of the breach of planning control alleged in the notice. I have considered the reasons for issuing the enforcement notice and the main issue is the effect of the breach of planning control on the character and appearance of the area.
15. The appeal site falls within a residential area. The LPA has provided photographs of the breach of planning control at appendix 1 of their statement of case. The fencing is seen within the context of several dwellinghouses in the area where boundary treatment is either low in the form of hedges, walls or fencing or where there is no means of enclosure. This adds positively and distinctively to the character and appearance of the locality in terms of ensuring that there is pleasing sense of open space to the side and front and properties when experienced from the main roads.
16. The appeal property is in a prominent location on the corner of Marsden Hall Road with Hallam Road and can be seen from the entrance to Marsden Park. Owing to the height, position, and extent of the fencing, it has an enclosing and dominating impact when seen by passers-by and detracts from the otherwise more spacious and greener outside amenity spaces that exist to the side and front of most of the dwellinghouses in the area. While the evidence is that the appellant has reduced the height of the fence since the notice was issued, my site visit revealed that it still appears incongruous and dominating in the street-scene. I accept that the wooden fence could be painted or treated with a stain. This would help it to assimilate better into the surrounding environment. However, this would not be sufficient to overcome the significant harm caused by it to the overall pattern of development in the area. In other words, it would still constitute poor design.
17. The appellant states that it is necessary to have a secure means of enclosure to ensure that when her grandchildren visit the property, who have an identified disability, they can play in a safe area without falling off the wall and into the road. I do not doubt that in relative terms, the fencing provides improved outside amenity space security and safety for the grandchildren. However, I am not persuaded that it would not be possible to explore the potential to opt for more sensitive options in terms of a means of enclosure, such as the planting of a quick growing and/or semi-mature hedge(s). In combination with the existing low wall, there is nothing before me to suggest that this option would

not offer the safety and security desired by the appellant and without the same level of harm being caused to the character and appearance of the area.

18. The appellant comments that there are houses in '*Barrowford, Nelson and other places that have the same or similar fences to mine*'. I have not been provided with details of where these fences are located and, in any event, I have determined this appeal on its individual planning merits and in the context of the character and appearance of the locality.
19. For the above reasons, I conclude that the breach of planning control has caused significant harm to the character and appearance of the area. There are no conditions that would suitably mitigate the harm caused. Therefore, there is conflict with the design, character and appearance requirements of policy ENV2 of the adopted 2015 Local Plan for Pendle Core Strategy 2011-2030 and chapter 12 of the National Planning Policy Framework 2023.
20. I recognise that the breach of planning control has been partly carried out to provide safe and private outside space for the appellant's disabled grandchildren. In this regard, and, in reaching the above conclusion, I have had due regard to the Public Sector Equality Duty contained in section 149 of the Equality Act 2010, which sets out the need to eliminate unlawful discrimination, harassment and victimisation, and to advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it. In this case, a refusal of planning permission is a proportionate and necessary approach to the legitimate aim of ensuring that the character and appearance of the area is safeguarded in the public interest.
21. For the reasons outlined above, I conclude that the ground (a) appeal fails.

Ground (f) appeal

22. The appeal made under ground (f) is 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 or to remedy any injury to amenity which has been caused by any such a breach.
23. The purpose of the notice is to remedy the injury caused to amenity. The LPA has decided to underenforce, notwithstanding the fact that the evidence indicates that the fence was erected as one single building operation. Therefore, and notwithstanding the appellant's comment that she has reduced it in height, the step required by the notice is not excessive as it does not exceed what is necessary to remedy the injury caused to amenity. Therefore, I conclude that the ground (f) appeal fails.

Ground (g) appeal

24. The appeal made on ground (g) is that the period specified in the notice in accordance with s173(9) falls short of what should reasonably be allowed. As part of the ground (a) appeal, the appellant asserts that she did not receive a copy of the notice until 5 July 2023 and hence did not have a full two months to comply with its requirement.
25. I have considered this matter as part of the ground (e) appeal above. In any event, the appeal did not take effect on 5 July 2023 as an appeal was lodged by the appellant. Therefore, the period for compliance with the requirement of

the notice is two months from the date of this decision. The appellant does not provide any evidence to demonstrate why two months would fall short of what should be reasonably allowed in terms of removal of the fence.

26. For the above reasons, I conclude that the ground (g) appeal fails.

Conclusion

27. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and a variation and refuse to grant planning permission on the deemed application.

D Hartley

INSPECTOR



Substitute Plan

This is the plan referred to in my decision dated: **1ST NOVEMBER 2023**

by D Hartley BA(Hons), MTP, MBA, MRTPI

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Scale: Not to scale

