



Appeal Decision

Site visit made on 5 March 2024

by Felicity Thompson BA(Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 April 2024

Appeal Ref: APP/Z4718/C/23/3317030

Land and property at 75 Cemetery Road, Heckmondwike WF16 9EG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
 - The appeal is made by Mr Alan Lindsay against an enforcement notice issued by Kirklees Metropolitan Council.
 - The notice was issued on 11 January 2023.
 - The breach of planning control as alleged in the notice is without the benefit of planning permission, the material change of use from a former ancillary car park to general storage and the erection of a fence adjacent to a highway.
 - The requirements of the notice are to:
 - a) Cease the use of the site for the general storage of materials.
 - b) Remove all stored items, including but not limited to caravans/campervans, cars, trailers and other residential paraphernalia.
 - c) Remove the heras fencing.
 - d) Remove the timber boundary fencing to the front of the site.
 - The period for compliance with the requirements is 60 days.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) and (f) of the Town and Country Planning Act 1990 (as amended).
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Decision

1. It is directed that the enforcement notice is corrected by substituting the plan attached to the issued enforcement notice with the one attached to this decision.
2. Subject to the correction, the appeal is dismissed, and the enforcement notice is upheld.

Preliminary Matters

3. The appellant's case on ground (d) is made in respect of the general storage use. To succeed on ground (d) the appellant would need to demonstrate, on the balance of probabilities, that the general storage use has taken place on a substantially uninterrupted basis for not less than ten years before the material date, being the date of the issue of the notice. The appellant has provided no evidence and therefore the appeal on ground (d) could not succeed.
4. The appellant's case is that the lawful use of the site is as garden to 75 Cemetery Road, which he occupies as a dwellinghouse. This argument is more pertinent to and appropriately considered under an appeal on grounds (b) and (c) albeit no substantive case under those grounds was made out. Since this was raised in the appellant's initial submission on which the Council has had the opportunity to comment, I shall address this as though those grounds had been pleaded.

5. The appellant also stated that the fence behind the wall is not adjoining the highway, this too is an argument more pertinent to an appeal on ground (c) and I address this accordingly.

The Enforcement Notice

6. Since the enforcement notice was issued and appeal made, the Council noted an error in the plan attached to the notice. They submitted a revised plan which marginally increases the site area, to accurately reflect the site boundaries. Whilst I have had regard to the appellant's comments, it is evident what the notice is directed at, and the appellant made their case accordingly.
7. The enlargement does not make the notice more onerous to comply with, nor does it result in the introduction of new issues or interests in the land. Accordingly, I will correct the notice by substituting the plan with the one attached to this decision, exercising my powers under section 176 of the Act, without causing injustice to either party.

The 'hidden' appeals on grounds (b) and (c)

8. An appeal on ground (b) is a claim that the matters stated in the enforcement notice (which may give rise to the alleged breach of planning control) have not occurred as a matter of fact, and ground (c) that those matters (if they occurred) do not constitute a breach of planning control. The burden of proof on both grounds is on the appellant.
9. Section 55(1) of the 1990 Act defines development as including the making of any material change in the use of any buildings or other land. Section 57(1) provides that planning permission is required for development.
10. As already set out the appellant's case is that the land is garden, they also stated that there is no heras fencing, no tarpaulins, and the vehicles shown in the aerial photograph had only been there for a short period. However, it makes no difference whether the breach had been stopped. The question is whether the breach had occurred by the date of issue of the enforcement notice. If the alleged use had occurred, an appeal on ground (b) cannot succeed simply on the basis that the use had ceased.
11. The Council stated that the site was formerly an ancillary car park to the education centre at 75 Cemetery Road, as shown in the aerial image dated 2018.
12. 'Parking' and 'storage' are separate and distinct uses. It is well established that parking is a materially different use from storage. Parking means leaving a vehicle while it is in current use, whether long or short term. It is a temporary cessation from when the vehicle is in motion, and it is still in use when it is parked. Storage takes place when something is put away for a period because it is not needed, or its use is not contemplated in the short term.
13. Whilst the Council's evidence is limited, submitted images dated 2021 and 2023 show the site in use for the storage of various items including numerous vehicles, and heras fencing. Although only accessible from No.75, the storage use is confined to the area of the car park and has resulted in a definable change to its character and appearance.

