



Appeal Decisions

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 A Ref: APP/V1260/C/23/3332354

Appeal B Ref: APP/V1260/C/23/3332355

603 Charminster Road, Bournemouth BH8 9RQ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeals are made by Ms Zakia Khan (Appeal A) and Miss Rimshah Khan (Appeal B) against an enforcement notice issued by Bournemouth, Christchurch and Poole Council.
 - The notice was issued on 9 October 2023.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of close boarded fencing, together with its respective fixtures, fittings, posts, rails and access gate, adjacent to a highway used by vehicle (*sic*) traffic, contrary to the conditions and limitations of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), Schedule 2, Part 2, Class A. A.1 (a)(ii) as it exceeds 1 metre in height when measure[d] from natural ground level.
 - The requirements of the notice are:
Either: (a) Demolish the means of enclosure consisting of close board timber, timber support posts and rails, and the timber access gate to the front boundary (indicated by the green line on the plan attached to the notice). (b) Remove from the land, all resulting materials resulting from compliance with (a) above. Or: (c) Reduce the means of enclosure consisting of close board timber, timber support posts and rails and the timber access gate to the front boundary (indicated by the green line on plan EN2 attached to the notice) to a maximum height of one (1) metre when measured from the immediate adjacent ground level. (d) Remove from the land, all resulting materials resulting from compliance with (c) above. Then: (e) The first one (1) metre of the means of enclosure (the fence) to both side boundaries, measured from the inside edge of the front boundary wall, (as indicated by the blue lines on plan EN2), shall be reduced to a height not exceeding one (1) metre when measured from the ground level immediately adjacent to the means of enclosure (fence). (f) Following completion of requirement (e) above, the height of the means of enclosure (fence) to both side boundaries shall, for the next one (1) metre, (as indicated by the yellow lines on plan EN2), be altered to allow for a gradual rise from a height of one (1) metre to the height of the existing means of enclosure (fence) to both side boundaries.
 - The period for compliance with the requirements is three months.
 - The appeals are proceeding on the grounds set out in section 174(2)(c), (f) and (g) of the Town and Country Planning Act 1990 (as amended). Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decisions

1. The appeals are dismissed and the enforcement notice is upheld.

Preliminary Matter

2. There is no deemed planning application before me, as neither appeal was made on ground (a) and the relevant fee has not been paid. This means that planning merits arguments, including the effect of the fence and gate on the character and appearance of the area, the presence of other tall fencing at the front of residential property in the immediate and wider surroundings, the appellants' wishes for privacy in their front garden and any associated health and wellbeing benefits, cannot be taken into account in determining these appeals.

Appeals A and B

Ground (c) appeals

3. The ground of appeal is that the matters alleged in the enforcement notice do not constitute a breach of planning control. This ground of appeal is strictly concerned with matters of fact and law. It is for the appellants to show why their appeals should succeed on ground (c), the relevant test of the evidence being on the balance of probability.
4. The notice attacks a close boarded fence and gate, both around 1.8 metres in height, erected in the front garden of a semi-detached dwelling. Erecting the fence and gate has involved 'development' as defined in s55(1) of the 1990 Act. Planning permission is required for the carrying out of any development of land, having regard to s57(1) of that Act.
5. At Article 3, Schedule 2, Part 2, Class A, the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) grants planning permission for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure, provided the height limitations in paragraph A.1 of that Class are not exceeded. Paragraph A.1(a)(ii) does not permit any gate, fence, wall or means of enclosure to be erected or constructed adjacent to a highway used by vehicular traffic which would exceed a height of 1 metre above ground level.
6. What constitutes 'adjacent to a highway' for the purposes of Class A is not defined in statute. However, relevant case law confirms that a fence/gate does not have to abut or touch a highway to be adjacent to it¹. A fence/gate could be set back some distance from the highway edge, but still be close enough to define the highway boundary and have the perceived function of doing so. The Inspector in an appeal decision referenced by the Council found that, in the circumstances of the case, a fence about 3 metres from the highway would still be adjacent to it. Therefore, whether the fence and gate in this appeal are adjacent to the highway is a matter of fact and degree.
7. The fence and gate are set back about 1 metre from and run parallel to a brick wall, which forms the front boundary between the appeal site and the highway. The fence and gate are therefore a limited distance from the highway boundary. The fence and gate clearly have the function of enclosing the front garden from the highway. At under 1 metre high, the front wall does not act as a significant physical barrier between the highway and the fence and gate, nor is it perceived as such.

