



Appeal Decision

Site visit made on 4 April 2024

by D Hartley BA (Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15TH AUGUST 2024

Appeal A: APP/M2372/C/22/3313692

Appeal B: APP/M2372/C/22/3313693

Land at 29 Princess Gardens, Blackburn BB2 5EJ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mrs Kate Barlow and Appeal B is made by Mr Thomas Barlow against an enforcement notice issued by Blackburn with Darwen Borough Council.
 - The enforcement notice was issued on 25 November 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of wood perimeter fencing and heavy-duty metal roller shutter gate at a height over 1 metre.
 - The requirements of the notice are to remove the roller shutter door and reduce the perimeter fencing to a height of no more than 1 metre to the front of the property and reduce the height of the side boundary fencing to a height of no more than 2 metres, reducing to 1 metre as it approaches the front fence line.
 - The period for compliance with the requirements is 2 months.
 - Appeals A and B are proceeding on the grounds set out in section 174(2) (d) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decisions

Appeal A: APP/M2372/C/22/3313692

1. It is directed that the enforcement notice be varied by deleting all the words in section 5 (i) and replacing them with '*(5) (i) Remove the heavy-duty metal roller shutter gate. (5) (ii) Either remove the front and side boundary fencing OR reduce the front boundary fence to a height of no more than 1 metre, and the side boundary fence to a height of no more than 2 metres reducing to no more than 1 metre as it approaches the front fence line for a distance of 3.10 metres back from the edge of the highway*'. Subject to this variation, the appeal is dismissed and the enforcement notice is upheld.

Appeal B: APP/M2372/C/22/3313693

2. It is directed that the enforcement notice be varied by deleting all the words in section 5 (i) and replacing them with '*(5) (i) Remove the heavy-duty metal roller shutter gate. (5) (ii) Either remove the front and side boundary fencing OR reduce the front boundary fence to a height of no more than 1 metre, and the side boundary fence to a height of no more than 2 metres reducing to no more than 1 metre as it approaches the front fence line for a distance of 3.10*

metres back from the edge of the highway'. Subject to this variation, the appeal is dismissed and the enforcement notice is upheld.

Applications for costs

3. Applications for costs have been made by Mrs Kate Barlow and Mr Thomas Barlow against Blackburn with Darwen Borough Council. These applications are the subject of separate Decisions.

Reasons

Ground (d) appeals

4. The appeals made on ground (d) are that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. In an appeal against an enforcement notice on ground (d), the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is on the balance of probability.
5. The appellant claims that a roller shutter gate and front boundary fence were respectively erected in 2015 and 2017 and that a fence was erected along the north-west side of the driveway in 2017. It is possible that such development did occur on the site at these times, although that is not in this case a determinative matter in respect of the consideration of the ground (d) appeals. I reach this view based on the email correspondence between the local planning authority (LPA) and appellant A, dated 24 June 2022. In that correspondence, and, in respect of the roller shutter gate, the appellant states *'it is true that a new unit was recently installed to replace the older one which had become unreliable, but the replacement is an almost exact replica of the older unit which was the same size'*.
6. The onus is on the appellant to make their case in respect of the ground (d) appeal, i.e., that the fencing and roller shutter gate have been on the land for more than four years and hence are immune from enforcement action. The above correspondence between the appellant and the LPA indicates to me that a new roller shutter gate was *'recently'* erected. On the evidence that is before me, and, even if there was a different roller shutter door on the land previously, I therefore find that a new roller shutter gate has been erected on the land. There is no objective or compelling evidence before me to indicate that the roller shutter gate has been in situ for a period of at least four years.
7. While the appellant claims that the boundary fencing has been in place for more than four years, this is not reasonably corroborated with objective evidence. I acknowledge the signed letter from residents which states, *'to the best of my recollection, the fence and roller shutter door at number 29 Princess Gardens have been in place since 2016'*. This does not quite accord with the dates outlined by the appellant in respect of the breach of planning control. Furthermore, it remains entirely possible that these comments relate to development on the land which was subsequently replaced by new development.
8. There is a lack of objective evidence from the appellants to counter the claim made by the LPA that when the notice was issued, new boundary fencing had been erected on the land in conjunction with the erection of a roller shutter gate. While it may have been the case that there was some sort of boundary

fencing on the land in the past, the evidence does not sufficiently support the claim made by the appellants that the fencing that was on the land when the notice was issued had been in situ for at least four years. In this regard, I do not find that the fencing is immune from enforcement action.

