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Planning      Development

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## **Enforcement Appeal - Section 174 Town & Country Planning Act 1990**

**Property between 6 and 8 Giles Street, Netherthong, Holmfirth, HD9 3EF**

### **Appeal Statement of Case**

#### 1. Introduction

1.1 This appeal is submitted against Kirklees Council's decision to issue an enforcement notice in respect of the above property.

1.2 The alleged breach of planning control is as follows:

“Without the benefit of planning permission, the alteration to a roof.”

1.3 The appellant seeks to dispute the enforcement notice in connection with Ground A under Section 174 (2) of the Town & Country Planning Act 1990 (as amended).

#### 2. Ground A - that planning permission ought to be granted

##### **Expediency of issuing the notice**

2.1 Section 172 of the Act requires that in addition to there being a breach of planning control, a judgement is also required “that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.”

2.2 The appellants respectfully submit that the Local Planning Authority do not appear to have taken into account a number of important *other material considerations* in this case, prior to a decision to take enforcement action was made. These other material considerations together with the merits of the development are considered to collectively outweigh any perceived harm caused by the breach. These matters will be set out in full below.

## **Planning history and reasons the privacy screen was installed**

- 2.3 The alleged breach in question relates to a privacy screen erected by the appellants, in order to prevent close overlooking from the raised garden area immediately to the rear (see Appendix A Map) into private garden areas and habitable rooms belonging to their house across the road (No.13), which is causing significant detriment to the appellants' residential amenities.
- 2.4 The starting point to the relevant background of this case was the granting of planning permission for the change of use of the small two-storey building immediately opposite the appellant's house to a holiday let in August 2019 (see Appendix B – decision notice, location plan & proposed plan).
- 2.5 The approved plans and attached conditions specified the following:
- i) The curtilage of the holiday let was restricted to a small area immediately to the rear of the holiday let (see location plan red line and approved layout / floor plan drawing no. 18/481/04).
  - ii) The erection of a 1.8 m solid screen timber fence on the eastern boundary of this curtilage area (see approved layout / floor plan)
  - iii) All external timber window frames to be painted an off-white colour before the holiday let was first brought into use, and thereafter retained (Condition 4 of planning permission).
- 2.6 However, the applicant in that case (the owners of the adjacent No. 8) have not implemented the permission in accordance with the plans and conditions.
- 2.7 The screen timber fence has not been erected; the curtilage area has expanded into the raised garden area to the east; and the windows and doors have not been painted off-white (see photo below).
- 2.8 The issue of the window frame / door colour will be revisited below, however the consequences of the other planning breaches have resulted in the raised garden area directly facing the appellant's house and garden being used by occupiers of the holiday let. This is resulting in unacceptable impacts on the privacy and amenities of the appellants, as a result of close overlooking of habitable room windows garden areas, together with unacceptable levels of noise and disturbance arising from occupiers of the holiday let.
- 2.9 The appellants' only area of private outdoor amenity space is located immediately to the front and side of the house (number 13). Habitable room windows belonging to a lounge area at ground floor level and the bedroom at first floor level, result in a distance of just 8.1m between the edge of the unauthorised holiday let garden area and the nearest habitable room windows at no.13 (with the distance to no.13's garden area being less than 8 metres).



**Photo courtesy of Airbnb website (advert for holiday let) showing unauthorised holiday let curtilage / seating area; absence of 1.8 m fence (which should be in line with the gable end of the property); and the unauthorised window / door finishes / colours (NOTE: appellants' house and habitable room windows in the background to the right)**

- 2.10 The close proximity and raised levels of the unauthorised holiday let amenity area result in extremely close overlooking of indoor and outdoor areas of number 13, with the consequence that the privacy and enjoyment of the appellant's property is severely diminished. This has resulted in significant anxiety and discomfort for the appellants, as a result of holiday let occupants (who are unfamiliar visitors) peering into their windows and garden areas on a frequent basis.
- 2.11 The appellants submitted a complaint about these matters to the LPA on 1<sup>st</sup> June 2021 (see Appendix C) . A separate matter of the installation of CCTV on the listed building (no. 8) was also raised, and which also creates a privacy issue for the appellants.
- 2.12 The reply from the planning enforcement officer dated 14 July 2021 (also Appendix C) stated that it was not expedient to further action upon the matters raised because: "The decking area is not in the conditions of the decision notice; it does not say that the seating area must be contained behind the property, and unfortunately, we cannot enforce upon annotations on submitted plans. Though

the 1800 mm fence should ideally be erected to allow the development to be in accordance with the submitted plans, again, this is considered to be *de minimis* meaning it is so minor to not have any legal consequence.”