¹ *Simmonds v SSE & Rochdale MDC* [1980] 40 P. & C.R. 432

8. In the past year or so, a line of shrubs has been planted between the front wall and the fence, to form a hedge. The hedge is roughly around 1.4 metres high on average, with some taller plant stems approaching the height of the top of the fence. Even so, being relatively immature and with a significant gap in it to allow for the gate, the hedge lacks the thickness and continuity to create a substantial intervening physical feature between the fence and gate and the highway. Nor does the hedge significantly screen the fence and gate in views from the highway. Although softening their profile somewhat, the fence and gate remain the more dominant features compared to the hedge.
9. Whilst the above could change over time as the hedge matures, I have to deal with this appeal on the basis of the current situation. Moreover, the continued presence of the hedge cannot reasonably be assured; although currently appearing healthy, one or all of the shrubs could at any time die, become diseased or damaged, notwithstanding the appellants' best efforts, or otherwise the hedge could be substantially cut back or removed. Therefore, as a matter of fact and degree and in the particular circumstances of this case, I consider that the fence and gate are adjacent to the highway.
10. By exceeding the 1 metre height limit in paragraph A.1(a)(ii) of Class A, the fence and gate are not granted planning permission by the GPDO. Development which does not comply with the relevant limitations and conditions in the GPDO is without planning permission. Also, no express planning permission has been granted for the fence and gate, the Council having refused a planning application made in that respect on 25 August 2021². At s171A(1)(a), the 1990 Act defines a breach of planning control as carrying out development without the required planning permission.
11. Consequently, the appellants have been unable to show that erecting the fence and gate does not constitute a breach of planning control. The ground (c) appeals fail.

Ground (f) appeals

12. The ground of appeal is that the requirements of the notice are excessive.
13. An enforcement notice can have the purpose of remedying the breach of planning control. This can include by making any development comply with the terms (including conditions and limitations) of any planning permission granted in respect of the land, or restoring the land to its condition before the breach took place. Alternatively, an enforcement notice can have the purpose of remedying any injury to amenity which has been caused by the breach.
14. Demolishing the fence and gate, along with the support posts and rails, would restore the site to its condition before the breach took place. The alternative step of reducing the fence and gate to a maximum of 1 metre in height on the other hand would bring them within the terms of the planning permission granted by the GPDO at Article 3, Schedule 2, Part 2, Class A. Therefore, although the notice does not state as such, its purpose is clearly to remedy the breach and not solely to remedy an injury to amenity.
15. Retaining the fence and gates at their current height or otherwise at a height above 1 metre would sustain the breach described in the notice. This would not achieve the purpose of the notice, as the site would not be restored to its

² Council Ref: 7-2021-24934-B

condition before the breach took place. Appeals made on ground (f) cannot be used to attack the substance of the notice where, as in this instance, the purpose is to remedy the breach and there is no deemed planning application following an appeal having been made on ground (a). Aside from retaining the fence and gate at their current height, the appellants advanced no alternative to the steps set out in the notice. To my mind, nothing less than those steps would remedy the breach.

16. Therefore, the notice requirements are not excessive; they are a proportionate remedy involving the minimum works necessary to restore the land to its condition before the breach took place. The ground (f) appeals also fail.

Ground (g) appeals

17. The ground of appeal is that the period for complying with the notice requirements falls short of what should reasonably be allowed.
18. As the appeals have not been successful on the above grounds, removal of the fence and gate, or alternatively reducing them to a height of no more than 1 metre, is inevitable. The extent to which the hedge might grow in future makes little difference in that respect. The appeals brought on this ground are therefore misconceived.
19. Demolishing or alternatively reducing the fence and gate to 1 metre high would be a small scale and relatively straightforward task for a suitably experienced fencing contractor and is unlikely to take more than a few days to complete. There are probably a considerable number of contractors possessing the relevant skills and experience to undertake the remedial works and who would be available to do so at relatively short notice. Although such works might involve a considerable financial outlay, there is little before me to suggest that securing any necessary funding would cause the appellants particular difficulty in terms of the likely time available to them.
20. Accordingly, in my view the three-month compliance period specified in the notice is not too short and is reasonable. The ground (g) appeals also fail.

Conclusions

21. For the reasons given above, I conclude that the appeals should not succeed.

Stephen Hawkins

INSPECTOR