



Appeal Decision

Site visit made on 6 August 2024

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 August 2024

Appeal Ref: APP/V1260/X/23/3331337

4A Elmstead Road, Poole BH13 7EZ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr C Hunt against the decision of Bournemouth, Christchurch and Poole Council.
 - The application ref APP/23/00745/J, dated 30 June 2023, was refused by notice dated 29 August 2023.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is *'retention of boundary treatment and sliding gate positioned on the front boundary of the site.'*
-

Decision

1. The appeal is dismissed.

Preliminary Matter

2. Whether an LDC should be issued is strictly a matter of fact and law. Therefore, the planning merits of the front boundary treatment and sliding gate cannot be considered in this appeal.

Main Issue

3. The main issue in the appeal is whether the Council's refusal to grant an LDC for the front boundary treatment and sliding gate was well-founded. This turns on whether it has been shown that planning permission was granted for the development by Article 3, Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO).

Reasons

4. The appeal property contains a two-storey detached dwelling, erected following a grant of planning permission in 2005¹. Conditions attached to the permission include condition No 6, which required that notwithstanding the provisions of the GPDO, land adjacent to the highway should be cleared of obstructions over 0.6m in height and that area maintained as such thereafter. They also include condition No 7, which required that before development commenced a hard landscaping scheme containing, amongst other things, details of railings/walling and fencing, should be submitted to and approved in writing by

¹ Council Ref: APP/05/06666/011/F

the Council and that the approved scheme be completed prior to the first occupation of the development and subsequently retained.

5. An LDC is sought in respect of the front boundary treatment to the property consisting of a solid fence around 1.8m in height, with a slightly lower sliding vehicle access gate. At s191(2)(a), the Act provides that uses and operations are lawful at any time if no enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for taking enforcement action has expired). The burden is firmly on the appellant to show why an LDC should be issued for the fence and gate, the relevant test of the evidence being on the balance of probability.
6. Planning permission is granted by the GPDO at Article 3, Schedule 2, Part 2, Class A for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure, subject to the limitations in paragraph A.1. This paragraph states that development is not permitted by Class A where, amongst other things, any of the following apply: 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 development exceed 1m above ground level (paragraph(a)(ii)); the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2m above ground level (paragraph (b)), and; the height of any gate, fence, wall or other means of enclosure maintained, improved or altered would, as a result of the development, exceed its former height or the height referred to in paragraph (a) or (b) as the height appropriate to it if erected or constructed, whichever is the greater (paragraph (c)).
7. There is no dispute that the fence and gate are more than 1m in height above ground level and that they are adjacent to a highway used by vehicular traffic, thus exceeding the height limitation in paragraph (a)(ii). The appellant argued that the fence and gate were nevertheless permitted by paragraph (c) above, being equivalent to the height of the pre-existing front boundary treatment. They referred to a drawing dated February 2008, submitted to the Council to discharge condition No 7, on which the proposed front boundary treatment to the property is described as *'300mm dwarf wall with 450mm square by 1.8m high piers in facing bricks to match house. Mild steel railings positioned between piers. Gates to match railings.'*
8. Although there is no record of the Council having objected to the above scheme, neither was correspondence supplied which showed that the Council had given approval for that scheme. The Council provided Google Streetview images of the property dated at intervals between 2012 and 2019. These images cast doubt on whether the front boundary treatment was constructed as per the submitted scheme. They show a significantly different front boundary treatment, consisting of metal railings and metal supports, with metal railed vehicular and pedestrian gates. Also, judging by the similarity in height with that of the front boundary at 6 Elmstead Road next door, the front boundary treatment shown in the above images looks to have been considerably lower than the current fence and gate. Consequently, the available evidence shows that the fence and gate are taller than the pre-existing front boundary treatment, exceeding the limits of what is permitted by paragraph (c).

9. Moreover, the available evidence points towards the pre-existing front boundary treatment as having been substantially replaced by the fence and gate. Little fabric from the pre-existing front boundary treatment would seem to have been incorporated into the current fence and gate. The solid fence panels and gate which make up the current structure have no resemblance to the pre-existing railed front boundary treatment. As a matter of fact and degree, substantial replacement of the front boundary treatment goes beyond what might be regarded as maintenance, or an improvement or alteration. Those terms imply that an existing structure is or has been maintained or modified, rather than erecting a substantially new and different structure. Therefore, the available evidence shows that in this respect also, the fence and gate exceed the limits of what is permitted by paragraph (c).
10. The appellant went on to argue that, as the front boundary treatment at the property had encroached on and obstructed the required visibility area, there had been a continuous breach of condition No 6 for a period of more than ten years which was immune from enforcement action having regard to s171B(3) of the Act. However, condition No 6 has not been removed following a further grant of planning permission. Immunity from enforcement action does not equate to removal of the condition in question. Development contrary to a planning condition is not permitted by the GPDO, having regard to Article 3(4) of that Order. Besides, the appellant failed to show that any previous breach of condition No 6 did not cease when the former front boundary treatment was removed and that a fresh breach did not occur on erection of the fence and gate.
11. Therefore, the appellant has been unable to discharge the burden on them to show that, on the balance of probability, planning permission is granted for the fence and gate by the GPDO at Article 3, Schedule 2, Part 2, Class A, the available evidence showing otherwise. It follows that, in the absence of a grant of express planning permission, the fence and gate are not lawful for planning purposes.

Conclusion

12. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of the front boundary treatment and sliding gate was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act (as amended).

Stephen Hawkins

INSPECTOR