

Appeal Decision

Site visit made on 12 August 2024

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 20th August 2024

APP/K3605/X/24/3337302

27 Douglas Road, Esher, Surrey KT10 8BA

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against the decision of Elmbridge Borough Council to refuse to grant a certificate of lawful use or development, (LDC).
- The appeal was made by Mr Simon Taylor.
- The application, reference 2023/2876 and validated 19 October 2023, was refused by a notice dated 21 December 2023.
- The application was made under section 192(1)(b) of the Act of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of development is sought is for the erection of entrance gates and fence to a height of 1.0m, (description, LPA refusal).

Summary of Decision: The appeal is dismissed.

Appellant proposal

1. The Appellant, Mr Simon Taylor, wishes to erect a fence to a height of 1.0m along the frontage of a rectangular area of open grassland on the eastern side of his semi-detached house at No. 27 Douglas Road, Esher. The new fence would incorporate a non-locking gate.

Council reason for refusal

2. The Council said the erection of a site fronting gate and fence to a height of 1m would not accord with Article 3 Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) Order 2015 (as amended), (the Order). That was because the road fronting fence and gate would facilitate a change of use of the land from open space to residential garden use falling within Use Class C3 as set out in the Town and Country Planning (Use Classes) Order 1987, (as amended). An application for planning permission would be required.

Considerations

3. An enforcement notice was issued on 17 August 2023 in respect of the appeal land to the side of No. 27 Douglas Road. Its requirement a) sought the permanent removal of the fence. There was no appeal against the notice. Its requirements were met. The notice land was the same area of land on which Mr Taylor now wishes to erect a new 1m high front boundary fence and gate. That project is the subject of the s.192(1)(b) application and this s.195 appeal.

4. Schedule 2, PART 2 at *Class A – gates, fences, walls etc*, allows for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. The Order permits the erection of a fence and gate 1m high adjacent to a highway.
5. As to the application of permitted development rights here where an upheld enforcement notice exists, in the case of *Challinor v Staffordshire CC [2007] EWCA Civ 864*, Keene LJ considered the relevant authorities, including *Duguid v Secretary of State for the Environment [2001] 82 P & CR 52*, and said, (at §52): “*In short, what this line of cases indicates is that an enforcement notice will be interpreted so as not to interfere with permitted development rights under the General Development Permitted Order. The authorities go no further than that and certainly do not establish any general right to assert existing use rights at a time when the enforcement notice has come into effect after an unsuccessful appeal or in the absence of an appeal. Such rights must be asserted at the time of appeal against the enforcement notice. If the landowner sleeps on those rights, he will lose them.*”.
6. In the present instance, there was no claim as to a defect in the enforcement notice, nor was it shown that the fence the subject of the notice’s requirement a) was lawful at the time. Indeed, no appeal was made against the enforcement notice, the time at which such rights could have been asserted, for instance, in an appeal on ground (c). Rights that might have existed for the erection of a 1m high fence under the terms of the Order were lost. By virtue of the enforcement notice issued on 17 August 2023 and currently in force, the requirement to permanently remove the fence from the land stands.
7. The Council’s case based upon their view that fencing along the front of the open space adjoining No. 27 Douglas Road could facilitate a material change of use to a residential garden use appeared to anticipate a breach of planning control. That concern was misplaced. The general principal of dealing with such matters was set out in *R v Rochester-upon-Medway CC ex parte Hobday [1990] JPL 17*, where it was held that an enforcement notice issued on the basis of a prospective breach was a nullity.
8. For the reasons given above I conclude that the Council’s refusal to grant a Lawful Development Certificate was correct. The appeal must fail.

FORMAL DECISION

9. The Council’s refusal to grant a certificate of lawfulness for the erection of an entrance gate and fence to a height of 1.0m at the frontage of the open grassland alongside the semi-detached house at No. 27 Douglas Road, Esher, Surrey KT10 8BA was correct. I exercise the powers transferred to me under s.195(3) of the 1990 Act as amended.

John Whalley

INSPECTOR