



## Appeal Decision

Site visit made on 8 August 2023

by **K A Taylor MSC URP MRTPI**

an Inspector appointed by the Secretary of State

**Decision date: 24<sup>TH</sup> AUGUST 2023**

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**Appeal Ref: APP/F4410/X/22/3312344**

**2 Rectory Gardens, Wheatley, Doncaster DN1 2JU**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (“the Act”) against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by Mr Andrew Muscroft-Gosden against the decision of Doncaster Metropolitan Borough Council.
  - The application ref 22/01655/CPL, dated 7 July 2022, was refused by notice dated 9 August 2022.
  - The application was made under section 192(1)(b) of the Act.
  - The development for which a certificate of lawful use or development is sought is for erection of a 2m boundary fence to the north east and north west boundaries.
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### Decision

1. The appeal is dismissed.

### Preliminary Matter

2. There is no description of development within the application form, I have therefore taken the description of development from the Council’s decision notice in the banner heading above. From the evidence before me, I consider this to be an accurate description of what is proposed and have dealt with the appeal on this basis.

### Main Issue

3. The main issue is whether the Council’s refusal to grant a LDC was well founded. This turns on whether the proposal would have been permitted development having regard to the relevant provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) if begun on the date the application was made.

### Reasons

4. Section 192(2) of the Act indicates that if, on an application under that section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case shall refuse the application.
5. The decision is therefore based on the facts of the case and any relevant judicial authority. For the avoidance of doubt, this means that any planning merits are not relevant to this appeal, such as those raised by the appellant and an interested party<sup>1</sup>. These include highway safety, security, medical waste,

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<sup>1</sup> Appendix D- Letter from neighbour at No.4 Rectory Gardens

- privacy and personal circumstances. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the development proposed would have been lawful if begun on the date on which the application was made, that being 7 July 2022.
6. Schedule 2, Part 2, Class A of the GPDO permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. These permitted development rights are subject to limitations.
  7. The relevant limitation set out at paragraph A.1 (a)(ii), is that development is not permitted if 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 the development, exceed 1 metre (m) above ground level.
  8. The appeal site relates to a detached property that is sited on the corner of Rectory Gardens and the highway junction of Thorne Road. The proposed development is to erect a 2m high wooden fence along the northern and western boundaries of the property.
  9. The Council refused the LDC application because it considered the fence would be adjacent to the highway and would exceed 1m in height. It is the appellant's case that due to its siting, distance from the highway including intervening railings, and vegetation, the proposed development would not be adjacent to the highway and so would be permitted development.
  10. There is no definition of 'adjacent' within the GPDO or the Act. The courts have held that legislators were not likely to have intended there to be a 'one size fits all approach'. Case law also clarifies that adjacent does not necessarily equate to something being 'contiguous' or 'abutting'. Consequently, the position established in the courts is that the word 'adjacent' does not necessarily mean that the fence in question must be abutting or touching the highway. It was held<sup>2</sup> that a fence higher than 1m and less than 1m from a footway to a highway did abut the highway. Therefore, the assessment of what would constitute 'adjacent' must therefore amount to a matter of fact and degree.
  11. The appellant has asserted that only a select number of fence panels would be near the highway on Rectory Gardens and Thorne Road due to their perpendicular siting. However, it has been established<sup>3</sup> that if one point of a fence or wall is unlawful then the entire structure is unlawful and that operational development must be considered in its entirety and should not be subdivided into parts. Therefore, I have considered the proposed fence in its entirety including the reference to 'edge' along the northern and western boundaries of the appeal site.
  12. It is contended by the appellant that the fence would be sited behind 1.8m metal railings which have been granted planning permission under a "split appeal decision"<sup>4</sup>. I saw from my own observations at the site visit, the railings do not appear to have been fully erected along the front boundaries and there were gaps between the boundaries of where the proposed fencing would be sited and aligned.

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<sup>2</sup> *Simmonds v SSE and Rochdale MDC* [1981]

<sup>3</sup> *Garland v Minister for Housing and local Government* [1968]

<sup>4</sup> APP/F4410/W/20/3249282

13. I also saw the vegetation at the appeal site along each of the boundaries, and I have had regard to the images of Thorne Road and Rectory Gardens at Annex F and G. Nonetheless, the matters of whether the proposed fence would be comparative to the metal railings, a natural boundary, materials and screened to a degree for pedestrians and vehicles would be a character and appearance issue relevant to a planning application and not a LDC where issues of planning merit are not relevant at any stage including the appeal process.
14. The plan shown at Annex B, Figure 2 of the appellant's statement of case indicates the alignment of the metal railings '*blue line*'. However, this plan does not show with any certainty the connection and position of the proposed fence in comparison with the metal railings or any interaction between the two. Nevertheless, the Figures at Annex B indicate that any gap between the end of the proposed fence and the footway will be minimal.
15. The proposed boundary plan which accompanied the LDC is annotated with an '*orange line*' to show the alignment of the proposed fence. The plan lacks sufficient detail and clarity of the proposed fence. It is ambiguous in that the '*orange line*' would likely overlap with that of the position and alignment of the metal railings shown within Figure 2. The boundary plan also causes further uncertainty of the siting of the proposed fence due to the width of the annotated '*orange line*' and that the proposed fence would be unlikely to be set back behind the metal railings even in its perpendicular form from the back edge of the footway.
16. The appellant has also provided a copy of the site plan relating to the appeal decision. This is not annotated with fencing and refers to 'wooden lower' and 'wooden higher'. Thus, I cannot be certain that this would be the same 2m high fence. In addition, that plan related to a different development, and not the fence which is the subject of this appeal.
17. Therefore, none of those submitted plans, figures or covering letter provide with any certainty that the proposed fence would comply with the limitation set out in A.1 (a)(ii) of the GPDO. Even, if I considered the fence would be sited behind the railings to a degree, given the close proximity to the footway and siting of the fence, including that it would be perpendicular it would still be adjacent to the highway and would not meet the limitation.
18. Therefore, in the particular circumstances of this case, it has not been demonstrated that the proposal would comply with the limitation set out in paragraph A.1 (a)(ii) of Schedule 2, Part 2, Class A of the GPDO.

### **Other Matters**

19. In support of the appeal, the appellant has referred me to other appeal decisions<sup>5</sup> as similar circumstances. However, I do not have the full details of these other schemes and they are not determinative. In any case, a grant of a LDC is dependent on the appellant demonstrating, on the balance of probability, that the proposed development would be lawful. Therefore, the proposal before me is considered on the facts of the case and its compliance or otherwise with the provisions of the GPDO.

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<sup>5</sup> APP/Q3115/X/16/3150593, APP/K3605/X/21/3279391

## **Conclusion**

20. The appellant has not demonstrated, on the balance of probabilities, that the proposed development would be permitted development, having regard to the relevant provisions of the GPDO. Therefore, in the absence of an express grant of planning permission it has not been demonstrated that the proposed development would have been lawful if begun on the date the application was made.
21. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a 2m boundary fence 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.

*K A Taylor*

INSPECTOR