- 2.13 It unfortunately appears that the LPA has not dealt with this matter at all appropriately. The LPA were incorrect to say that the decision notice had to specify that the seating (amenity) area must be contained behind the property, because the planning unit, which is clearly set out on the approved location plan, has been restricted by the specified red line to the immediate rear of the property only.
- 2.14 Secondly, the LPA appear to incorrectly claim that the fence that was supposed to be erected, was of no legal consequence. Condition 2 of the relevant planning permission states clearly that the development must be carried out in complete accordance with the plans and specifications schedule listed in the decision notice.
- 2.15 Thirdly, the LPA allege the fence in question was *de minimis* and so the appellants in this case would quite naturally question why their screen fence is being treated differently and is the subject of enforcement action.
- 2.16 As a result of the Council saying it was not prepared to take enforcement action against the owners of the holiday let for the alleged breaches of planning control, the appellants wrote to the Council’s enforcement department again on 8<sup>th</sup> May 2023 (Appendix D) , requesting the consideration of the erection of a fence on the property abutting the expanded area of holiday let amenity space, and asking if planning permission was needed for this. The appellants stated “it seems logical that if you have given them the right to build the fence, we should have the right to do the same.”
- 2.17 The enforcement officer replied on 9 May 2023 (also Appendix D), stating “The conditions specify that if the fence is located adjacent to a highway, the fence can be a maximum of 1 m in height. If the fence is not located next to a highway, then the fence can be a maximum of 2 m in height. **Therefore if you would like to erect a 1.8 m fence that is not located adjacent to a highway then you are permitted to do so.**”<sup>1</sup>
- 2.18 On the basis of this advice from the LPA, the appellant proceeded to erect the screen fence in the location specified in August 2023. The privacy screen fence (that subject of the enforcement notice) was erected on the building as the LPA as previously specified to the LPA, but is lower than the 1.8m specified and agreed (1.4m in height). It is set back from the highway as alluded to in the appellant’s original e-mail request.
- 2.19 However, on 4<sup>th</sup> January this year, the appellants received a letter from the Council alleging that the privacy screen required planning permission and that it should be

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<sup>1</sup> Bold our emphasis

taken down, unless retrospective planning permission was applied for and granted. However, upon receipt of a further email dated 19<sup>th</sup> January (see Appendix E), the appellants were advised by the LPA that the screen fence would be unlikely to obtain permission. As such, the appellants felt strongly discouraged from submitting an application at that time.

2.20 In detail, the privacy screen fence comprises vertical timber boarding and is 4.6m in length and 1.4m in height. It is painted in Lamp Room Gray colour, which is Number 88 in the Farrow and Ball range. The screen is attached to the roof via vertical timber posts projecting through the roof from ground level inside the host building.

### **The appellants' case**

2.21 The enforcement notice alleges the screen has a detrimental impact on visual amenity and the historic environment in terms of the Conservation Area and setting of the adjacent Grade II listed building.

2.22 The appellants respectfully dispute this for the following reasons:

(a) The privacy screen is set back from the road edge and as the street scene photos at Appendix F demonstrate <sup>2</sup> it is not visible for significant parts of the public realm in respect of Giles Street.

(b) The limited areas of the public realm from which the privacy screen is visible are not materially offended by the structure in the appellants' opinion. The privacy screen is not considered to be visually discordant or offensive in any material way due to:

- it being relatively lightweight structure with limited depth;
- the relatively minor nature of its construction, being a simple timber screen;
- its position adjacent to raised ground levels to the rear;
- the traditional vertical timber boarded construction;
- the light grey paint finish, which is in keeping with the existing timber windows / doors on the host buildings both underneath and opposite, and the fence immediately across the road.

(NOTE: If Condition 4 of the holiday let planning permission had been properly enforced by the LPA, the windows on the holiday let should have been painted off-white and would therefore more closely match the privacy screen colour.)

