



# Appeal Decision

Site visit made on 9 January 2023

by **D Fleming BA (Hons) MRTPI**

an Inspector appointed by the Secretary of State

**Decision date: 14 February 2023**

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**Appeal Ref: APP/B5480/C/21/3273157**

**View 1, The Track, Prospect Road, HORNCHURCH RM11 3TY**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr. Gerard Anthony O'Connor against an enforcement notice issued by London Borough of Havering.
  - The notice was issued on 22 March 2021.
  - The breach of planning control as alleged in the notice is without planning permission, the importation into the site of aggregates and hard-core, the laying of hard surfaces and the erection of wooden boundary fencing outside the curtilage of the property in the Green Belt.
  - The requirements of the notice are to:
    - I. Remove all wooden boundary fencing including concrete posts from the area hatched in black identified in the attached site plan AND;
    - II. Remove all hard surfaces, hard core, aggregates, building materials, rubble and debris from the area hatched in black identified in the attached site plan AND;
    - III. Remove all accumulated materials from the site when taking steps 1 and 2 above. The period for compliance with the requirements is two months.
  - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d), (f) of the Town and Country Planning Act 1990 as amended.
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## Decision

1. It is directed that the enforcement notice be corrected by the deletion of the words "outside the curtilage of the property in the Green Belt" and by the substitution of the plan annexed to this decision for the plan attached to the enforcement notice. Subject to these corrections, the appeal is dismissed, the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act.

## Procedural Matters

2. At the site visit it was apparent that the plan accompanying the enforcement notice incorrectly identified a small parcel of land that had not been laid with hard surfacing or been encompassed by new fencing. This area sits directly to the east of The View and south of The Grove. I can correct the notice without injustice by substituting a new plan, which shows a slightly smaller hatched area.
3. Following the issue of the notice, some fence panels were removed and replaced with a pair of gates adjacent to The Track to form a new vehicular access into the site. Neither party has made any reference to this apparently new development. To correct the notice to include these works would I believe cause injustice to both parties as neither has had an opportunity to make submissions on these changes. I shall therefore proceed on the basis of the development at the time of the notice.

4. This brings me to how the Council has phrased the second part of the allegation, which the appellant refers to in the ground (c) appeal. The erection of boundary fencing is described as being "outside the curtilage of the property in the Green Belt." However, whether the fencing is in or outside a curtilage or the Green Belt does not affect whether it is or not development. To omit these words, which I shall do, would not be fatal to the allegation and would not cause injustice as it is clear from both party's submissions that they have not been misled by the incorrect framing of the allegation.
5. The Council's development plan has changed since the issue of the notice. The London Borough of Havering Local Development Framework Core Strategy and Development Control Policies Development Plan Document from 2008 has now been replaced by The Havering Local Plan 2016-2031, which was adopted November 2021 (the HLP). The appellant was given an opportunity to comment on the new policies, on which the Council now rely, but none were received within the timetable set for submissions. I have nevertheless proceeded to determine this appeal on the basis of the new HLP.

### **Background**

6. The appeal relates to land surrounding an existing caravan site known as The View, accessed from an unmade road known as The Track. This serves another small caravan site opposite, namely The Grove, as well as some isolated dwellings further east.

### **The ground (b) appeal**

7. In appealing on ground (b) the burden of proof is firmly on the appellant to demonstrate that the matters stated in the notice relating to the operational development have not occurred as a matter of fact.
8. The appellant accepts that the operational development described in the notice has occurred as a matter of fact. However, he submits that at the time the notice was issued in March 2021 a material change of use had also occurred in that caravans had been sited on the land for residential purposes. He refers to the Council's own dated photographs of the land as evidence and believes the allegation should be corrected to include the change of use.
9. On inspection, the February 2021 photographs only appear to show that one caravan had been sited on the land but it is not clear from the photographs whether the caravan was in residential use at that point. It is necessary to establish not only that a caravan was sited on the land but also that it was being used for residential purposes. The only other information from the appellant to demonstrate that a material change of use had occurred is a copy of the planning application form dated 21 October 2021 seeking planning permission for the material change of use. However, in answer to question 6 "Has the work or change of use started?", the box ticked indicated "No".
10. The appellant also seeks to rely on the Council's enforcement investigation into a material change of use but the Council has only recently formally established their position. A new enforcement notice was issued on 24 January 2023 relating to a material change of use of land by the stationing of caravans/mobile homes for residential purposes. However, on the evidence before me, it has not been demonstrated that this use began before March 2021.

11. I therefore conclude that clear and unambiguous evidence has not been produced to demonstrate, on the balance of probability, that a material change of use to residential, by the siting of a caravan, had occurred before the issue of the enforcement notice. As the appellant accepts the operational development has occurred as a matter of fact, the appeal on ground (b) fails.