9. In reaching the above conclusions, I have also given weight to the fact that a complaint about the breach of planning control was lodged with the LPA by 'a *ward Councillor familiar with the area*'. This casts further doubt about the claim made by the appellants about the breach of planning control being in place for more than four years. I consider it unlikely that a local Councillor, who is familiar with the area, would have pursued such a complaint had there not been substantial changes made to the appearance of the appeal site and indeed evidence of new development taking place.
10. For the reasons outlined above, and, on the balance of probability, I conclude that the breach of planning control was not immune from enforcement action when the notice was issued and hence enforcement action could be taken at this time. Therefore, the ground (d) appeals fail.

Ground (f) appeals

11. The appeals made under ground (f) are 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.
12. The purpose of the notice is to remedy the breach of planning control in respect of the roller shutter gate and, in the context of the Town and Country (General Permitted Development) (England) Order 2015 (as amended) (GPDO), to remedy the injury caused to amenity which has been caused by the boundary fencing by reducing it in height so that it does not exceed the height restrictions as permitted by Class A of Part 2 of Schedule 2 of the GPDO. Consequently, I find that the requirements of the notice do not exceed what is necessary to remedy the breach of planning control in respect of the roller shutter gate, or to remedy the injury caused to amenity in respect of the boundary fencing.
13. Notwithstanding the above, the notice does not give the appellant the option of removing the fencing in the alternative and, furthermore, the notice lacks precision in terms of the specific part of the side boundary fencing which the notice requires, as an option, to be reduced to 1 metre in height. i.e., to reflect the permitted development fall-back position. Indeed, Class A of Part 2 of Schedule 2 of the GPDO states that 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 1 metre above ground level.
14. The Council confirmed on the site visit, after considering existing driveway land levels and the position of the fence with the highway, that in respect of the requirements of the notice it was their intention that the side boundary fence be reduced to no more than 1 metre as it approaches the front fence line and for a distance of 3.10 metres back from the edge of the highway. The latter precision is not, however, contained within the requirements of the notice. I obtained written comments from the main parties about this matter following the site visit.

15. While the appellant has commented that *'I am not sure that it would be appropriate for me to agree, at this late stage, an amendment to the notice'*, I am nonetheless satisfied that I can vary the requirements, without injustice being caused to the main parties, by deleting all the words in section 5 (i) and replacing them with *'(5) (i) Remove the heavy-duty metal roller shutter gate. (5) (ii) Either remove the front and side boundary fencing OR reduce the front boundary fence to a height of no more than 1 metre, and the side boundary fence to a height of no more than 2 metres reducing to no more than 1 metre as it approaches the front fence line for a distance of 3.10 metres back from the edge of the highway.* This variation provides precision to the requirements of the notice, but it does not in itself make the notice more onerous. The LPA intended the requirements of the notice to include an amendment to the height of the side boundary fence as it approaches the highway.
16. In the context of the above variation, I conclude that the ground (f) appeals succeed.

Other Matters

17. The appellant has referred me to examples of other boundary treatments in the area. This is a matter that would have been relevant to the consideration of a ground (a) appeal and a deemed planning application. A ground (a) appeal is not before me and therefore it is not possible for me to consider the planning merits of the breach of planning control.
18. The appellant asserts that the side boundary fencing is less than 2 metres in height. As part of my site visit, the height of the side boundary fence was measured. The main parties agreed that part of the side boundary fence was more than 2 metres in height above ground level. Furthermore, part of the side boundary fence, which is a single building operation, is adjacent to a highway and is more than 1 metre in height. Therefore, and while the appellant has not lodged a ground (c) appeal, i.e., that the matters alleged do not constitute a breach of planning control, the breach of planning control is not permitted development in respect of Class A of Part 2 of the Schedule 2 of the GPDO.
19. Consequently, and to the extent that there is a hidden ground (c) appeal, I conclude that the appeals do not succeed on ground (c). For the same reason, I also conclude that to the extent that there is a hidden ground (b) appeal, i.e., that the matters mentioned in the allegation have not occurred, I conclude that the appeals do not succeed on ground (b).

Conclusions

20. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with a variation.

D Hartley

INSPECTOR