



Appeal Decision

Site visit made on 26 January 2018

by Susan Wraith Dip URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 February 2018

Appeal Ref: APP/V2255/X/17/3176191 15 Wilks Close Upchurch Kent ME8 8EY

- The appeal is made under s195 of the Town and Country Planning Act 1990 [hereafter "the Act"] as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development [hereafter "LDC"].
 - The appeal is made by Mr Mark McCusker against the decision of Swale Borough Council.
 - The application no: 17/501293/LAWPRO, dated 7 March 2017, was refused by notice dated 3 May 2017.
 - The application was made under s192(1)(b) of the Act.
 - The development for which an LDC is sought is: to erect a fence along the length of my driveway approximately 1.2 metres tall.
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Decision

1. The appeal is dismissed.

Preliminary matters

2. The site visit had been arranged on an accompanied basis but the Council did not attend. I carried out an inspection of the site and surroundings unaccompanied. I am satisfied that I have sufficient information to reach a decision.
3. The description of the development is taken verbatim from the appellant's description. I interpret the words "my driveway" to mean the driveway at 15 Wilks Close. I shall deal with the appeal accordingly.
4. The relevant date for this determination of lawfulness is the date of the LDC application, i.e. 7 March 2017. The matter to be decided upon is whether the erection of the fence, if carried out at that date, would have been lawful. For ease of reading, however, I shall write as though the proposal is current. There has been no material change in planning law in the intervening period.
5. The appellant has asked me to consider an amendment involving the reduction in height of the fence to 1.0m where adjacent to the highway to meet the limitation for permitted development. I am not, however, able to determine the appeal on the basis of an amendment as my consideration is limited to the plans that were before the Council.
6. In an appeal under s195 of the Act against the refusal of an LDC the planning merits of the matter applied for do not fall to be considered. The decision will

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be based strictly on the evidential facts and on relevant planning law. The burden of proof is upon the appellant.

Main issue

7. The main issue in this appeal is whether the Council's decision to refuse the LDC was well founded.

Reasons

8. There is no dispute that the erection of the fence is development as defined by s55 of the Act¹. The question of lawfulness hangs on two matters. These are, firstly, whether the fence is permitted development and, secondly, whether it complies with a condition² imposed at the time of the approval of details for the housing development. I shall consider each in turn.

Whether permitted development

9. Permitted development rights for fences³ limit height to 1.0m where adjacent to a highway used by vehicular traffic. The term "adjacent to" is not defined in the Order. When applying an everyday meaning I interpret the term to mean "close to", "lying near to" and/or "contiguous with". The provision covers fences of various angles to the highway and does not only apply to those that are parallel.
10. Wilks Close is a highway used by vehicular traffic. The subject fence, which would run alongside the common boundary with number 16, would meet the highway approximately at right angles at its end point. It would be close to and contiguous and, thus, "adjacent" to the highway. It would be subject to the 1.0m height limitation⁴.
11. The LDC plans and details propose a fence of approximately 1.2m height. That would exceed the permitted height. The fence, therefore, as proposed in the LDC application, would not be permitted development. Without planning permission granted by the Council it would not be lawful.

Whether there is compliance with the condition

12. The condition concerned states that, notwithstanding permitted development rights, "... no gates, fences, walls or other means of enclosure shall be erected or provided in advance of any wall or any dwelling fronting on a highway without the consent in writing of the District Planning Authority".
13. The appellant says that the fence is intended for the purpose of containing a neighbouring hedge and for aesthetic reasons. The fence would also, to my mind, serve a purpose of "enclosure" as it would frame the driveway to one side. As far as I am aware, there is no "consent in writing" that has been given by the District Planning Authority. On both these points the fence falls within the general ambit of the condition.

¹ S55 of the Act states that development means (amongst other things) the carrying out of building and other operations.

² Condition no. (vi) of application ref.: SW/97/100.

³ Permitted development rights for the erection of gates, fences, walls or other means of enclosure are set out in Class A of Part 2 to Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the Order).

⁴ The extent to which a fence (amended) would be "adjacent" to the highway, and subject to the 1.0m height restriction, is not a matter for me to determine in this appeal. It is a matter for the appellant and the Council in the first instance.

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14. The condition, by its use of the word "or", differentiates between "any wall" and "any dwelling" fronting on a highway. I therefore interpret "wall" in the sense of an enclosure rather than a wall that is part of a dwelling. There are no walls nearby, however, to be considered.
15. That leaves the question of whether the fence is "in advance of" any dwelling and whether the dwelling(s) concerned front(s) on a highway.
16. When applying an everyday meaning, I interpret the term "in advance of" as being not only the land immediately in front of a dwelling but also the area in front of a line drawn from the ends of the elevation extending out towards (or beyond) the boundaries of the plot. However, for a fence to be reasonably considered as "in advance of" a dwelling there must, at least, be some visual and/or functional relationship between the fence and the dwelling concerned. Distance is also a factor. In this case I consider that only the host dwelling (number 15) and the closest neighbouring property (number 16) would have that relationship. Whether the fence breaches the condition, however, depends on whether either of these dwellings fronts on a highway.
17. In respect of number 15, the property sits well back from the highway positioned mainly behind number 16. Only its garage is visible at a distance along the drive. I do not consider the property can reasonably be regarded as fronting on a highway in these circumstances. Neither has the Council sought to argue such.
18. Number 16 is closer to and more visible from the highway. However, its main elevation, with front door and main living room windows, looks out across the private drive at number 15. The elevation facing the highway (its north elevation) is of quite simple appearance containing only, what appears to be, a couple of secondary window.
19. When looking at the wording of the condition it is the dwelling as a whole (not each elevation of it) that is to be considered. The use of the word "fronting" (rather than "facing") is also significant as that indicates, perhaps, a front door and/or other significant architectural features that would define the "front" of the dwelling. These nuances indicate that it is necessary to identify the "front" of the dwelling and that it is the "front" that must look out to the highway if the condition is to bite.
20. In this case, the side (north) elevation of number 16 faces the highway but the dwelling as a whole "fronts" the private drive. Thus neither of the dwellings which the fence could be considered to be in advance of are actually fronting on a highway. In these circumstances, I do not find that the fence would fall foul of the condition.

Other matters

21. Matters have been raised concerning the design of the fence, its appearance within the street scene and the reasons for why it is being proposed. These are matters that concern the planning merits of the proposal but have no bearing on whether the fence is lawful.
22. This determination cannot take into account private legal matters concerning the interests of one neighbour against another. The decision is to be based solely upon "planning" law.

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23. It is not my role to arbitrate between the appellant and the Council as to what would be needed to make the fence lawful or to comment upon the level of service provided by the Council.

Conclusion

24. Whilst I find that the fence would not breach the planning condition it would be adjacent to the highway and be in excess of the permitted height limitation. It would not therefore benefit from permitted development rights and, without planning permission from the Council, would not be lawful.

25. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of the erection of a fence along the length of the driveway, approximately 1.2 metres tall, was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me under s195(3) of the Act.

Susan Wraith

INSPECTOR