# Appeal Decision

Site visit made on 2 July 2010

**by Alan Woolnough BA(Hons) DMS MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

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**Decision date: 19 July 2010**

**Appeal Ref: APP/G2245/C/10/2123244**
**14 Shinecroft, Otford, Sevenoaks, Kent TN14 5NA**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr George Fodor against an enforcement notice issued by Sevenoaks District Council.
- The Council's reference is 310/92/202.
- The notice was issued on 19 January 2010.
- The breach of planning control as alleged in the notice is without planning permission, the carrying out of building operations namely the erection of a wooden fence and gate with canopy feature which also forms part of the structure.
- The requirements of the notice are:
  (a) Demolish the wooden fence, gate and canopy feature, adjacent to Rye Lane.
  (b) Remove the resultant materials from the land.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(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 initial appeal on ground (a) and application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed and do not fall to be considered.

**Summary of Decision: The appeal succeeds in part on ground (f) and the enforcement notice is upheld as corrected and varied in the terms set out below in the formal decision. The appeal fails on ground (g).**

## Procedural matter

1. There is inconsistency between the wording of the alleged breach of planning control set out at section 3 of the enforcement notice and that of requirement (a) in section 5, in that the latter refers specifically to development 'adjacent to Rye Lane'. Consequently, upholding the notice means that an unconditional planning permission will be granted under section 173(11) of the 1990 Act as amended for any unlawful sections of fence within the appeal site that are not adjacent to Rye Lane at the point when the notice is complied with in full.

2. Requirements should match the matters alleged unless under-enforcement is intended. However, it is not clear from the documentation before me whether the Council had intended to under-enforce in this respect or, indeed, whether any of the fencing set back from Rye Lane so benefits. In view of this uncertainty, I am not empowered under section 176(1) of the 1990 Act as amended to resolve the discrepancy by correcting the notice as this could, potentially, place the Appellant in a worse position than had he not appealed, thereby causing injustice.

## The notice

3. Requirement (b) in section 5 of the notice specifies the removal of materials from the land. However, whilst 'the land' might be assumed to be that which is subject to the notice, this has not been made entirely clear within the document. I will therefore, for the avoidance of doubt, correct the notice at section 2 by indicating that the area shown on the plan attached to it constitutes 'the land' for the purposes of the subsequent sections.

## The appeal on ground (f)

4. The Appellant contends that requirement (a) of the notice is excessive on the basis that 'a reduction in height of the existing boundary treatment to one metre would be permissible'. It is clear that he is referring to permitted development rights conveyed by Class A of Part 2 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 as amended (the GPDO) and Article 3 of that Order.

5. These provisions grant deemed planning permission for the erection of means of enclosure which, adjacent to a highway used by vehicular traffic, would not exceed one metre above ground level in circumstances where, having regard to Article 3(6) of the GPDO, the development does not create an obstruction to the view of any persons using such a highway so as to be likely to cause danger to such persons. I am satisfied that a means of enclosure of one metre in height adjacent to Rye Lane would not obstruct the visibility of drivers or pedestrians so as to endanger them. Accordingly, I find that such a structure would benefit from GPDO rights under Class A of Part 2.

6. I note that this point is acknowledged in the initial officer report to the Council's Development Control Committee meeting of 12 November 2009, which specifically recommended that any enforcement action authorised should only require the structure to be lowered to one metre in height. Nonetheless, a late amendment to that report changed the recommendation to read that action should be taken instead against the whole structure. The Council expands on this stance in submissions on the appeal, pointing out that the structure had been erected as one building operation and so, in order to remedy the breach of planning control, it is necessary to require removal of the whole structure.

7. I have no reason to doubt that the development was undertaken as a single operation. However, the Council's approach seems to derive from a misinterpretation of longstanding case law arising from the judgement in *Garland v MHLG* [1968] 20 P&CR 93. This indicates that, in determining what constitutes a breach of planning control, operational development must be considered in its entirety and should not be subdivided into parts that constitute permitted development and parts that do not. In other words, if one part of the appeal development is unlawful then so is the development as a whole, including that part less than one metre above ground level. The Council was thus correct to allege in the notice that the erection of the entire wooden fence and gate with canopy feature amounted to a breach of planning control.

8. However, this does not prevent the Council from under-enforcing so as to only partly remedy the breach thus identified, as it is empowered to do under

section 173(3) of the 1990 Act as amended. An enforcement notice cannot override permitted development rights. Therefore, where the GPDO provides a 'fallback' position, as in this case, which could allow some element of the development enforced against to be reinstated if removed, it is a matter of common sense that the notice should not seek the removal of that part in the first place. The initial officer report was therefore correct.

9. I conclude that requirement (a) is excessive, in that it takes no account of the permitted development rights available to the Appellant, and that a lesser step would suffice. The appeal therefore succeeds on ground (f) and I will vary the notice accordingly so as to require the reduction in height of the wooden fence, gate and canopy structure adjacent to Rye Lane to no more than one metre above ground level.

**The appeal on ground (g)**

10. The Appellant contends that the period for compliance of three months specified in the notice would not allow for the raising of finance and the appointment of a contractor to carry out the work, and requests a period of six months for the purpose. However, there is no evidence before me of financial hardship. Nor is it apparent why a competent contractor should need more than three months' notice in order to take on and complete this relatively straightforward task.

11. I conclude that the specified period for compliance is adequate and, accordingly, the appeal on ground (g) fails. It remains within the Council's power to further extend the period for compliance under section 173A(1)(b) of the 1990 Act as amended, should a convincing case for doing so be made.

**Conclusion**

12. For the reasons given above and having regard to all matters raised, I conclude that requirement (a) of the enforcement notice is excessive. I will vary the enforcement notice accordingly, prior to upholding it, and the appeal under ground (f) therefore succeeds. I will also correct the notice as previously indicated. However, I further conclude that the appeal on ground (g) should fail.

**Formal decision**

13. I allow the appeal on ground (f) and direct that the enforcement notice be:
    (i) corrected by, in section 2, the addition of the words '(hereinafter referred to as "the land")' after the word 'plan'; and
    (ii) varied by the deletion of requirement (a) in section 5 in its entirety and the substitution of the following requirement:
        (a) Reduce the height of the wooden fence, gate and canopy structure adjacent to Rye Lane to no more than one metre above ground level.

14. Subject to this correction and variation I uphold the enforcement notice.

*Alan Woolnough*

INSPECTOR