14. I note the appellant lives at No.75 and may have done so for over four years. Nevertheless, they have provided no evidence or substantive explanation about how the various stored items are used in association with the residential use of No.75. Moreover, as a matter of fact and degree the extent of the storage use is such that it could not be ancillary to any residential use.
15. The appellant has failed to demonstrate that the use for general storage purposes, alleged in the notice has not occurred, and that it does not constitute a breach of planning control. The appeals on ground (b) and (c) must fail.

Fence behind the wall

16. The erection of a gate, fence, wall, or other means of enclosure can be permitted development under Article 3, Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO). However, other than in the case of schools, the erection of a gate, fence, wall, or other means of enclosure over 1m in height, which is adjacent to a highway used by vehicular traffic, is not permitted development and express planning permission is required.
17. The appellant does not dispute the height of the boundary fence being over one metre in height but argued that part of the fence is set back from the carriageway behind the section of fence on top of the wall and does not adjoin the highway.
18. The word adjacent is not defined in the GPDO however, it is an established principle, in the context of the GPDO, that 'adjacency' does not equate to something being 'contiguous' or 'abutting.' A fence does not have to adjoin a highway to be 'adjacent' to it; it is a matter of planning judgement in each case as to whether a fence is perceived to define the boundary of a property from the highway edge, and hence whether it is 'adjacent' to the highway.
19. The fence has been erected near the wall. Given the height of the fence and its visibility above the fence on top of the wall, it appears as a boundary fence separating the land from the highway, clearly intended, and perceived as a means of enclosing the appellant's land from the highway. Accordingly, I find, as a matter of fact and degree, that the fence is 'adjacent' to the highway.
20. The fence is in excess of one metre in height, in breach of limitation A.1(a)(ii) to Class A of Part 2 of Schedule 2 to the GPDO, and planning permission has not been granted for its erection. As such the fence constitutes a breach of planning control and the appeal on ground (c) therefore fails.

The appeal on ground (f)

21. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in section 173 of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). As the enforcement notice requires, amongst other things, the timber boundary fencing to the front of the site to be removed, the purpose is to remedy the breach of planning control.
22. The appellant's case on this ground relates to the fence and is that they would like to retain the fence, reducing the height of the fence that they consider adjoins the highway to one metre and 'moving the 6ft back away from the

highway by 1m', which I understand to mean the section of the fence behind the wall.

23. Whilst the purpose of the enforcement notice is to remedy the breach of planning control and removal of the fencing is consistent with that purpose, the enforcement procedure is intended to be remedial rather than punitive. Consequently, it is open to me, and I am required, to consider whether there is an obvious alternative which would overcome the planning difficulties at less cost and disruption than total removal.
24. As such, whilst acknowledging that permitted development rights cannot be claimed retrospectively, I considered whether the notice could be amended to reflect the permitted development right for a one-metre-high fence. However, there is no detailed scheme before me, and I cannot be sure that it would be a realistic option to reduce the height of the fence to one metre given its method of construction.
25. The appellant's arguments regarding health and safety and that the fence is in keeping with many in the street, are matters which relate to and require a consideration of planning merits.
26. However, where there is no appeal under ground (a) there is no deemed application for planning permission, as such there can be no arguments about the planning merits of the development under ground (f). Similarly, whilst I acknowledge representations of support, comments about the impact on the appellant's health, and the appellant's misgivings about the Council's handling of the case, these are matters which have no bearing on this ground of appeal. The only consideration is whether the requirements exceed what is necessary to achieve the identified purpose.
27. It is not excessive, in order to remedy the breach of planning control, to require the removal of the timber boundary fencing to the front of the site and no lesser steps would remedy the breach of planning control that has occurred. The appeal on ground (f) therefore fails.

Conclusion

28. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction.

Felicity Thompson

INSPECTOR

Plan

This is the plan referred to in my decision dated: 23 April 2024

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