### **The ground (c) appeal**

12. Under a ground (c) appeal the onus of proof is on the appellant to show that there has not been a breach of planning control. In this case the appellant has lodged a ground (c) appeal only in respect of the fencing. He submits that the fencing is lawful as it benefits from permitted development (PD) rights set out in the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO).
13. The meaning of development is set out in section 55(1) of the Town and Country Planning Act 1990 (the 1990 Act) and includes the carrying out of building operations in, on or over land. Section 55(1A) confirms that such operations include operations normally undertaken by persons carrying out a business as a builder. I find the erection of the fencing, including the fence posts, amounts to an operation of development as defined by section 55(1), having regard to its height, construction and extent.
14. In some circumstances operational development can be PD under the provisions of the GPDO. Schedule 2, Part 2, Class A states that the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is PD subject to various criteria. Development is not permitted if the height of the gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would exceed 1 metre above ground level.
15. The fencing and fence posts are stated to be 2m high. One section of fencing runs parallel to and adjacent to The Track, whereas the remainder is situated away from The Track. It would appear that the appellant assumes The Track is a private road, as opposed to a highway, in order to claim that the section of fencing adjacent to it is PD. Neither the GPDO nor the Highway Act 1980 contain a complete definition of a highway. As such, it is necessary to turn to case law.
16. The Courts have held that a highway is a defined route over which the public can pass and repass without hindrance or charge. The use must be "as of right" meaning without force, secrecy or permission. The public right to pass and repass as of right may be limited to a particular class of user or mode of transport.
17. Access to The Track appears to be open to the public and all vehicles, there being no signs to indicate otherwise when leaving Prospect Road, which leads into The Track. It is only once past the bungalow "Jalna", that The Track is gated and signs indicate that it is not permitted to proceed any further. In the absence of any information to indicate otherwise, I am satisfied that The Track is a highway and as such the fencing adjacent to it is not PD as it is over 1m in height. However, most of the fencing, including the fence posts, situated at right angles to The Track and extending into the open space and around the rear of The View is PD as all other criteria set out in Class A are met or are not applicable. That area of fencing is therefore lawful.

18. The appeal on ground (c) therefore succeeds in part and the deemed planning application now only relates to the fencing adjacent to The Track.

### **The ground (d) appeal**

19. This appeal has only been made in respect of the hard surfacing. This ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. The burden of proof in an appeal on this ground lies with the appellant. As such, the appellant needs to show, on the balance of probabilities, that the laying of the hard surfacing was carried out more than four years before the notice was issued. The relevant date is therefore 22 March 2017.

20. The appellant's case is that most of the hard surfacing is immune from enforcement action as it was pre-existing and the appellant has only repaired and maintained it with new material. Reference is made to photographic evidence but none has been submitted since the appeal was lodged.

21. The Council's aerial photographs dated 2010, 2013, 2016 and 2020 appear to show the appeal site is undeveloped and contains several trees, grass and undergrowth. The Council's investigation photographs from February and July 2021 show that all trees and greenery have been removed, hard core has been laid and aggregate has been spread on top.

22. It has not been demonstrated that the hard core and aggregates covered and repaired any existing hard surfacing. The Planning Practice Guidance advises that if a local planning authority has no evidence itself nor any from others to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to reject it. This is provided the appellant's evidence is sufficiently precise and unambiguous, on the balance of probabilities.

23. From the limited material before me, I find that the appellant has not satisfied the requirement to submit evidence that is sufficiently precise and unambiguous, on the balance of probabilities. Consequently, he has not discharged the onus of proof that the hard surfacing was substantially complete for a period of four years before the issue of the notice. The ground (d) appeal therefore fails and the hard surfacing will therefore be considered as part of the deemed planning application.

### **The ground (a) appeal and the deemed planning application**

#### **Main Issues**

24. The appeal site is within the metropolitan Green Belt. Therefore, the main issues are:

- whether the development is inappropriate development for the purposes of the National Planning Policy Framework (the Framework) and development plan policy;
- the effect of the development on the character and appearance of the area; and
- if the development is inappropriate development, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by

other considerations so as to amount to very special circumstances necessary to justify it.

## Reasons

### *Whether inappropriate development and openness*

25. The Framework establishes that the construction of new buildings is inappropriate development. The term "building" refers to any structure or erection and it therefore includes fencing. Paragraph 149 sets out exceptions to this policy but fencing is not included.
26. Paragraph 150 lists other forms of development including engineering operations which are also not inappropriate in the Green Belt, provided they preserve its openness. It is considered that the hard surfaced area is an engineering operation within paragraph 150(b).
27. Policy G2 London's Green Belt, from The London Plan, published 2021, is consistent with the Framework and is therefore afforded significant weight. It states the Green Belt should be protected from inappropriate development and development proposals that would harm the Green Belt should be refused, except where very special circumstances exist.
28. The Council also seek to rely on several policies from their recently adopted HLP, which I find are consistent with the Framework, but none deal directly with whether development is or is not appropriate in the Green Belt.
29. Openness is an essential characteristic of Green Belts but is not defined in the Framework. The Courts have held that the matters relevant to openness in any particular case are a matter of planning judgement, not law. I find that the fencing adjacent to The Track results in a loss of openness. There are public views of it and given its height and extent, there is some effect on the openness of the Green Belt as a whole. As such, the fencing, when judged against the Framework and Policy G2 is inappropriate development in the Green Belt.
30. Openness is also a consideration when deciding whether engineering operations are inappropriate development in the Green Belt. The size of the hard surfaced area is significant, around twice the size, if not more, of the existing development, The View. The depth of the area is not easily discernible, amounting in part to approximately a steep step up from surrounding ground level. It is also enclosed with fencing, and therefore there is limited visibility of it. Nevertheless, I find that it results in a loss of openness having regard to the purposes of including land within the Green Belt. In particular, one of the purposes is to assist in safeguarding the countryside from encroachment. As such, when judged against the Framework and Policy G2, the hard surfacing is inappropriate development in the Green Belt.