2.23 As a result, the privacy screen is not considered to be visually intrusive in terms of its form, scale and layout, and consequently, the appellants do not consider that

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<sup>2</sup> With reference to the photo locations on the map at Appendix A

the screen is detrimental to visual amenity in connection with local plan policy LP 24 (Design).

- 2.24 It is noted that the reasons at Section 4 the Notice allege the screen fence detrimentally impacts on heritage assets (the Conservation Area and setting of the listed building), but does not specify the level of harm alleged to the significance of these assets in accordance with Section 16 of the NPPF.
- 2.25 Government Planning Practice Guidance Historic Environment' Paragraph 018 <sup>3</sup> "While the impact of total destruction is obvious, partial destruction is likely to have a considerable impact but, depending on the circumstances, it may still be less than substantial harm or conceivably not harmful at all, for example, when removing later additions to historic buildings where those additions are inappropriate and harm the buildings' significance. **Similarly, works that are moderate or minor in scale are likely to cause less than substantial harm or no harm at all....**" <sup>4</sup>
- 2.26 The official Historic England listing is enclosed at Appendix G. The listing describes the property as an early C19th detached house (formerly a handed pair) with hammer dressed stone and a stone slate roof. It goes on to describe how the first and second floors "each have probable former 10-light stone mullioned window across whole facade. Now centre portions blocked giving two 3-light windows to each floor."
- 2.27 It is noted that modern windows have been installed on the property in recent years, which may be viewed as being unsympathetic to the character of this listed building.
- 2.28 The Netherthong Conservation Area is not accompanied by a Conservation Area appraisal according to the Council's records (Appendix H). Nevertheless, it forms a typical nucleated settlement for this area, containing tightly knit buildings and streets arising from the early weaving industry, dating back to the 18th Century.
- 2.29 In the light of the above reasoning, whilst the appellants acknowledge that the alleged unauthorised development is within the Netherthong Conservation area, and within the setting of a Grade II listed building, for the reasons set out in Paragraph 2.22 above, the impact on the significance of these assets arising from this very minor form and sympathetic nature of the development is considered to be neutral in terms of harm to the significance of these assets.
- 2.30 Without prejudice to this view, should the inspector consider that the harm created is in the category of 'less than substantial', NPPF paragraph 208 is engaged and the appellants submit that there are a number of public benefits that outweigh this limited degree of harm as follows. <sup>5</sup>

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<sup>3</sup> Reference ID: 18a-018-20190723

<sup>4</sup> Bold our emphasis

<sup>5</sup> With reference to Local Plan Policy LP35, the policy wording does not appear to cover scenarios where either no harm or 'less than substantial' harm is caused. It only appears to deal with matters of substantial

## **Public benefits**

- 2.31 The Government's Planning Practice Guidance on the Historic Environment states at paragraph 20<sup>6</sup> "Public benefits may follow from many developments and could be anything that delivers economic, social or environmental objectives as described in the National Planning Policy Framework (paragraph 8). Public benefits should flow from the proposed development. They should be of a nature or scale to be of benefit to the public at large and not just be a private benefit."
- 2.32 As mentioned above, the LPA do not appear to have taken into account material considerations in balancing the question of expediency in the public interest. The LPA appear merely to have assessed the screen fence in relation to visual harm, and its effect on Conservation Area and setting of the listed building. There also does not appear to have been any assessment of the level of harm, as per NPPF policy, followed by whether there are any public benefits (and if so, if they outweigh such harm).
- 2.33 However, as detailed above, there are a number of public benefits arising from the development, the most crucial one being the prevention of close overlooking which has severely impinged on the appellant's privacy and the ability to enjoy their own home and limited garden space. Matters of close overlooking and impacts upon the privacy of neighbouring residents are material planning considerations in the assessment of planning applications. As such, the privacy screen provides an important public benefit in preventing close overlooking, for both current and future occupiers of the residential property opposite the fence (No. 13).
- 2.34 A further public benefit of the screen fence is to mitigate the effects of noise and disturbance arising from the unauthorised use of the enlarged holiday let amenity area.
- 2.35 The appellants consider that the important public benefits arising from the development (which is only in place to mitigate the harmful effects of the unauthorised development not enforced upon by the LPA) outweigh any limited harm to heritage assets that may or may not be judged by the Inspector.