### *Character and appearance*

31. The appeal site lies within the countryside or urban fringe bordering residential development in Harold Wood. To the south there appears to be a disused hotel accessed from a dual carriageway and separated from the appeal site by a belt of trees. To the east there is the Thames Chase Community Forest though there is no access to it from The Track. Near the site there are tree belts, hedgerows and fields as well as some football pitches accessed from between

the houses along Prospect Road. In addition to the two caravan sites and dwellings along The Track there is also a cluster of single storey buildings, which appear to be used for storage purposes.

32. Given the nature of these uses in the area, some limited boundary fencing already exists along The Track although the front boundaries of the dwellings are largely open. Most of The Track though is bounded by hedging or trees and I find, having regard to the height and extent of the new fencing, that it is not only prominent to users of The Track but is also a discordant feature, at odds with the rural appearance of the area.
33. At the site visit I saw that some laurel shrubs have been planted adjacent to part of the new fencing and that there is the potential for some mitigation, which could be secured by condition. However, it appears there is insufficient space between the fencing and The Track to establish an indigenous hedge and the non-native evergreen appearance of the laurel shrubs only adds to the significant harm caused by the development.
34. This part of the development therefore does not accord with Policy 26, which requires high quality design; Policies 11 and 27, which require high quality boundary treatment to be integrated with and sympathetic to local landscape character; and Policies 12, 18 and 30, which seek to protect and improve the quality of open space.
35. Turning to the hard surfacing, given the extent of the area I find it harms the landscape character of the countryside as it has resulted in a loss of natural landscaping. The Council's aerial photographs show that this area previously had significant tree cover and this has now been removed. Notwithstanding that, there are limited views of the hard surfacing as it is largely enclosed and it is low in height. On balance though, I find some harm is caused and therefore this part of the development does not accord with Policies 12, 18, 26 and 30.

#### *Other considerations*

36. The appellant submits that the new hard surfaced area improves the previously overcrowded nature of The View, which contains caravans sited for residential purposes occupied by gypsies and travellers. That implies that the deemed application before me relates to a material change of use but the appeal on ground (b) is dismissed. This submission therefore only attracts limited weight.
37. The Council rely on several other policies to support their case. However, Policy 23 Transport Connections and Policy 29 Green Infrastructure are not relevant as they do not contain any wording that relate to the development the subject of the deemed planning application. The reason for issuing the notice sets out that the development causes harm to the character and appearance of the area. There is no reference to the effect of the development on flooding in the area and, as such, I find Policy 32 Flood Management is also not relevant. Policy 15 Culture and Creativity is also listed but a copy was not included with the Council's submissions.

### Conclusion on ground (a) and the deemed planning application

38. The fencing and hard surfacing are inappropriate development in the Green Belt, which is by definition harmful to the Green Belt and should not be approved except in very special circumstances. Substantial weight has to be attached to any harm to the Green Belt. The fencing and hard surfacing result in a loss of openness and harm the character and appearance of the countryside. Other considerations do not clearly outweigh these objections. The very special circumstances required to justify both developments do not exist and both developments do not accord with either HLP Policies 11, 12, 18, 26, 27 and 30 or The London Plan Policy G2, as well as the requirements of the Framework. For the reasons given the ground (a) appeal fails.

### The ground (f) appeal

39. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to achieve its purpose. The purposes of an enforcement notice are set out in section 173 of the 1990 Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy any injury to amenity (s173(4)(b)). In this case the notice requires the removal of the fencing and the hard surfacing. I therefore consider that the purpose of the notice is to remedy the breach of planning control.

40. In appealing on ground (f) the onus is on the appellant to specify lesser steps, which in his view would overcome the objections to the development. However, no lesser steps are specified and therefore the appeal on ground (f) fails.

41. With regard to the submission that the second and third requirements are imprecise, S173(3) of the 1990 Act requires that an enforcement shall "specify" the steps required to be taken to remedy the breach of planning control. Hard surfacing has been laid which I saw is in the form of hardcore in the main with different types of aggregates on top. Paragraph 5 of the notice does not merely state what is to be done but specifies what is to be done in a particular and precise way. The words are clear in the second step in that the hard surfacing is to be removed and the third step requires that the removal is to be away from the site. As such, I find no basis for the appellant's submission.

### Conclusion

42. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act.

*D Fleming*

INSPECTOR



## Plan

This is the plan referred to in my decision dated: 14 February 2023

by **D Fleming BA (Hons) MRTPI**

**Land at: View 1, The Track, Prospect Road, HORNCHURCH RM11 3TY**

**Reference: APP/B5480/C/21/3273157**

Scale: Not to scale