## **Other mitigating factors of material consequence in this case**

- 2.36 As detailed above, it is also a matter of public interest that the LPA had the opportunity to:
- (a) enforce the limited extent of the curtilage area within the planning unit set out clearly on the location plan submitted as part of the holiday let planning application;

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harm, or non-designated heritage assets. As such, the appellants in this case defer to the form of assessment set out through the NPPF.

<sup>6</sup> Ref ID 18a-020-20190723

- (b) Secure the erection of the screen fence through the holiday let planning permission through an express planning condition; and / or
- (c) enforce in the public interest, the erection and retention of this fence in order to safeguard the privacy of the appellants' property.

However, the LPA failed the appellants in both regards.

- 2.37 The appellants also had a legitimate expectation following advice from the LPA in answer to the question as to whether the appellants were entitled to erect a privacy screen to mitigate the consequences of the LPA's failure to take action: "Therefore if you would like to erect a 1.8 m fence that is not located adjacent to a highway then you are permitted to do so."
- 2.38 The LPA were aware the appellants were ordinary members of the public, not conversant with planning law. Consequently, the appellants quite naturally relied upon the professional planning advice received from the LPA and had a legitimate expectation that in following such advice, they would not be the subject of planning enforcement action at a later date.
- 2.39 The Planning Encyclopaedia paragraph 70.15 (under the Town & Country planning act 1990 section) <sup>7</sup> states the following:

"Albeit the general position is that material considerations must relate to the character of the use of land, in *Westminster City Council v Great Portland Estates Plc [1985] A.C. 661* the House of Lords accepted that this approach should be tempered where appropriate having regard to the circumstances of individuals. Lord Scarman (in whose opinion the other members of the House concurred) insisted that there must be exceptions:

*Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it. It follows that, though the existence of such cases may be mentioned in a plan, this will only be necessary where it is prudent to emphasise that, notwithstanding the general policy, exceptions cannot be wholly excluded from consideration in the administration of planning control."*

- 2.40 The above case law analogy is relevant to this particular case because to view the issue of the *appearance* of privacy screen in isolation (i.e. as a simple matter of whether or not it is in keeping with the area), has the potential to ignore a number

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<sup>7</sup> Section 70 determination of applications: general considerations

of other important material planning considerations in this case. The 'human factor' here is one of the appellants suffering from a severe and ongoing impact of close overlooking (and noise & disturbance), which has reduced their levels of privacy and standards of residential amenity below normal and acceptable levels. The appellants were reliant on the LPA properly administering and enforcing the approved plans & conditions connected with the holiday let planning permission, but they have felt badly let down by the Council in this regard.

- 2.41 These issues were not of the appellants' making and they have merely sought to remedy the consequences of the LPA's inaction through the erection of the privacy screen, for which they had been previously informed by the LPA that planning permission was not required.

### **Summary and conclusions**

- 2.42 In summary, it is considered that the issue in dispute causes no material harm to visual amenity, or the character of the Conservation area / setting of the listed building. In the event that the Inspector concludes there is a degree of harm, such harm is considered to be outweighed by a number of public benefits, and the appellants consider that the balance is tipped in favour of granting permission in accordance with NPPF.
- 2.43 Paragraph 011 of the Government guidance on Enforcement states: "Enforcement action should, however, be proportionate to the breach of planning control to which it relates and taken when it is expedient to do so. Where the balance of public interest lies will vary from case to case."
- 2.44 This appeal has identified a number of material considerations not previously taken into account by the Council when deciding whether or not it was expedient in the public interest to take enforcement action. In considering all the material considerations outlined in this statement, it is respectfully submitted that it was not expedient in the public interest to take enforcement action in this case.
- 2.45 In the first instance, the appellants invite the LPA to withdraw the Enforcement Notice before the conclusion of this appeal process.
- 2.46 Alternatively, the absence of such a withdrawal, the appellants respectfully request that the Inspector upholds this appeal for the reasons set out above.
- 2.47 The appellant is content to accept or suggest planning conditions that would mitigate the impact of the development if the appeal is successful on Ground A.

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**29<sup>th</sup> May 2024**